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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 4: Divorce**

Canadian HIV/AIDS Legal Network  
2009



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**About the Canadian HIV/AIDS Legal Network**

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

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

The Legal Network may be able to offer technical support or collaboration in undertaking national law reform advocacy to protect women's rights in the areas of sexual and domestic violence, and family and property issues. Please send inquiries to: [\*\*womensrights@aidslaw.ca\*\*](mailto:womensrights@aidslaw.ca)

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## About this publication

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

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

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

## How to use this publication

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

### Volume One: Sexual and Domestic Violence

- (1) Rape and Sexual Assault
- (2) Domestic Violence

### Volume Two: Family and Property Issues

- (1) Marriage
- (2) Domestic Partnerships
- (3) Property in Marriage
- (4) Divorce
- (5) Inheritance
- (6) Implementation Provisions

There is considerable overlap and intersection among all of these issues; readers are thus encouraged to consult all eight modules. In addition, each module is drafted on the

assumption that the country adopting it has implemented similar legislation on the issues set out in the other modules. Accordingly, provisions are cross-referenced to one another. In adapting the legislative provisions to a particular jurisdiction, appropriate revisions and amendments will need to be made.

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

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

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

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

# Volume Two Introduction

## Women and HIV/AIDS

Over 25 years into the epidemic, it is now widely recognized that laws and policies must affirm and protect women's rights in order to mount an effective response to HIV/AIDS. Governments have repeatedly declared their commitment to respect, protect and fulfill women's rights and have acknowledged the linkages between HIV and gender inequality.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> Discriminatory laws and practices can also legitimize gender inequality, contour women's experiences within their families, communities and society, and limit their range of options and opportunities. These render women more vulnerable to HIV infection. For example, as a result of discriminatory laws and practices and inadequate legal protections, women lack access to productive resources, their livelihoods and economic independence are undermined, their

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<sup>1</sup> 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.”

<sup>2</sup> 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.

<sup>3</sup> 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>.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

## **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

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<sup>5</sup> See, for example, the commentaries on marriage payment and polygamy in Module 1 "Marriage."

<sup>6</sup> UNAIDS, *Facing the Future Together*, p. 10 [see note 3].

<sup>7</sup> 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](http://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.<sup>8</sup> Similarly, where constitutional and statutory law defer to customary law, it may be difficult or impossible for women to inherit or divorce.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> For women who are living with HIV, in particular, fighting a

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<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> As noted in one study on women and property rights, "The efficacy of judicial activism as a means of implementing women's human rights is dependent on a civil society that has the human, legal and economic resources to challenge laws, policies and practices": I. Ikdahl et al, *Human Rights, Formalisation*

lengthy court battle in order to protect their rights may not be desirable or possible. Furthermore, courts may have difficulty in identifying, understanding and appreciating the customary law norms and human rights norms that they are asked to rule on. There is no guarantee that they will rule in favour of equality when faced with contrary customary practices.<sup>12</sup> 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.<sup>13</sup>

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.

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*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.

<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> Where customary laws have not kept pace with changing social and economic conditions, the original rationale underlying a custom may be lost, and the discriminatory aspect of the law may become

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<sup>14</sup> 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].

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.”<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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<sup>17</sup> 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.

<sup>18</sup> 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.

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

<sup>20</sup> 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](http://www.hrw.org).

<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> In some cases, prohibitions may also be a requirement of international law — for example, in the case of forced marriage.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> This may involve, for example, empowering customary courts to

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<sup>22</sup> 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.

<sup>23</sup> 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."

<sup>24</sup> 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].

<sup>25</sup> 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," 33<sup>rd</sup> Session, U.N. Doc. A/60/38, 22 July 2005, para. 326.

<sup>26</sup> 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 women<sup>27</sup>

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.<sup>28</sup>

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*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.

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

<sup>28</sup>For example, COHRE reports: "Research conducted by the Rwanda Initiative for Sustainable Development (RISD) revealed that there is some opposition to the provision that both sons and daughters should inherit in the same proportion. Families expressed concern that their small lots would not be enough to sustain both sons *and* daughters. Many men thought it unfair that women should receive anything from their marital families, because they would then receive two plots of land to use: one from the marital family and one from their new husband when they remarried. Even some women agreed that females should not be entitled to an equal share of land and property — for the same reason, i.e. that

Therefore, to be effective on the ground, law reform and the enactment of new statutes must include timely consultation with stakeholders who will be affected by, or will implement, the legislation. This is essential in order to ensure that the realities of women's lives are accurately reflected in an appropriate legislative response. The law reform process must also be supported by education and awareness-raising programs, service provision initiatives to empower women and eradicate poverty, implementation and monitoring efforts, and the necessary resource allocations for all of these activities. Likewise, law reform advocacy must occur in tandem with widespread public awareness campaigns to educate the public about the linkages between human rights, HIV/AIDS and legislative change.<sup>29</sup>

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.<sup>30</sup>

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.

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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.

<sup>29</sup> 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.

<sup>30</sup> See, for example, the approach to women, land and housing of the Huairou Commission, online: [www.huairou.org/campaigns/land/index.html](http://www.huairou.org/campaigns/land/index.html).



# Module 4: Divorce

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# Prefatory Note

## Women, divorce and HIV/AIDS

Lack of access to divorce on fair terms is one factor that puts women at greater risk of HIV infection and leaves women, especially HIV-positive women, vulnerable to economic destitution. While women in sub-Saharan Africa increasingly worry about HIV infection as a result of their husbands' sexual activity outside the marriage, many remain in those relationships.<sup>1</sup> Moreover, a study of socio-cultural factors linked to HIV revealed that women were often inhibited from demanding safer sex in marriage because of their fear of the poverty associated with divorce.<sup>2</sup> This fear may be reinforced in jurisdictions where divorce regimes discriminate against women in terms of access to property and do not have provisions for spousal maintenance.

The likelihood of imminent or worsening poverty upon divorce has also been shown to constrain HIV-positive women's ability to seek appropriate treatment and support. For women living with HIV, their inability to seek HIV information or to start and continue using antiretroviral treatment may be impeded by violence and the fear of violence by intimate partners; or by the fear of abandonment and divorce, in an environment where women suffer insecure property rights and property grabbing upon the death of a spouse.<sup>3</sup> In situations where married women perceive the negative economic and social consequences of leaving high-risk relationships to be more serious than the health risks of staying in those relationships, access to property and maintenance upon divorce is critical to enabling women to end unwanted and abusive marriages and to discouraging informal separations, which leave women and children without legal protection.<sup>4</sup> Therefore,

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<sup>1</sup> K. Smith and S. Watkins, "Perceptions of risk and strategies for prevention: responses to HIV/AIDS in rural Malawi," *Social Science & Medicine* 60 (2005): 649–660. See also, J. Kenyega-Kayondo et al, "Risk perception and HIV-1 prevalence in 15 000 adults in rural south-west Uganda," *AIDS* 13(16) (1999): 2295–2302.

<sup>2</sup> T. Lindgen et al, "Malawi women and HIV socio-cultural factors and barriers to prevention," *Women & Health* 41(1) (2005): 69–86, at 81. See also CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi," para. 12.10.

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

<sup>4</sup> The negative economic consequences of divorce may be further compounded by an inability to return to the natal home, or a lack of prospects for another partnership: K. Yu-Isenberg, *Why All the Talk about Women and AIDS? Information Sheet on Gender Issues in Sub-Saharan Africa*, World Bank, 1996; L. Heise and C. Elias, "Transforming AIDS prevention to meet women's needs: a focus on developing countries," *Social Science and Medicine* 40 (1995): 931–943. See also, Legal Assistance Centre of Namibia (LAC), *Summary of Proposals for Divorce Law Reform in Namibia*, 2000 [hereinafter *Proposals*], p. 1; National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Supply and Services Canada,

facilitating women’s access to divorce requires the legal frameworks governing divorce to be fair. At a minimum, laws should stipulate the equitable division of marital property between spouses upon divorce and specify conditions for the provision of spousal maintenance.

The procedures governing divorce should also apply equally to men and women. Yet, laws in some countries continue to discriminate against or disadvantage women in divorce proceedings. Some countries’ laws stipulate different grounds for divorce between men and women, as well as establish lengthier or more complicated procedures for women than men to divorce, thus hindering women’s ability to end the marriage.<sup>5</sup> For example, a husband’s adultery may never be considered a ground for divorce, while an act of adultery by a wife is a sufficient ground.<sup>6</sup> Women’s ability to end their marriage may also be hindered if there is a risk of losing access to their children where divorce regimes discriminate against women in terms of child custody, as they do in some countries.<sup>7</sup>

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1990), p. 60; M. Boyd, “The social demography of divorce in Canada,” in K. Ishwaran (ed), *Marriage and Divorce in Canada* (Toronto: Methuen, 1983), p. 255. The latter two papers contend that women risk becoming poor or poorer upon separation and divorce and that economic dependence and independence are important factors in whether “unstable” marriages proceed to separation and divorce (women with unstable marriages and lowest incomes remain married while women with higher incomes are more likely to end unstable marriages). Boyd also notes women who are economically dependent are more likely to be abused and less likely to leave marriages.

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

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

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

## Women, divorce and human rights

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

The right to an adequate standard of living<sup>10</sup> and the right to property<sup>11</sup> are also relevant to legislating in divorce because, as the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has noted, many divorced women

have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship ... is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.<sup>12</sup>

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

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<sup>8</sup> *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. 16.

<sup>9</sup> U.N. Human Rights Committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” U.N. Doc. HRI/GEN/1/Rev.1 at 28, 39<sup>th</sup> Session, 1990, para. 9.

<sup>10</sup> *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. 11(1).

<sup>11</sup> *African [Banjul] Charter on Human and Peoples' Rights*, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5 (entered into force 21 October 1986) [African Charter], art. 14.

<sup>12</sup> CEDAW Committee, “General Recommendation No. 21: Equality in Marriage and Family Relations,” U.N. Doc. A/49/38, 1994, para. 28.

<sup>13</sup> UNAIDS and Office of High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, 2006, guideline 5(f).

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

Some regional treaties also provide specific obligations with respect to protecting women upon divorce. For example, the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) obligates states parties to “enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.”

Therefore, states parties must ensure that women and men have the “same rights to seek separation, divorce or annulment of a marriage,” and that this shall be “effected by judicial order.” In case of separation, divorce or annulment of marriage, states parties must ensure that women and men have “reciprocal rights and responsibilities towards their children” and have the “right to an equitable sharing of the joint property deriving from the marriage.”<sup>15</sup>

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

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<sup>14</sup> U.N. Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa, *Facing the Future Together: Report of the Secretary-General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa*, 2004, online: [www.ungei.org/resources/1612\\_1023.html](http://www.ungei.org/resources/1612_1023.html).

<sup>15</sup> *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 13 September 2000, O.A.U. Doc. CAB/LEG/66.6 (entered into force 25 November 2005) [Protocol on the Rights of Women in Africa], art. 7.

<sup>16</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 22.

<sup>17</sup> ICESCR, art. 12; CEDAW, art. 12; Protocol on the Rights of Women in Africa, art. 14; African Charter, art. 16.

<sup>18</sup> ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.

<sup>19</sup> ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.

<sup>20</sup> ICCPR, art. 8; African Charter, art. 5.

<sup>21</sup> ICCPR, art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.

<sup>22</sup> Women’s right to be free from sexual violence is explained in General Recommendation No. 19 of the CEDAW Committee at 24(b): “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”: CEDAW Committee, “General Recommendation No. 19: Violence Against Women,” U.N. Doc. A/47/38, 1993.

been explicitly recognized by the CEDAW Committee as rights which are impaired or nullified by gender-based violence.<sup>23</sup>

## A. Equal Grounds for All Forms of Divorce

### NOTE:

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

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

- (1) The grounds for, and the effects of, dissolution of marriage shall be the same whichever the form of celebration of the marriage and whichever the forum or procedure for dissolution.<sup>24</sup>

#### **Commentary: Article 1**

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

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<sup>23</sup> CEDAW Committee, "General Recommendation No. 19" (supra), paras. 7–9.

<sup>24</sup> This article is derived from Ethiopia, *Revised Family Code of 2000*, art. 74(1).

<sup>25</sup> These jurisdictions include Swaziland, Uganda, Namibia and Malawi. See T. Ezer et al, "Divorce reform: rights protections in the new Swaziland," *The Georgetown Journal of Gender and the Law* 8(3) (2007): 883–990, at 886; Uganda Association of Women Lawyers (FIDA-U), *Marriage and Divorce in Uganda*, undated, p. 17; LAC, *Proposals* (supra), p. 3; CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi," p. 83; and South African Law Commission, *Project 90, Discussion Paper 74, The Harmonization of the Common Law and Indigenous Law: Customary Marriages*, 1997, p. 119. South Africa and Tanzania have attempted to codify their customary laws in relation to marriage and divorce. At the time of writing, both Kenya and Sierra Leone had customary marriage and divorce bills (the *Marriage Bill* and the *Registration of Customary Marriage and Divorce Bill*, respectively) pending passage into law.

<sup>26</sup> South African Law Commission, *Project 90, Discussion Paper 74* (supra), p. 119; and LAC, *Proposals* (supra), p. 14.

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

## B. Forum for Dissolution of Marriage

### NOTE:

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

### Article 2. Forum for dissolution

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

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

(1) Any marriage, however solemnized, may only be dissolved by a civil court.<sup>30</sup>

<sup>27</sup> South African Law Reform Commission, *Project 90, Discussion Paper 74* (supra), Recommendation 23.

<sup>28</sup> See CEDAW Committee, “Concluding Comments: Eritrea,” 34<sup>th</sup> Session, CEDAW/C/ERI/CO/3, 3 February 2006, para. 29.

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

<sup>30</sup> This provision is derived from South Africa, *Recognition of Customary Marriages Act of 1998*, s. 8(1) and Ethiopia, *Revised Family Code of 2000*, art. 117.

## **Commentary: Article 2A**

Divorce under civil law generally offers greater legal protections for women because civil courts provide a means to oversee property division, maintenance and child custody matters. In jurisdictions where customary or religious law divorce is available for couples married under more than one regime, men may opt out of civil law divorce because it mandates certain protections for women.<sup>31</sup> Customary or religious courts have also been alleged to be unaccountable, undemocratic and biased against women.<sup>32</sup> Under customary law, the procedural requirements for women to divorce may be more onerous than those for men.<sup>33</sup> As a result, some countries have excluded customary law courts from having jurisdiction over matters such as maintenance, custody or guardianship of minor children; dissolution of marriage; and the interpretation of the validity and effect of wills.<sup>34</sup> In situations where customary or religious law departs significantly from civil law in the protections afforded to women, requiring divorces to take place in civil courts may be the easiest way to ensure the faithful application of divorce legislation.

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

- (1) Any marriage, however solemnized, may be dissolved by a civil court.
- (2) With the free and full consent of both spouses, a customary marriage may be dissolved by a customary court established or recognized by statute.
- (3) With the free and full consent of both spouses, a religious marriage may be dissolved by a religious court established or recognized by statute.
- (4) Decisions in relation to marriage dissolution under Sections (2) and (3) may be appealed by either spouse to a civil court.

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<sup>31</sup> LAC, *Proposals* (supra), p. 72.

<sup>32</sup> See South African Law Commission, *Project 90, Discussion Paper 82, The Harmonization of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, 1999, pp. 10–11; South African Law Commission, *Project 90, Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders*, 2003, pp. 10–11; Uganda Association of Women Lawyers, *Shadow Report of Uganda's First Periodic State Report to the African Commission on Human and Peoples' Rights*, 2006, p. 13.

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

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

### **Commentary: Article 2B**

In some settings, civil courts may be located too far from where people live, may involve procedures that are too expensive, or may be under-resourced, leading to long delays for obtaining a hearing. This would impact on women, who are likely to have fewer means than men to attend civil court. Where civil courts are inaccessible or are unlikely to be used or respected, customary or religious courts may be a useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive, simple and, in some cases, fluid system of justice.<sup>35</sup> In Zambia, for example, local customary courts have acquired progressively more authority over customary marriages and have laid down conditions and consequences for the dissolution of marriage which have developed over time.<sup>36</sup> Some local customary courts have increasingly applied a “best interests of the child” standard in resolving custody disputes and have been willing to order maintenance and property division, even if it means deviating from strict interpretations of customary law.<sup>37</sup>

Sections (2) and (3) require the consent of both parties to help prevent a vulnerable party to the marriage from being compelled to plead before a customary or religious court if she feels it is against her best interest.<sup>38</sup> These sections also require customary and religious courts presiding over divorce to be established or recognized by statute. This allows some measure of oversight to ensure that customary and religious courts comply with statutory provisions of divorce legislation. Broad rights of appeal from decisions of religious or customary courts that do not comply with statutory provisions may also address, to some extent, concerns about bias, lack of expertise, or resistance to applying human rights norms.<sup>39</sup>

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<sup>35</sup> In Zambia, for example, a divorce under customary law is “much simpler, cheaper and quicker”: M. Munalula, “Family law in Zambia,” in A. Bainham (ed), *The International Survey of Family Law 1997* (Netherlands: International Society of Family Law, 1999), p. 363.

<sup>36</sup> See, for example, S. Coldham, “Customary marriage and the urban local courts in Zambia,” *Journal of African Law* 34(1) (1990): 67–75, at 72 and 75.

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

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

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

## C. Divorce Procedures

### NOTE:

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

### Article 3. Right to petition for dissolution

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

### Article 4. Mutual consent to divorce

- (1) Where the spouses have agreed to divorce by mutual consent, they may petition the court for divorce by submitting in writing an agreement regarding the division of assets, spousal and child maintenance and custody of, and access to, any affected minor or dependent children.
- (2) Spouses who petition for divorce by mutual consent are not required to state any reason for the divorce.<sup>40</sup>
- (3) A court granting a decree of divorce shall not confirm as an order of court an agreement between the spouses described in Section (1) unless the court is satisfied that it is in accordance with Article 10 of this Act.
- (4) Provided there is no evidence that either spouse was subject to fraud, coercion, undue influence or domestic violence in order to agree to the divorce and that the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act, the court shall approve the divorce without delay.

### **Commentary: Articles 3 and 4**

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

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<sup>40</sup> This section is derived from Ethiopia, *Revised Family Code of 2000*, art. 77(3).

<sup>41</sup> For example, procedural complexity may make it difficult for NGOs to assist women with their divorces, and may create the need for legal representation: LAC, *Proposals* (supra), pp. 80 and 185. See also HRW, *Divorced from Justice* (supra); HRW, *Policy Paralysis* (supra), p. 81; CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Initial, Second and Third Periodic Report of States Parties: Ethiopia,” CEDAW/C/ETH/1-3, 21 May 1993, p. 18.

a petition for divorce and expensive legal fees present barriers to some people seeking divorce.<sup>42</sup> One consequence of the complexity of divorce proceedings is that couples who are married under both civil and customary regimes may choose to dissolve their marriage only under customary procedures if this process is seen as a more accessible and less expensive option. However, under customary rules women may not receive their fair share of marital property, spousal maintenance or child support.<sup>43</sup>

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

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

<sup>42</sup> LAC, *Proposals* (supra), pp. 81 and 36–37.

<sup>43</sup> *Ibid.*, pp. 70–71. See also HRW, *Hidden in the Mealie Meal* (supra), pp. 17 and 32.

<sup>44</sup> For example, in Kenya, s. 6 of the *Matrimonial Causes Act of 1941* provides, “No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage.” In Tanzania, s. 100 of the *Law of Marriage Act of 1971* stipulates, “No person shall, without the prior leave of the court, petition for divorce before the expiry of two years from the date of the marriage which it is sought to dissolve,” while s. 110 permits the court to adjourn divorce proceedings for up to six months for “further attempts at reconciliation to be made.” In Botswana, s. 21 of the *Matrimonial Causes Act of 1973* restricts divorce actions within two years of marriage. In Malawi, civil marriages cannot be terminated within three years of celebration unless there is exceptional deprivation and hardship: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi,” CEDAW/C/MWI/2-5, 28 June 2004, pp. 82–83. In Zambia, s. 6 of the *Matrimonial Causes Act of 2007* states, “No petition for divorce shall be presented to the Court unless, at the date of the presentation of the petition, one year has passed since the date of the marriage.”

<sup>45</sup> LAC, *Proposals* (supra), p. 170.

<sup>46</sup> *Ibid.*

<sup>47</sup> For example, in Namibia, of the 4257 divorce actions instituted from 1989 to 2000, only 12 marriages were reconciled: LAC, *Proposals* (supra), p. 169. Figures in Zambia also reveal that courts rarely succeed in reconciling parties: S. Coldham, “Customary marriage and the urban local courts in Zambia,” *Journal of African Law* 34(1) (1990): 67–75, at 71.

<sup>48</sup> LAC, *Proposals* (supra), p. 183.

courts should only grant a petition for divorce once appropriate arrangements have been made in respect of the welfare of any minor or dependent children who are affected. This practice is followed in a number of countries and gives the court leverage to encourage the parties to agree upon suitable arrangements for the children and to avoid potentially traumatic delays.<sup>49</sup>

## Article 5. Affidavit evidence

- (1) A court may grant a decree of divorce based on affidavit evidence alone, but may summon one or both of the spouses and any other person whom the court considers necessary to appear before a judge in chambers or in court to give further evidence.<sup>50</sup>

### **Commentary: Article 5**

Article 5 allows divorces based on affidavit evidence. This reduces costs and may reduce the trauma that women experience in speaking about the failures of their marriage in public. Standard form affidavits in clear and simple language could be provided via all courts that are competent to grant divorces.<sup>51</sup>

### **NOTE:**

The provision below would abolish court orders for the restitution of conjugal rights. Such orders sanction marital rape, place women at increased risk of violence and abuse and violate individuals' freedom of association (by compelling spouses to continue cohabitating).

## Article 6. Abolition of orders for restitution of conjugal rights

- (1) No court shall be competent to issue an order for the restitution of conjugal rights.<sup>52</sup>

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<sup>49</sup> See, for example, s. 57 of Nigeria, *Matrimonial Causes Act of 1990*; s. 42 of Zambia, *The Matrimonial Causes Act of 2007*; s. 10 of Zimbabwe, *Matrimonial Causes Act of 1986*; s. 6 of South Africa, *Divorce Act of 1979*; art. 189–192 of Burundi, *Code des personnes et de la famille of 1980*; s. 41(1) of U.K., *Matrimonial Causes Act of 1973*.

<sup>50</sup> This article is derived from s. 16 of the *Draft Divorce Act* featured in LAC, *Proposals* (supra). In Canada, courts will also hear uncontested divorces on affidavit evidence where the divorce and items of corollary relief are agreed upon. No appearance is required. See, for example, Rule 60(25) of British Columbia, *Court Rules Act*, B.C. Reg. 221/90; Rule 36 of Ontario, *Family Law Rules*, O. Reg. 114/99; Rule 70.12 of Manitoba, *Court of Queen's Bench Rules*, Regulation 553/88.

<sup>51</sup> LAC, *Proposals* (supra), p. 184. See, for example, the standard family law affidavit forms provided by Ontario Court Services (Canada), online: [www.ontariocourtforms.on.ca/english/family](http://www.ontariocourtforms.on.ca/english/family).

<sup>52</sup> This section is derived from s. 14. of South Africa, *Divorce Act of 1979*. See also, s. 23 of Botswana, *Matrimonial Causes Act of 1973*; U.K., *Matrimonial Proceedings and Property Act of 1970*; s. 21 of Hong Kong, *Matrimonial Proceedings and Property Ordinance of 1997*.

## Commentary: Article 6

Conjugal rights have been defined as the “legal rights of each partner in a marriage to companionship, support, and affection (often taken to imply sexual relations) provided by the other.”<sup>53</sup> Conjugal rights have also been understood to confer on men unlimited sexual access to their wives.<sup>54</sup> Some countries require or allow courts to order restitution of conjugal rights before a divorce can be granted.<sup>55</sup>

In current practice, orders for restitution of conjugal rights are effectively court-ordered waiting periods designed to encourage reconciliation but, ultimately, they unduly delay divorce. Conjugal rights which confer a duty on spouses to cohabit may sanction marital rape and enable domestic violence. Many countries long ago abolished the power to order conjugal rights and recognized that “[i]t is an intolerable interference with the freedom of individuals for the court to order adults to live together.”<sup>56</sup> Conjugal rights also may be abused in an attempt to gain leverage in divorce negotiations.<sup>57</sup> In order for a country to be compliant with CEDAW, “legislation should not empower courts to provide an order for restitution of conjugal rights ... which are discriminatory as they take away a woman’s autonomy to choose when and with whom she has sexual relations.”<sup>58</sup>

## D. Grounds for Divorce

### NOTE:

A requirement to demonstrate fault as a condition of divorce limits women’s access to divorce, particularly where fault is disproportionately and unfairly attributed to women. In the absence of mutual consent, the irreparable breakdown of marriage should be a sufficient ground for divorce.

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<sup>53</sup> *Canadian Oxford Dictionary, Second edition* (Canada: Oxford University Press, 2004).

<sup>54</sup> V. Muzvidziwa, “An alternative to patriarchal marriage: Maputo unions” *Nordic Journal of African Studies* 11(1) (2002): 138–155, at 143.

<sup>55</sup> For example, under current Namibian practice, a court must issue an order for restitution of conjugal rights after a claimant seeks a divorce (unless adultery can be proved). The court can enter a divorce decree only if the parties have not reconciled within six to eight weeks of the date that the order for restitution of conjugal rights has been served: LAC, *Proposals* (supra), p. 34. In Nigeria and Kenya, s. 47 of Nigeria, *Matrimonial Causes Act of 1991* and s. 20 of Kenya, *Matrimonial Causes Act of 1941*, respectively, permit a petition to be made by a party to a marriage for a decree of restitution of conjugal rights. Claimants seeking divorce in Swaziland face a similar predicament. See T. Ezer et al, “Divorce reform” (supra), p. 894, citing s. 44 of Swaziland, *High Court Rules of 1954*.

<sup>56</sup> See English Law Commission, *Published Working Paper No. 22, Family Law: Restitution of Conjugal Rights*, 1969, para. 6(d).

<sup>57</sup> For example, in the Namibian case *James v. James* 1990 NR 112(HC), the respondent in a divorce proceeding tried to halt the proceeding with an offer to restore conjugal rights, not in good faith but rather merely as an attempt to gain leverage in divorce negotiations.

<sup>58</sup> United Nations Development Fund for Women (UNIFEM) and United Nations Development Programme (UNDP), *Translating CEDAW into Law: CEDAW Legislative Compliance Review in Nine Pacific Island Countries*, 2007, p. 292.

## Article 7. Grounds for divorce

- (1) The only grounds on which a decree of divorce may be granted are:
  - (a) mutual consent, as contemplated in Article 4;
  - (b) the irreparable breakdown of the marriage, as contemplated in Article 8;
  - (c) lack of mental capacity, as evidenced by the medical testimony of at least two psychologists, that the non-petitioning spouse lacked mental capacity at the time of the petition and will continue to lack mental capacity, with no reasonable expectation of recovery; or
  - (d) continued unconsciousness, as evidenced by the medical testimony of at least two medical doctors specializing in neurology, that the non-petitioning spouse is in a persistent vegetative state and that there is no reasonable expectation of recovery.<sup>59</sup>

## Article 8. Irreparable breakdown of a marriage

- (1) For the purposes of this section, “irreparable breakdown” occurs when there is no reasonable prospect of the restoration of a mutually satisfactory marriage relationship between the spouses.<sup>60</sup>
- (2) If one spouse petitions for divorce and the other spouse does not deny that there has been irreparable breakdown of the marriage, the court shall grant a decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act and there is no evidence that either spouse was subject to fraud, coercion, undue influence or domestic violence in order to seek or acquiesce to the divorce.
- (3) If one spouse petitions for a divorce and the other spouse denies that there has been irreparable breakdown, the court shall, after consideration of the spouses’ affidavits and such oral evidence as the court may deem necessary, either:
  - (a) make a finding that the marriage is irreparably broken down and grant a decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act; or
  - (b) if there appears to the court to be no evidence of domestic violence and a reasonable prospect of reconciliation, postpone the matter for a period not exceeding [number] months, at the end of which period the court shall enter a

<sup>59</sup> Subsections (c) and (d) are derived from s. 5 of South Africa, *Divorce Act of 1979*.

<sup>60</sup> This section is derived from s. 4 of South Africa, *Divorce Act of 1979* and s. 8(2) of South Africa, *Recognition of Customary Marriages Act of 1998*.

decree of divorce, provided the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the children as defined in Articles 18 to 20 of this Act, and either of the spouses continues to allege that the marriage is irreparably broken down.<sup>61</sup>

### **Commentary: Articles 7 and 8**

Under a number of divorce law regimes, husbands are able to divorce their wives for a host of reasons which are not available to wives. For example, some countries' laws focus on grounds related to a wife only, particularly on an alleged fault or failing on her part, as the basis for a divorce, while having little regard for the grounds on which a husband's fault or failing may or ought to give rise to a woman's right to divorce.<sup>62</sup> Equal grounds for divorce between men and women uphold women's right to equality and the prohibition of discrimination.<sup>63</sup> Therefore, Article 7 stipulates the same grounds for divorce for men and women.

There has been a trend across the globe away from fault-based divorce, as modern marriage is increasingly viewed as a contract between individuals which can be terminated at the will of either party.<sup>64</sup> A right to freedom of association also prevents courts from compelling people to remain married to each other against their will.<sup>65</sup> The role of law is now seen as ensuring that assets are distributed equitably upon dissolution and protecting the interests of children, rather than compelling continued marriage

<sup>61</sup> This section is drawn from recommendations contained in LAC, *Proposals* (supra), and premised on the idea that it should not be the role of the court to force a contemplation period *unless there is reasonable prospect of reconciliation*. "Reconsideration" or "reflection" periods for divorce are found in, for example, U.K. law (nine months), Swedish law (six months), Finnish law (six months), Canadian law (unspecified time period) and South African law (unspecified time period). See R. Bird and S. Cretney, *Divorce: The New Law*, (London: Family Law, 1996), p. 41; K. Boele-Woelki et al, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp: Intersentia, 2004), p. 55; s. 10 of Canada, *Divorce Act of 1985*; s. 4 of South Africa, *Divorce Act of 1979*.

<sup>62</sup> For example, in Sierra Leone and Tanzania, a husband can leave his wife for numerous reasons not available to wives: CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Initial, Second, Third, Fourth and Fifth Periodic Report of States Parties: Sierra Leone," CEDAW/C/SLE/5, 14 December 2006, p. 8; Tanzania, Local Customary Law.

<sup>63</sup> In Uganda, the Constitutional Court found that the provisions of the *Divorce Act* which established different grounds of divorce for men and women were discriminatory (on the basis of gender) and thus contrary to the Constitution. The Court held that women, like men, should have the right to divorce their husbands for the sole reason of adultery, and that provisions related to compensation for adultery, maintenance and settlement should apply to both sexes: *Uganda Association of Women Lawyers and 5 Others v. the Attorney General*, Constitutional Petition No. 2 of 2003, Constitutional Court.

<sup>64</sup> See English Law Commission, *Reform of the Grounds of Divorce, the Field of Choice: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965, 1966/7*, p. 165; LAC, *Proposals* (supra), p. 167.

<sup>65</sup> Article 22 of the ICCPR provides, "Everyone shall have the right to freedom of association with others.... No restrictions may be placed on the exercise of this right." See also, *Snyman v. Snyman*, Case No. (P) I 166/2003, High Court of Namibia, in which the plaintiff husband successfully argued that the Namibian Constitution's guarantee of freedom of association gave him the right to withdraw from an association, such as his marriage, which had broken down irretrievably, so he was not limited to the grounds for divorce accepted under Namibian law.

against the will of one or both spouses.<sup>66</sup> If either spouse experiences economic hardship as a result of divorce, this should be addressed through equitable provisions on marital property and maintenance rather than by requiring the legal persistence of a marriage that has irreparably broken down. However, some countries continue to provide an enumerated list of grounds upon which a person may petition for divorce.<sup>67</sup> Such lists may be problematic for a number of reasons:

- They are highly restrictive and fail to recognize the complexity of marriage and its breakdown.
- The grounds cited are usually fault-oriented and thus reinforce the adversarial nature of the divorce process, adding unnecessary tension to an already difficult process.
- Spouses may actively engage in perjury to fulfill the legal requirement of a fault-based ground.<sup>68</sup>
- Limiting access to divorce through the requirement of fault may encourage informal separations which leave economically weaker parties, who tend to be women, without protection.<sup>69</sup>

In order to overcome these above-mentioned limitations, Article 7(2) stipulates that “irreparable breakdown” is a sufficient ground for divorce where there is no mutual consent. In some communities, the notion of irreparable breakdown also comports with traditional understandings of marriage dissolution and accommodates the parties’ cultural orientation while integrating the conciliation procedures typical of customary law into the divorce process.<sup>70</sup> At the same time, it is important that entitlements to divorce be clear,

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<sup>66</sup> See LAC, *Proposals* (supra), p. 167.

<sup>67</sup> See, for example, Uganda, *Divorce Act of 1904*; Kenya, *Matrimonial Causes Act of 1941*; Nigeria, *Matrimonial Causes Act of 1990*; Zambia, *The Matrimonial Causes Act of 2007*; Rwanda, *Law 42/1988 of 27/10/1988 Establishing the Preliminary Title and Book One of the (Rwandan) Civil Code*; Burundi, *Code des personnes et de la famille of 1993*. In some countries, HIV status has been construed and accepted as a ground of divorce, reinforcing discrimination against people living with HIV and potentially impeding voluntary HIV testing and disclosure. For example, a customary court in Nigeria granted a divorce on the ground of a wife’s HIV status: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Sixth Periodic Report of States Parties: Nigeria,” CEDAW /C/NGA/6, 5 October 2006, pp. 26–27. In Kenya, a man was reported to have argued that his wife’s HIV status put his life in danger, tantamount to “cruelty” as a ground of divorce. The Kenya Court of Appeal rejected his argument: “Kenyan HIV ruling hailed,” BBC News, 3 August 2000.

<sup>68</sup> E. Melnick, “Reaffirming no-fault divorce: supplementing formal equality with substantive change,” *Indiana Law Journal* 75 (2000): 711–729, at 713.

<sup>69</sup> LAC, *Proposals* (supra), p. 168.

<sup>70</sup> In reference to “irreparable breakdown” as a ground for divorce, the South African Law Commission provides, “While this ground is normally associated with the Divorce Act, it actually reflects customary law, where termination of marriage has always been based on frank acceptance of the fact that the parties can no longer maintain their relationship”: South African Law Commission, *Project 90, Discussion Paper 74*, (supra), p. 126.

so that neither partner is able to manipulate informal rules and procedures for his or her personal benefit.<sup>71</sup>

Where one party seeks divorce and the other party does not wish to divorce, Article 8(3)(b) gives courts the discretion to postpone the divorce for a short reflection period if there appears to be a reasonable prospect of reconciliation, after which the court must grant the divorce if either of the spouses continues to allege that the marriage is irreparably broken down.<sup>72</sup> Unlike mandatory waiting periods, this provision is discretionary and conditional on a party's objection to the divorce, no evidence of domestic violence and a reasonable prospect of reconciliation. The intention is to ensure that the marriage has genuinely broken down where some doubt may exist.

In all cases, however, the court can only grant a decree of divorce provided the arrangements made in respect of the welfare of the minor or dependent children are in the best interests of the children in the circumstances. Laws in many countries stipulate that no court should be able to grant a divorce until it is satisfied that the best possible arrangements have been made for the minor or dependent children.<sup>73</sup> This approach is designed to ensure that children's interests are prioritized and gives courts leverage to push parties to agree upon suitable arrangements for the children, thereby reducing delays in divorce proceedings which can be traumatic for children.<sup>74</sup>

#### **NOTE:**

The following provision prohibits the requirement to return marriage payment as a condition of divorce.

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### **Article 9. Prohibition of return of marriage payment**

(1) It is prohibited to demand a return of marriage payment, as defined in the [relevant marriage legislation], as a requirement of divorce.

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<sup>71</sup> LAC, *Proposals* (supra), pp. 72–73.

<sup>72</sup> In the U.K., the requirement of a period of reflection and consideration in the *Family Law Act* was intended to ensure that the door to reconciliation would be kept firmly open throughout the divorce process, and that the importance of attempting to save a marriage would be “loudly signalled.” Other benefits cited by the U.K. Government for this period were: that it would ensure that couples whose marriages are in difficulty will be better informed about the options available to them; introduce a system that is better at identifying saveable marriages; facilitate referrals to marriage guidance when couples believe there may be some hope for the marriage; make available every opportunity to explore reconciliation even after the divorce process has started; and ensure that there is an adequate period of time to test whether the marriage has genuinely broken down: J. Walker, “Divorce Reform and the Family Law Act 1996,” in J. Walker (ed), *Information Meetings and Associated Provisions Within the Family Law Act 1996* (Newcastle Centre for Family Studies, University of Newcastle upon Tyne: 2000), pp. 25 and 27.

<sup>73</sup> See, for example, s. 71 of Zambia, *The Matrimonial Causes Act of 2007*; s. 6 of South Africa, *Divorce Act of 1979*; s. 11 of Canada, *Divorce Act of 1985*; s. 55A of Australia, *Family Law Act of 1975*.

<sup>74</sup> LAC, *Proposals* (supra), p. 175.

- (2) Where marriage payment has been given by any party to a marriage, any person demanding the return of that marriage payment as a requirement of divorce is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.<sup>75</sup>

### **Commentary: Article 9**

Marriage payment (also known in various situations as bride price, bride wealth, *lobola* or *lobolo*) may result in discrimination against women upon marriage dissolution.<sup>76</sup>

Under some customary regimes, a woman's father must return the marriage payment to her husband if she seeks a divorce.<sup>77</sup> Where such customary practices are followed, wives cannot divorce their husbands without the consent of their fathers, whereas husbands are able to initiate divorce without obtaining anyone's consent. According to one commentator, the necessity of the "[r]efund of bride price(wealth) has hitherto kept women in bad marriages."<sup>78</sup> To remove this potential barrier to divorce for women therefore, Article 9 prohibits the requirement to refund marriage payment in order to terminate a marriage.<sup>79</sup>

### **NOTE:**

Some parties seeking divorce may be able to agree upon the terms of their divorce before going to court. In these circumstances, the court can accept this agreement if certain criteria are met.

## **Article 10. Agreement between spouses**

- (1) A court granting a decree of divorce may, in accordance with a written agreement between the spouses, make an order on division of property, the payment of maintenance by one spouse to the other, or custody of and access to any minor or dependent children, or related matters, if it is satisfied that:

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<sup>75</sup> This text is derived from ss. 16 and 20 of Uganda, *Domestic Relations Bill of 2003*.

<sup>76</sup> For a more detailed discussion of the human rights and HIV arguments against marriage payment, see the related commentary in Module 1 "Marriage."

<sup>77</sup> See, for example, Law Reform Commission of Tanzania, *Inquiry and Report on the Law of Marriage Act of 1971*, 1994, p. 10, online: [www.lrc.tz/documents/marriage.pdf](http://www.lrc.tz/documents/marriage.pdf); s. 37 of Tanzania, Local Customary Law.

<sup>78</sup> Uganda, *CEDAW Report of 2000*, CEDAW/C/UGA/3 at 69. See also LAC, *Proposals* (supra), p. 13; Y. Jansen, "Unifying Babylon: can post-colonial states successfully unify a plural (legal) society?" *Widener Law Journal* 16 (2006): 71–110, at 96; T. Higgins, J. Fenrich and Z. Tanzer, "Gender equality and customary marriage: bargaining in the shadow of post-apartheid legal pluralism," *Fordham International Law Journal* 30 (2007): 1653–1708, at 1674.

<sup>79</sup> Similarly, the Ugandan Law Reform Commission has suggested the requirement to refund marriage payment in order to terminate a marriage must be eliminated and made a criminal offence: CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Third Periodic Report of States Parties: Uganda," CEDAW/C/UGA/3, 3 July 2000, p. 69.

- (a) the agreement has not been obtained through fraud, coercion, undue influence or domestic violence;
- (b) the agreement is not manifestly unfair;
- (c) any provisions of the agreement concerning any affected minor or dependent children are in the best interests of the children, as defined in Articles 18 to 20 of this Act;<sup>80</sup> and
- (d) the division of assets and liabilities includes, at a minimum, detailed provisions for the disposition of the assets and liabilities described in Article 13.

### **Commentary: Article 10**

Any marital property regime can generally be varied by an agreement entered into before, or as a condition of, marriage, on the premise that couples should be free to determine how marriage and divorce will affect their property, the arrangements in relation to their children, and other related matters. Where spouses have agreed to divorce by mutual consent pursuant to Article 4, they may also opt to submit a written agreement to the court regarding the division of assets, spousal and child maintenance and custody of children.

However, systemic power imbalances, stemming from social and economic inequalities, place men as a group in a better bargaining position in relation to women, imbalances which are exacerbated where domestic violence is involved.<sup>81</sup> Therefore, courts should have the power to ensure agreements between spouses are fair; sufficiently precise; obtained in the absence of fraud, coercion, undue influence or domestic violence; and in the best interests of the minor or dependent children. In all cases, courts must balance parties' freedom to contract with the rights of vulnerable parties to the divorce.

## **E. Division of Property**

### **NOTE:**

In many cases of divorce, women acquire very little from the marriage other than their personal belongings. The following provisions stipulate a default marital property regime of modified community of property and outline the procedures for equitable property division upon divorce.

<sup>80</sup> This article is derived from art. 15 of the *Draft Divorce Act* in LAC, *Proposals* (supra).

<sup>81</sup> See, for example, A. Mackay, "Who gets a better deal? Women and prenuptial agreements in Australia and the USA," *University of Western Sydney Law Review* 6 (2003): 109–135; S. Seguino, "Toward a vision of sexual and economic justice," paper presented at the University of Vermont, 2 November 2007; Women's Legal Services Network, *Summary of Final Submission on Proposed Family Law Property Law Reform* (undated), online: [www.nwjc.org.au/prosum.html](http://www.nwjc.org.au/prosum.html); M. Neave, "Private ordering in family law: will women benefit?" in M. Thornton (ed), *Public and Private: Feminist Legal Debates* (Australia: Oxford University Press, 1995), 144–173, pp. 168–69.

## Article 11. Default marital property regime: modified community of property

(1) Where the spouses have not:

- (a) elected a marital property regime to be subject to; or
- (b) entered into an agreement specifying the distribution of property upon divorce that accords with the requirements set out in Article 10;

they shall be deemed to have elected to be in modified community of property, as defined in the [relevant marital property legislation], and a court shall order a division of property acquired during the marriage in equal shares where there are no minor or dependent children, or may divide property acquired during the marriage in such unequal shares as the court deems just and equitable, where minor or dependent children are placed in the custody of one spouse, with the larger share going to the custodial parent.<sup>82</sup>

(2) Notwithstanding Section (1), where family and traditional property, as defined in the [relevant marital property legislation], is excluded from the joint estate, the court may divide the remaining property acquired during the marriage in such unequal shares as the court deems just and equitable, considering the following factors:

- (a) the duration of the marriage;
- (b) the direct or indirect contribution made by each spouse, including contributions made by looking after the home, caring for the family, or performing other domestic duties;
- (c) the unwarranted dissipation of the marital property by either spouse;
- (d) the economic circumstances of each spouse at the time of the divorce, taking into account the:
  - (i) income;
  - (ii) earning capacity, including the extent to which it may have been impaired by a spouse having devoted time to domestic duties or having foregone education, training, employment or career opportunities due to marriage;
  - (iii) assets and other financial resources; and
  - (iv) financial obligations and responsibilities, including maintenance payments ordered at the time of the divorce;that each spouse is likely to have in the foreseeable future;
- (e) the custody arrangements regarding any minor or dependent children of either spouse, including the desirability of awarding the matrimonial home or the right to live in it indefinitely, or for some other reasonable period of time based on custody arrangements or until alternative housing arrangements may be made for, or by, the spouse charged with child custody;

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<sup>82</sup> This provision is derived from LAC, *Proposals* (supra), p. 174.

- (f) the value to either of the spouses or to a child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage; and
- (g) any other factor which the court deems relevant.<sup>83</sup>

### **Commentary: Article 11**

Norms and practices regarding the division of property upon marriage dissolution vary greatly between communities. However, in many cases of religious and customary divorce, women acquire very little from the marriage other than their personal belongings.<sup>84</sup> While some traditional obligations of kin networks may have ensured that women and children were adequately taken care of following a divorce, in many communities these mechanisms are no longer adequate or functional. In some systems, a woman is expected to leave the matrimonial home and return to her parents and family.<sup>85</sup> Where this is not feasible, some women may remain in abusive relationships because they have limited alternative options for survival.<sup>86</sup>

Recognizing this, the CEDAW Committee has stated that “[m]any countries recognize that right [of women and men to share marital property equally upon divorce], but the practical ability of women to exercise it may be limited by legal precedent or custom.”<sup>87</sup> The notion of sharing marital property upon divorce is also recognized in the Protocol on the Rights of Women in Africa, which obligates states parties to enact appropriate

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<sup>83</sup> These factors are drawn from LAC, *Proposals* (supra), p. 174, which draws heavily on South African, Zimbabwean, U.K., American and Canadian legislation. See, for example, the Domestic Relations provisions of the *Revised Code of Washington State* (U.S.), RCW 26.09.080, 1989; s. 503(d) of the *Illinois Marriage and Dissolution of Marriage Act*, 750 ILCS 5/204(d); the federal American *Uniform Marriage and Divorce Act of 1987*; s. 7 of South Africa, *Divorce Act of 1979*; s. 7 of Zimbabwe, *Matrimonial Causes Act of 1986*; s. 25 of U.K., *Matrimonial Causes Act of 1973*; s. 5(6) of Ontario, Canada, *Family Law Act of 1990*; s. 65 of British Columbia, Canada, *Family Relations Act of 1996*.

<sup>84</sup> See, for example, T. Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Law Reform and Development Commission, Ministry of Justice Namibia, 1996; HRW, *Double Standards: Women’s Property Rights Violations in Kenya*, Vol. 15, No. 5(A), 2003, p. 25, online via: [www.hrw.org](http://www.hrw.org); J. Shezongo-Macmillan, “Women’s property rights in Zambia,” paper presented to the Strategic Litigation Workshop, 14-18 August, 2005, Johannesburg, South Africa, para. 2.2. See also, the case of *Ryland v. Edros*, [1997] (2) SA 690, Case No. 16993/92, High Court, Cape Provincial Division, South Africa; and the Tanzanian case *Mohamed v. Makamo*, Civil Appeal No. 45 of 2001, High Court of Tanzania at Dar Es Salaam, 8 June 2001, in which the appellant wife appealed a decision of the district court awarding her five percent of the marital property, and her husband 95 percent, upon their divorce. The High Court held that the lower court decision was “discriminatory and a reflection of stereotyped concepts of the roles of man and woman.” It was deemed to be contrary to Tanzania, *Law of Marriage Act of 1971* and Tanzania’s Constitution, which guarantees equal protection of the law. The appellant wife was consequently awarded 50 percent of the marital assets.

<sup>85</sup> For example, in Niger, a husband can still expel his wife from the matrimonial home without warning: 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: Niger,” CEDAW/C/NER/1-2, 21 November 2005, p. 63.

<sup>86</sup> See HRW, *Double Standards* (supra), p. 25.

<sup>87</sup> CEDAW Committee, “General Recommendation No. 21” (supra), paras. 30–33.

legislation to ensure that “in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.”<sup>88</sup>

Article 11(1) specifies a “modified community of property” as the default marital property regime for all forms of marriage. This regime renders all property acquired during marriage part of the joint estate, a scheme that generally provides women with greater access to property upon divorce than a separation or an “out of community” of property regime (which involves the separate ownership of individual property during marriage).<sup>89</sup> Where minor or dependent children are placed in the custody of one spouse, Article 11(1) also authorizes the court to award the larger share to the custodial parent. This is to compensate for the “lost opportunity costs” the custodial parent may experience as a result of the significant responsibilities (financial and otherwise) associated with custody and which may not be compensated through child maintenance awards.<sup>90</sup> Article 11(2) also makes exceptions where family and traditional property is excluded from the joint estate.<sup>91</sup> Because this may constitute a significant share of property and in many cases may be the residence or principal source of wealth of a married couple, or both, Article 11(2) allows for compensation to the other spouse through the re-adjustment of joint assets upon marriage dissolution.

## Article 12. Overriding exercise of judicial discretion and criteria for division of joint estate

- (1) Where the spouses have entered into an agreement specifying the distribution of marital property upon divorce which the court finds manifestly unfair or was the result of fraud, coercion, undue influence or domestic violence, the court may make such disposition of the assets and liabilities of the parties, without regard to which spouse holds title or rights to any property, as shall appear just and equitable, considering the factors enumerated in Article 11(2).

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<sup>88</sup> Art. 7(d) of the African Protocol on the Rights of Women in Africa.

<sup>89</sup> For a discussion of the health and human rights arguments associated with other marital property regimes, see the commentaries in Module 3 “Property in Marriage.”

<sup>90</sup> For example, reviews of international literature with respect to child support suggested that, when compared with the actual costs of raising a child, child maintenance awards were inadequate and often erratically, or never, paid: D. Stewart and L. McFadyen, “Women and the economic consequences of divorce in Manitoba: an empirical study,” *Manitoba Law Journal* 21 (1992): 80–99, citing M.L. McCall et al, *The Process and Economic Consequences of Marriage Breakdown* (Calgary: Canadian Research Institute for Law and the Family, 1988) and F.M. Steel, “Alimony and maintenance orders” in S.K. Martin and K.E. Mahoney (eds), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), pp. 155–167. See also, LAC, *Proposals* (supra), p. 173.

<sup>91</sup> For a discussion of family and traditional property, see the related commentary in Module 3 “Property in Marriage.”

**Commentary: Article 12**

Spouses may not always be in an equal bargaining position at the time of marriage and during its course. Women, in particular, may make contributions to the couple's shared estate through managing the home, caring for children and contributing their employment income to the household, although they may not have any property registered in their own names. There should, therefore, be some degree of judicial discretion to adjust property division equitably where women have given up property rights upon marriage or where their contributions to the marriage, whether financial or otherwise, are not reflected in the terms of the antenuptial agreement.<sup>92</sup>

Accordingly, Article 12 authorizes judges to allocate marital property in a more equitable manner, guided by a list of factors to facilitate the fair exercise of judicial discretion. These factors include ones which have been traditionally overlooked in terms of women's contribution to a marriage and the household, such as looking after the home, caring for the family, or performing other domestic duties, as well as the extent to which women's earning capacity may have been impaired by having devoted time to domestic duties.

**NOTE:**

The following provisions establish a requirement to record the items that were acquired before or during the marriage and to regulate the use of those items during divorce proceedings to ensure marital property is eventually equitably distributed.

**Article 13. Inventory of immovable and movable property**

- (1) Within [number] days after the commencement of divorce proceedings, an inventory of all immovable and movable property acquired before or during the marriage shall be made jointly by the spouses and submitted to the court.
- (2) Failure to make an inventory described in Section (1) does not affect the rights of either spouse, but the burden to prove the existence of any property shall be on the spouse alleging the existence of that property.

**Article 14. Types of assets and liabilities**

- (1) Any order for the division of property as set out in Articles 11 and 12 must include, at a minimum, detailed provisions for the disposition of the following types of assets and liabilities acquired during the marriage:

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<sup>92</sup> See M. A. Glendon, *The New Family and the New Property* (Toronto: Butterworths & Co., 1981), p. 66; D. Poirier and M. Boudreau, "Formal versus real equality in separation agreements in New Brunswick," *Canadian Journal of Family Law* 10 (1992): 239–256, who noted that one-third of the separation agreements which they evaluated in New Brunswick did not respect the formal legal equality mandated by New Brunswick marital property law, thus negatively impacting women.

- (a) immovable property;
- (b) shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment held in a financial institution;
- (c) jewellery, coins, stamps, paintings, livestock or any assets held mainly as investments;
- (d) furniture or other effects of the common household;
- (e) credit agreements, where either spouse is a credit receiver;
- (f) contracts, where either spouse is a purchaser in terms of such a contract;
- (g) any other outstanding indebtedness which affects the joint estate; and
- (h) any costs, duties and professional fees incurred in the division of assets and liabilities under this section.<sup>93</sup>

## Article 15. Interim order

- (1) Neither spouse shall damage, transfer, encumber, conceal or otherwise dispose of any property in the course of the divorce proceedings, except in the usual course of business or for the necessities of life.
- (2) Notwithstanding the foregoing, nothing in the interim order shall preclude either spouse from using any property to pay reasonable legal fees and costs in order to retain legal counsel in the divorce proceeding.<sup>94</sup>
- (3) On an application by either spouse, if the court considers it necessary for the protection of the other spouse's interests under this Act, the court may make an interim or final order:
  - (a) restraining the depletion of a spouse's property; and
  - (b) for the possession, delivering up, safekeeping and preservation of the property.<sup>95</sup>
- (4) On an application by either spouse, the court may vary or rescind an order made under Section (3) on terms it considers appropriate.
- (5) Where a spouse knowingly violates the terms of an order to restrain the depletion of a spouse's property made under Section (3), the court may re-apportion the amount awarded to each spouse to account for such depletion.<sup>96</sup>

<sup>93</sup> The items on this list are derived from s. 6(6) of the *Draft Divorce Bill* in Republic of Namibia Law Reform and Development Commission, *Report on Divorce Project 8*, November 2004.

<sup>94</sup> This provision is derived from T. Ezer et al, "Divorce reform" (supra), p. 952 (s. 15 of the proposed *Matrimonial Causes Act of 2007* is, in turn, modeled after s. 2040 of California, U.S., *Family Code of 2006*).

<sup>95</sup> This section is derived from s. 12 of Ontario, Canada, *Family Law Act*, R.S.O. 1990, c. F.3.

<sup>96</sup> This section is derived from s. 5(6) of Ontario *Family Law Act*.

**Commentary: Article 15**

An inventory provides an essential mechanism for accountability and oversight with respect to the distribution of the marital property. The precise form and requirements of the inventory may vary from jurisdiction to jurisdiction, but in general terms the inventory is a list of all of the movable and immovable property acquired before and during the marriage, containing a reasonably detailed description of the property along with its fair market value.

Article 14 ensures that orders for the division of marital property are sufficiently detailed to prevent further disputes between the parties. Article 15 prohibits a spouse from disposing of property during divorce proceedings in order to avoid the equitable distribution of marital property. To deter individuals from misappropriating items and to remedy any resulting injustice, Article 15(5) authorizes the court to re-apportion the amount awarded to each spouse in any final marital property settlement to reflect the amount of property that has been depleted against an order of the court.

**NOTE:**

Article 16 mandates special provisions pertaining to possession of the matrimonial home upon divorce. These provisions are applicable irrespective of the marital property regime chosen by the couple.

**Article 16. Exclusive possession of matrimonial home**

- (1) Neither spouse may evict the other spouse from the matrimonial home, as defined in the [relevant marital property legislation].
- (2) Without regard to which spouse holds title to the matrimonial home, the court may on application by either spouse, make an interim or final order to:
  - (a) provide for the transfer of possession, safekeeping and preservation of the matrimonial home;
  - (b) direct that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs;
  - (c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;
  - (d) direct that the contents of the matrimonial home, or any part of them:
    - (i) remain in the home for the use of the spouse given possession, or
    - (ii) be removed from the home for the use of a spouse or child;
  - (e) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make periodic payments to the other spouse for those purposes; or
  - (f) authorize the disposition or encumbrance of a spouse's interest in the matrimonial home, subject to the other spouse's right of exclusive possession as ordered.<sup>97</sup>

<sup>97</sup> This section is derived from s. 24(3) of Ontario, *Family Law Act*.

- (3) In determining whether to make an order under Section (2)(b), the court shall consider:
- (a) the best interests of the minor or dependent children affected, as defined in Articles 18 to 20 of this Act, and in particular the desirability of allowing the custodial parent to occupy the matrimonial home until the children have reached the age of majority;
  - (b) whether the matrimonial home is situated on family or traditional property, as defined in the [relevant marital property legislation];
  - (c) any existing orders under this Act and any existing maintenance orders;
  - (d) the financial position of both spouses;
  - (e) any written agreement between the spouses;
  - (f) the availability of other suitable and affordable accommodation; and
  - (g) any violence committed by a spouse against the other spouse, any affected minor or dependent children, or any other family member.<sup>98</sup>
- (4) In the event of a court making an order giving a spouse exclusive possession for any period of time in the matrimonial home, that order shall also state that the right must be registered against any title deed and against any mortgage bond which may exist over the matrimonial home.<sup>99</sup>

### **Commentary: Article 16**

The matrimonial home is central to family life and is often the primary asset of a couple. However, inequalities in terms of ownership and access to the matrimonial home continue in many countries, at times resulting in the exclusion of women from their homes. For example, the matrimonial home may be registered solely in the husband's name, making the process by which a woman may prove her interest in that home onerous and uncertain.<sup>100</sup> All too often, a woman loses her home when her marriage comes to an end.<sup>101</sup> Allowing women to be evicted from their homes by virtue of the fact that they are not the legally registered owners subjects women to insecurity, vulnerability, poverty and sexual violence.<sup>102</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> This subsection is derived from s. 6(7) of the *Draft Divorce Bill* in Republic of Namibia Law Reform and Development Commission, *Report on Divorce Project 8*, November 2004.

<sup>100</sup> See, for example, S. Chirawu, "Till death do us part: marriage, HIV/AIDS and the law in Zimbabwe," *Cardozo Journal of Law & Gender* 13(1) (2006): 23–50, at 47.

<sup>101</sup> See, for example, HRW, *Double Standards* (supra), pp. 25–29; and M.O.A. Ashiru, "Gender discrimination in the division of property on divorce in Nigeria," *Journal of African Law* 51(2) (2007): 316–331, at 318 and 321.

<sup>102</sup> V. Bennett et al, "Inheritance law in Uganda: the plight of widows and children," *Georgetown Journal of Gender and the Law* 7 (2006): 451–520, at 476.

Enacting specific protections for the matrimonial home is a practical and increasingly common means to protect women’s access to housing at the dissolution of a marriage.<sup>103</sup> Article 16 empowers courts to make orders for the exclusive possession of the matrimonial home, regardless of the terms of a marital property regime or antenuptial agreement. This enables courts to consider the needs of both spouses, with particular attention to arrangements for child custody and relationships involving domestic violence.

The right to adequate housing is an internationally recognized human right. The U.N. Committee on Economic, Social and Cultural Rights has articulated that the right is “the right to live somewhere in security, peace and dignity,” which includes security of tenure.<sup>104</sup> Forced evictions are *prima facie* incompatible with this right.<sup>105</sup> In particular, the Committee has recognized that women suffer disproportionately from the practice of forced eviction, “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and [women’s] particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”<sup>106</sup> In the Committee’s view, the non-discrimination provisions of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) “impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.”<sup>107</sup>

## F. Maintenance and Custody

### NOTE:

Spousal and child maintenance are critical to ensure that women are able to divorce without the threat of economic destitution. The following provisions set out the criteria for spousal maintenance, child maintenance and child custody.

### Article 17. Spousal maintenance

- (1) In the absence of an acceptable agreement between the spouses as defined in Article 10 as to spousal maintenance, a court may, on application by either or both spouses during or after a divorce proceeding, make an order for the adequate, just and

<sup>103</sup> See, for example, s. 15 of Ireland, *Family Law (Divorce) Act of 1996*; s. 24 of Ontario, Canada, *Family Law Act of 1990*; ss. 19–20 of Alberta, Canada, *Matrimonial Property Act of 2000*. Rwanda is also seeking to protect the matrimonial home after separation: art. 232 of the draft revisions to Rwanda, *Family Code*.

<sup>104</sup> U.N. Committee on Economic, Cultural and Social Rights, “General Comment No. 4: The Right to Adequate Housing (Article 11(1)),” U.N. Doc. A/43/8/Add.1, 13 December 1991, para. 7. See also, art. 16 of the Protocol on the Rights of Women in Africa.

<sup>105</sup> *Ibid.*, para. 18.

<sup>106</sup> *Ibid.*, para. 10.

<sup>107</sup> *Ibid.*, para. 10.

equitable provision of support of the other spouse after consideration of the following factors:<sup>108</sup>

- (a) the duration of the marriage and the age of the spouses;
  - (b) the standard of living of the spouses immediately prior to the divorce;<sup>109</sup>
  - (c) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
  - (d) any impairment of the present or future earning capacity of the spouse seeking maintenance as a result of that spouse having devoted time to domestic duties, including the maintenance of the family home, care and upbringing of the children, or having foregone or delayed education, training, employment or career opportunities as a result of the marriage;
  - (e) contributions by the spouse seeking maintenance to the education, training, employment, career or career potential or business of the other spouse;
  - (f) contributions by the spouse seeking maintenance to the maintenance of family and traditional property as defined in the [relevant marital property legislation] which has been excluded from the joint estate;
  - (g) the custody arrangements regarding any affected minor or dependent children, taking into account the loss of economic opportunity and earning capacity forgone from the responsibility of custody, and not including maintenance expenses arising from custody;
  - (h) any economic hardship arising from the breakdown of the marriage;
  - (i) the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time;
  - (j) the relevant financial circumstances of another marriage(s) or domestic partnership(s) of either spouse; and
  - (k) any other factor which the court deems relevant.<sup>110</sup>
- (2) Upon application by either spouse, the court may make an order against the non-applicant spouse for a contribution of costs to the pending action referred to in Section (1) for the applicant spouse.

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<sup>108</sup> See s. 2 of British Columbia, Canada, *Wills Variation Act of 1996*. The meaning of “adequate, just and equitable” was dealt with by the Supreme Court of Canada in *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, in which the court held that the twin purposes of the Act was to ensure that “adequate, just, and equitable” provision is made for spouses and children, while giving appropriate recognition to testamentary autonomy.

<sup>109</sup> See, for example, the Ugandan case *Bakojja v. Bakojja*, Divorce Cause No. 11 of 1998, High Court of Uganda at Kampala, 20 February 2000, in which the Court held that the petitioner was entitled to alimony that would support her at a standard comparable with that of her position during marriage, and not significantly less than her husband’s lifestyle.

<sup>110</sup> This section is derived from s. 7 of South Africa, *Divorce Act of 1979*; s. 15.2 of Canada, *Divorce Act of 1985*; s. 4320 of California, U.S., *Family Code*; s. 75 of Australia, *Family Law Act of 1975*; art. 14 of the *Draft Divorce Act* in LAC, *Proposals* (supra). Subsection (g) does not refer to maintenance expenses, but to the fact that child custody may exclude the spouse in question from certain jobs, such as those with long hours or evening hours, or those involving extensive travel.

### Commentary: Article 17

Spousal maintenance is intended to enable an ex-spouse to achieve a standard of living upon divorce that is comparable to that during the marriage and to compensate the ex-spouse for lost opportunity costs. Therefore, statutory provisions related to spousal maintenance should be primarily based on need, not fault.<sup>111</sup> The need for spousal maintenance is particularly acute in cases where women are denied access to property upon divorce because of the particular marital property regime chosen, the provisions of an antenuptial agreement, or in cases where property used during marriage involves family or traditional property.

Because according to a number of customary and religious traditions, women are expected to return to their parents' home upon marriage dissolution, with the responsibility for their maintenance shifting to their parents, many customary and religious law regimes have little concept of post-marital spousal maintenance. Women may have no guarantee of support from their families after the dissolution of their marriage and are often left to raise minor children alone.<sup>112</sup> Insufficient maintenance for women post-divorce has been found to lead to malnutrition, disease and even death.<sup>113</sup> Various forms of “compensation” may be paid under customary laws.<sup>114</sup> Arguably, however, statutory recognition of the right to spousal maintenance in specific circumstances may more systematically protect women from poverty after divorce.<sup>115</sup>

<sup>111</sup> For example, Mali, *Marriage and Guardianship Code of 1992* allows the termination of maintenance support awarded to an ex-wife on grounds of “immoral behaviour”: CEDAW Committee, “Concluding Comments: Mali,” 34<sup>th</sup> Session, CEDAW/C/MLI/CO/5, 3 February 2006, para. 11.

<sup>112</sup> South African Law Commission, *Issue Paper 3, Project 90: Harmonization of the Common Law and Indigenous Law (Customary Marriages)*, 1996, p. xvii.

<sup>113</sup> T. Ezer et al, “Divorce reform” (supra), p. 920, citing Women and Law in Southern Africa, *Maintenance in Swaziland*, 1992, p. 60.

<sup>114</sup> For example, the South African Law Commission noted that a father is generally required to pay a beast (*isondhlo* in Xhosa) to the person who raised his child, though *isondhlo* is not compensation for past expenditure, nor is it a contribution to future costs. Nevertheless, courts have confounded *isondhlo* with maintenance in order to update customary law to meet modern conditions. See South African Law Commission, *Project 90, Discussion Paper 74* (supra), p. 132. A form of post-marital maintenance is also recognized in Islamic law during the *idda* period (a three-month waiting period when a divorce is still revocable): Gender Project, Community Law Centre (University of the Western Cape) and Gender Unit, Legal Aid Clinic (University of Western Cape), *Submissions on South African Law Commission’s Issue Paper No. 15: Islamic Marriages and Related Matters*, 2000, p. 36. In the Indian case *Mohammad Ahmad Khan v. Shah Bano Begum*, SCC 2 (1985) Sec. 556, the Indian Supreme Court granted a Muslim woman maintenance on the basis that this was in line with the Quranic spirit of justice in respect of support for a person in need. However, religious leaders objected to the decision and challenged the court’s authority to interpret the Quran, which led to the passage of a law which effectively invalidated the court’s decision.

<sup>115</sup> See S. Goonesekere, “Family support and maintenance: emerging issues in some developing countries with mixed jurisdictions,” *Family Court Review* 44(3) (2006): 361–375; M. Gordon, “Spousal support guidelines and the American experience: moving beyond discretion,” *Canadian Journal of Family Law* 19 (2002): 247–343. See also, the Tanzanian case *Njobeka v. Mkorogoro*, P.C. Civil Appeal NA. 6 of 2001, High Court of Tanzania at Dar Es Salaam, 13 July 2001, in which the appellant wife argued that the primary court’s order to her husband to pay a certain amount as a “parting gift” in divorce was inadequate because it failed to take into account both parties’ contributions to the marital property. The High Court found that the lower court erred by failing to provide the appellant an effective remedy in accordance with

Therefore, Article 17 lists specific criteria for determining the amount of maintenance to be paid to ensure a minimum level of support for a former spouse in need and to dissuade arbitrary determinations of the amount of the award.<sup>116</sup> The list includes factors which have been traditionally overlooked in terms of women’s contribution to marriage, including limitations on the nature and hours of work women are realistically able to pursue because of domestic duties or support for a spouse’s education or career, contributions by women to the maintenance of family and traditional property, and compensation for lost opportunity costs (for example, diminished potential for future earning).<sup>117</sup> Article 17 also permits the parties to make an application for maintenance during or after a divorce, to allow greater flexibility in terms of when such an application is made, as well as for either party to make an application for the other spouse to contribute to the costs of the pending action, so a party with fewer financial means is not further dissuaded from making an application for maintenance.<sup>118</sup> By explicitly empowering courts to recognize women’s contributions to the family and ensuring greater access to and flexibility with respect to claims for maintenance, states are taking an appropriate step in fulfilling their obligation to recognize the right of individuals to an adequate standard of living and non-discrimination on the basis of sex and marital status.

## Article 18. Best interests of the child

- (1) A court shall not grant a decree of divorce until it is satisfied that the arrangements made in respect of the welfare of any affected minor or dependent children are in the best interests of the child in the circumstances.
- (2) In determining the best interests of the child, a court may not discriminate against a parent on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age, mental or physical disability, or health status.<sup>119</sup>

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the principle of equal protection of the law guaranteed by the Tanzanian Constitution, and the lower court’s order was contrary to Article 2(a) of CEDAW, which requires state parties to embody the principle of equality before the law in their national Constitutions. The Court therefore set aside the lower court’s order and substituted it with an order that the appellant be awarded one of the two houses the couple had jointly acquired as her share of the matrimonial assets.

<sup>116</sup> In Algeria, for example, despite the requirement for spousal maintenance, judges have awarded spousal maintenance conditional on child custody. This has, in the past, led to fathers initiating custody disputes as a way to circumvent spousal maintenance: A. Mammeri, “Algerian women cite problems with implementation of new family code,” *Magharebia*, 15 February 2008.

<sup>117</sup> R. Langer, “Post marital support discourse, discretion, and male dominance,” *Canadian Journal of Family Law* 12 (1994): 67–90.

<sup>118</sup> See T. Ezer et al, “Divorce reform” (supra), p. 922, who contends that because women are under “a great deal of emotional stress and are entirely focused on having their marriage dissolved,” they may overlook their need for maintenance at the time of divorce proceedings.

<sup>119</sup> Sections 1 and 2 are derived from s. 6 of South Africa, *Divorce Act of 1979*.

- (3) Whether a minor or dependent child is born inside or outside the marriage of the parents shall have no bearing upon determinations of custody, guardianship, access or maintenance.
- (4) For the purposes of Articles 19 and 20 of this Act, the court may appoint an independent legal practitioner to represent a minor or dependent child at the proceedings and may order the spouses or either spouse to pay the costs of the representation.<sup>120</sup>

## Article 19. Child custody and access

- (1) Notwithstanding any customary or religious laws or practices, a court granting a decree of divorce may make any order it deems to be in the best interests of any affected minor or dependent child with respect to the custody of that minor or dependant child, giving particular regard to:
  - (a) the wishes of the child, where practicable;
  - (b) the child's physical, emotional and educational needs, and the capabilities of each parent to meet the child's needs; and
  - (c) the desirability of giving custody of the child to the parent who has been the child's primary caretaker prior to the divorce application, to ensure continuity of care.<sup>121</sup>
- (2) Notwithstanding Section (1), custody shall not be awarded to a parent if there is *prima facie* evidence that that parent has engaged in domestic violence, as defined in the [relevant domestic violence legislation], towards the other spouse, any child of the marriage or any other family member, unless the court is satisfied that this will be in the best interests of the child.
- (3) A primary caretaker is the person who carries out most of the following activities in respect of the child:
  - (a) preparing and planning of meals;
  - (b) bathing, grooming and dressing;
  - (c) purchasing, cleaning and care of clothes;
  - (d) medical care, including nursing and trips to physicians;
  - (e) arranging for or monitoring social interaction among peers after school;
  - (f) arranging alternative care;
  - (g) putting the child to bed at night, attending to the child during the night, and waking the child in the morning;
  - (h) disciplining the child;

<sup>120</sup> Section 4 is drawn from s. 6 of South Africa, *Divorce Act of 1979*.

<sup>121</sup> Article 20(1) is adapted from s. 1 of U.K., *Children Act of 1989*; s. 11 of U.K., *Family Law Act of 1996*; s. 518.17 of Minnesota, U.S., *Minnesota Statutes of 2008*; s. 60CC of Australia, *Family Law Reform Act of 1975*.

- (i) educating the child in the religious, cultural and social spheres;
  - (j) teaching the child elementary skills; and
  - (k) any other caretaking activity.<sup>122</sup>
- (4) A court granting a decree of divorce may make an order granting or denying access to an affected minor or dependent child by the non-custodial parent.
- (5) In a case involving a request for access by a non-custodial parent where there is *prima facie* evidence that the parent requesting access has engaged in physical violence towards the other spouse, any affected child or any other family member, the court shall impose special measures to protect the safety of the child or children and the custodial parent, including, but not limited to, supervised access, access only at specified venues, or transfer of the child from one parent to the other only at specified venues.<sup>123</sup>

### **Commentary: Articles 18 and 19**

Where divorce regimes discriminate against women in terms of child custody, the risk of losing access to their children may hinder some women’s ability to end their marriage.<sup>124</sup> Therefore, child custody should not depend on the individual preferences of judges, and courts should discount discriminatory custodial preferences based on customary or religious practices (such as bride price, which in some communities confers upon the husband an automatic right to custody of the children upon marriage dissolution).<sup>125</sup>

Article 19 stipulates that custody of the child is guided by the child’s wishes, preferences and needs, each parent’s capabilities, which parent is the child’s primary caretaker and the need to protect the child against domestic violence.<sup>126</sup> As one writer contends, “[a]

<sup>122</sup> This article is derived from art. 10 of the *Draft Divorce Act in LAC, Proposals* (supra).

<sup>123</sup> Sections (4) and (5) are derived from art. 12 of the *Draft Divorce Act in LAC, Proposals* (supra).

<sup>124</sup> See, for example, s. 104 of Tanzania, Local Customary Law, which states, “Children belong to the father, and he shall have the right to insist that they reside with him or with his relatives.”

<sup>125</sup> CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Third and Fourth Periodic Report of States Parties: Zambia,” CEDAW/C/ZAM/3-4, 12 August 1999, p. 66. See also, T. Ezer et al, “Divorce reform” (supra), p. 903, which discusses the legal environment in Swaziland and provides, “Under customary law, children are assumed to belong to the father and his family, and under civil law, courts have come to adopt the best interests standard ... with no legislative guidance, judges generally fall back on stereotypes — awarding physical custody to the mother and legal custody to the father.” See also, s. 204 of Tanzania, Local Customary Law, which stipulates that children “belong to the father, and he shall have the right to insist that they reside with him or with his relatives” after divorce; Unit for Gender Research in Law (UNISA), *Women & the Law in South Africa*, (Kenwyn: The Rustica Press, 1998), p. 22, which describes how in “KwaZulu-Natal the Code of Zulu Law provides that the children fall under the guardianship of the husband” upon the termination of a customary marriage.

<sup>126</sup> See, for example, L. Clark, “Wife battery and determinations of custody and access: a comparison of U.S. and Canadian findings,” *Ottawa Law Review* 22 (1990): 691–724, who provides, “Both explicitly and implicitly, [Canadian] courts have recognized that it is beneficial to children to continue to be cared for by the parent who has been primarily responsible for this in the past and who has already demonstrated the ability to provide the care and support needed.” Art. 12 of the *Convention on the Rights of the Child*, 12

primary caretaker presumption would make it easier for women to leave an abusive relationship secure in the knowledge that they would continue to have custody of their children.”<sup>127</sup> Giving custodial preference to the primary caretaker also provides reasonable guidance to judicial discretion without unfairly disadvantaging either parent, reduces uncertainty and focuses on facts that are clearly related to the child’s best interests.<sup>128</sup> To better ensure the wishes of the child, Article 18(4) authorizes the court to appoint an independent legal practitioner to protect the interests of the children of divorcing parents so that, for example, he or she may conduct enquiries into the arrangements being made for children when a divorce is pending.<sup>129</sup>

The CEDAW Committee has noted that “in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married.”<sup>130</sup> Therefore, Article 16 of CEDAW obligates states parties to ensure, on a basis of equality of men and women the “same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.” Similarly, Article 7 of the Protocol on the Rights of Women in Africa stipulates that “in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children.” Common to both treaties is the stipulation that interests of the children be “paramount.”<sup>131</sup>

The “best interests of the child” principal is recognized in the *African Charter on the Rights and Welfare of the Child*, which provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration,” and further stipulates that in “all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views ... opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”<sup>132</sup> A number of countries around the world have similarly acknowledged the best

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December 1989, 1577 U.N.T.S. 3, (entered into force 2 September 1990) [CRC], stipulates that children’s views should be given due weight in accordance with the child’s age and maturity, and that children should have an opportunity to be heard in judicial and administrative proceedings affecting them.

<sup>127</sup> L. Clark, “Wife battery” (supra), para. 45.

<sup>128</sup> In Clark’s view, this approach has “the additional benefit of discouraging litigation and providing certainty with respect to outcome”: L. Clark, “Wife battery” (supra), para. 44. See also pp. 174–179 of LAC, *Proposals* (supra).

<sup>129</sup> UNISA, *Women & the Law in South Africa* (supra), p. 81.

<sup>130</sup> CEDAW Committee, “General Recommendation No. 21” (supra), para. 19.

<sup>131</sup> Art. 16 of CEDAW provides that “in all cases the interests of the children shall be paramount,” while art. 7 of the Protocol on the Rights of Women in Africa provides that “the interests of the children shall be given paramount importance.”

<sup>132</sup> See art. 4 of the *African Charter on the Rights and Welfare of the Child*, 29 November 1999, Organization of African Unity, O.A.U. Doc. CAB/LEG/24.9/49 (1990), (entered into force 29 November 1999). The *Convention on the Rights of the Child* also holds that in all actions concerning children, “the best interests of the child shall be the paramount consideration”: *Convention on the Rights of the Child*, 12 December, 1989, 1577 U.N.T.S. 3, (entered into force 2 September 1990) [CRC], art. 3(1). In the view of

interests of the child as the foremost consideration and provide for explicit use of the best interests of the child principle in custody determinations.<sup>133</sup> While it is beyond the scope of this project to include an exhaustive analysis of “the best interests of the child,” a number of countries have codified the various factors comprising this principle.<sup>134</sup>

## Article 20. Child maintenance

- (1) A court granting a decree of divorce may make any order it deems to be in the best interests of any affected minor or dependent child with respect to his or her maintenance, based on the needs of the child, including:
- (a) the financial, educational and developmental needs of the child, including but not limited to, housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;
  - (b) the age of the child;
  - (c) the manner in which the child is being, and in which his or her parents reasonably expect him or her to be, educated or trained; and
  - (d) any special needs of the child, including but not limited to needs arising from a disability or other special condition<sup>135</sup>

and the respective financial means of the parents, and taking into account the extra financial burden which normally falls on the custodial parent.

### **Commentary: Article 20**

Article 20 authorizes courts to order child maintenance to compensate the custodial parent for the extra financial responsibilities undertaken. This serves to provide a child of divorce with a standard of living appropriate for the child’s needs and the parents’ means, to the greatest extent possible, and mitigates the risk of poverty for the custodial parent and his or her children.

According to the CEDAW Committee, the “best interests of the child” principle requires granting the parents of children equal status, despite the reality that, “where the mothers are divorced or living apart, many fathers fail to share the responsibility of care,

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the CEDAW Committee, this principle requires granting the parents of children equal status, despite the reality that, “where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children”: CEDAW Committee, “General Recommendation No. 21” (supra), para. 19.

<sup>133</sup> T. Ezer et al, “Divorce reform” (supra), p. 906. The countries include South Africa, Nigeria, Australia and Zimbabwe.

<sup>134</sup> See, for example, s. 4 of Namibia, *Matrimonial Affairs Ordinance 35 of 1955*. For a fuller discussion of the content of the “best interests of the child” principle, see T. Ezer et al, “Divorce reform” (supra), p. 907. A list of factors in a “best interests” analysis is provided on pp. 913 and 966–969.

<sup>135</sup> These provisions are derived from s. 16 of Namibia, *Maintenance Act of 2003* and s. 66J of Australia, *Family Law Act of 1975*.

protection and *maintenance* of their children.”<sup>136</sup> [emphasis added] The *African Charter on the Rights and Welfare of the Child* stipulates, “No child shall be deprived of maintenance by reference to the parents’ marital status.”<sup>137</sup> Further, both the *African Charter on the Rights and Welfare of the Child* and the ICCPR provide that “[i]n the case of dissolution, provision shall be made for the necessary protection of the child/any children.”<sup>138</sup> In terms of the amount of maintenance to be awarded, the *Convention on the Rights of the Child* (CRC) and the ICESCR recognize the right of children to an adequate standard of living.<sup>139</sup> The CRC further stipulates that children’s standard of living should be adequate for his or her “physical, mental, spiritual, moral and social development.”<sup>140</sup>

## Article 21. Interim orders

- (1) Where an application is made under Article 17, the court may, on application by either spouse, order temporary maintenance for the support of the other spouse, taking into account the factors enumerated in Article 17 and pending the determination of the application under Article 17.<sup>141</sup>
- (2) Where an application is made under Articles 19 and 20 regarding the custody, access and/or maintenance of an affected minor or dependent child, the court may, on application by either or both spouses, order temporary custody, access and/or maintenance of that child based on the factors enumerated in Articles 19 and 20 and pending the determination of the application under Articles 19 and 20.

### **Commentary: Article 21**

Article 21 allows for interim orders for maintenance in order to ensure neither spouse is rendered financially vulnerable while a divorce proceeding is pending. Because divorce proceedings can be protracted, courts should also be empowered to order temporary custody, access or maintenance of children to provide stability and clarity with respect to the child or children’s arrangements prior to a final order being made.

## Article 22. Rescission, suspension or variation of maintenance and custody orders

- (1) A spousal or child maintenance order or an order in respect of custody or access may at any time be rescinded or varied or, in the case of a spousal or child maintenance

<sup>136</sup> See CEDAW Committee, “General Recommendation No. 21” (supra), para. 19.

<sup>137</sup> See art. 18(3) of the *African Charter on the Rights and Welfare of the Child*.

<sup>138</sup> See art. 18(2) of the *African Charter on the Rights and Welfare of the Child*, and art. 23(4) of the ICCPR.

<sup>139</sup> See art. 27(1) of the CRC and art. 11(1) of the ICESCR.

<sup>140</sup> See art. 29(1) of the CRC.

<sup>141</sup> This provision is partly derived from s. 15.2 of Canada, *Divorce Act of 1985*.

order or an order with regard to access to a minor or dependent child, be suspended by a court if the court finds that there is sufficient reason, based on the factors enumerated in Articles 17 to 20 of this Act, to do so.<sup>142</sup>

## Article 23. Enforcement

- (1) A spouse who knowingly violates the terms of an order made under Articles 17 or 20 shall be guilty of an offence and liable to a fine not exceeding [monetary amount].
- (2) A court may authorize payment of spousal or child maintenance by an employer on behalf of an employee within one month of the employee's default, which may be made from the employee's salary, wages, remuneration or allowance.<sup>143</sup>
- (3) A court may seize any property, including pensions and annuities, to cover spousal or child maintenance payments.<sup>144</sup>

### (Optional additional clause:)

- (4) The [relevant state ministry] shall appoint enforcement officers for the purpose of enforcing spousal maintenance orders and child maintenance orders determined under Articles 17 and 20.

## Commentary: Articles 22 and 23

Reviews of international literature with respect to child maintenance awards reveal they are often erratically, or never, paid.<sup>145</sup> A system of maintenance in which defaulting on payment is the norm deeply constrains women's choices to leave oppressive and abusive relationships.<sup>146</sup> Therefore, a system of enforcement should accompany a spousal maintenance scheme to ensure maintenance orders are carried out. Depending on the infrastructure and resources of each country, possible means to respond to non-compliance of maintenance orders could include fines for late payment or non-payment,

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<sup>142</sup> See s. 8 of South Africa, *Divorce Act of 1979*.

<sup>143</sup> Sections (2) and (3) are derived from s. 34 of proposed *Matrimonial Causes Act of 2007* featured in T. Ezer et al, "Divorce reform" (supra), pp. 982–983, which is in turn derived from s. 77 of Uganda, *Children's Act*.

<sup>144</sup> See, for example, *Gerber v. Gerber and Another* (12166/07; 12691/07) [2007] ZAWCHC 65 (9 November 2007) (South Africa, High Court), in which the Court ordered the attachment of the assets of the respondent to enable him to pay child support and to protect the best interests of his daughter. The Court held that it should intervene to protect the interests of the child even though the respondent would generally have the right to determine how he spends his own assets.

<sup>145</sup> See R. Langer, "Post marital support discourse" (supra); D. Stewart and L. McFadyen, "Women and the economic consequences of divorce in Manitoba: an empirical study," *Manitoba Law Journal* 21 (1992): 80–99, citing M.L. McCall et al, *The Process and Economic Consequences of Marriage Breakdown* (Calgary: Canadian Research Institute for Law and the Family, 1988); F.M. Steel, "Alimony and maintenance orders" (supra); J.M. Masson, R. Bailey-Harris and R.J. Probert, *Principles of Family Law* (London: Sweet & Maxwell, 2008), p. 465.

<sup>146</sup> R. Langer, "Post marital support discourse" (supra), paras. 34 and 40.

criminal prosecution, court orders for the sale or seizure of property, or deductions from earnings in order to fulfill maintenance obligations. These options are provided in Article 23. Article 23's optional additional section allows for the appointment of enforcement officers trained and dedicated to handling maintenance claims, which may facilitate enforcement in jurisdictions where there are few other means to ensure payment.

The CRC explicitly makes the connection between the right to an adequate standard of living and a state-sponsored maintenance system by requiring states parties to “take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.”<sup>147</sup> A dysfunctional maintenance system violates children's and, in many cases, women's right to an adequate standard of living by preventing them from obtaining the financial support necessary for food, shelter and basic necessities.<sup>148</sup>

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<sup>147</sup> See art. 27(4) of the CRC.

<sup>148</sup> See art. 11(1) of the ICESCR.