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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 3: Property in Marriage

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

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

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

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About this publication

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

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

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

How to use this publication

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

Volume One: Sexual and Domestic Violence

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

Volume Two: Family and Property Issues

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

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

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

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

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

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

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

Volume Two Introduction

Women and HIV/AIDS

Over 25 years into the epidemic, it is now widely recognized that laws and policies must affirm and protect women's rights in order to mount an effective response to HIV/AIDS. Governments have repeatedly declared their commitment to respect, protect and fulfill women's rights and have acknowledged the linkages between HIV and gender inequality.¹ To this end, the United Nations and other international agencies have developed various programs to respond to the gender dimensions of the epidemic and work towards gender equality.² Yet women's legal, economic and social subordination continues to catastrophically increase their risk of HIV infection and constrain their access to HIV testing, treatment, care and support.³

Violations of women's human rights in marriage, domestic partnerships, divorce, property and inheritance are decisively linked to the HIV epidemic. As will be demonstrated in the modules that follow, discriminatory laws and practices with respect to family and property issues can put women at direct risk of HIV infection — for example, in the case of widow inheritance.⁴ Discriminatory laws and practices can also legitimize gender inequality, contour women's experiences within their families, communities and society, and limit their range of options and opportunities. These render women more vulnerable to HIV infection. For example, as a result of discriminatory laws and practices and inadequate legal protections, women lack access to productive resources, their livelihoods and economic independence are undermined, their

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

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

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

⁴ For a discussion of the linkages between widow inheritance and HIV, see the commentary on widow inheritance in Module 1 “Marriage.”

ability to control their sexuality and reproduction is limited, and their ability to maintain adequate housing is destroyed. Without adequate legal and social structures to facilitate women's access to redress for these violations, many women are relegated to positions of disempowerment and dependence. All of these factors can contribute to situations where women are unable to leave unwanted or abusive relationships or to negotiate safer sex; or where they engage in transactional sex to obtain money, goods, school fees or lodging — to cite just three examples.⁵

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

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

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

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

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

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

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

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

⁷ UNAIDS, *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa*, July, 2004, at p. 6, online: www.ungei.org/resources/1612_1023.html. [Authors' Note: Although this publication bears the same name as the publication cited in notes 3 and 6 above, it is actually a different document.]

issues. Gains made on one front may be undermined by existing rules in another, or limited in effect because of contradictory rules and processes in other laws. It is therefore imperative to prioritize the harmonization of laws and policies in efforts to legislate for women's rights.

For example, as is discussed further in the modules that comprise this volume, across sub-Saharan Africa, laws from both civil and customary systems operate against women's capacity to marry with their free and full consent, divorce, or own and deal with property, particularly land. In some countries, despite legal guarantees of women's equal rights in the Constitution and other legislation, "marital powers" award husbands full legal power over their wives and over all family property, denying women the right to administer property, sign contracts or obtain credit and, ultimately, the right to economic independence.⁸ Similarly, where constitutional and statutory law defer to customary law, it may be difficult or impossible for women to inherit or divorce.⁹

Where the applicable statutes, customs and regulations conflict, courts play a critical role with respect to determining women's rights. Constitutional challenges can ultimately lead to the overturning of statutes or customary laws that discriminate against women. The process, however, can be slow and piecemeal, leaving women's constitutionally guaranteed rights unfulfilled until a successful case on each relevant issue is litigated.¹⁰ Litigation also requires significant resources, both personal and financial, which are often not available to women or the non-governmental organizations (NGOs) that might intervene on their behalf.¹¹ For women who are living with HIV, in particular, fighting a

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

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

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

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

lengthy court battle in order to protect their rights may not be desirable or possible. Furthermore, courts may have difficulty in identifying, understanding and appreciating the customary law norms and human rights norms that they are asked to rule on. There is no guarantee that they will rule in favour of equality when faced with contrary customary practices.¹² For all of these reasons, it is desirable to harmonize laws in order to protect women's rights in the context of HIV, reducing disputes and uncertainties in the process.

Harmonization also relates to international human rights treaties and their domestic application. All human rights need to be imbued with a gender perspective, and their interdependence must be recognized. Women will never be empowered in the area of marriage, for example, if violations in the areas of property and inheritance persist. Similarly, women's right to the highest attainable standard of health will never be fully achieved if women's rights to non-discrimination and an adequate standard of living are violated. Moreover, the relevance and significance of human rights guarantees to women can only be understood when viewed through a gender perspective and applied to women's specific experiences. Women's rights violations will never be remedied if they are not understood as violations in the first place.¹³

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

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

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

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

Customary laws and women's rights issues

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

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

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

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

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

¹⁶ For example, in northern Nigeria, the personal law code of the Sharia applies, under which male heirs inherit twice as much as female heirs. A widow receives one-quarter of the estate if there are no heirs, and one-eighth of the estate if there are heirs. In polygamous unions, one-eighth of the estate is shared among all wives, which is often not sufficient for the women's continued survival: COHRE, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, 2004, p. 79. In the context of divorce, Tanzanian customary law stipulates that a husband's adultery is never considered a ground for divorce, while an act of adultery by a wife is a sufficient ground: s. 106 of Tanzania, Local Customary Law.

more apparent and unjustifiable.¹⁷ For example, with the development of private property regimes, the application of customary laws which originated in a context of collective land ownership now often operate to exclude women from ownership and inheritance. As a result, women have lost the rights of use and occupancy they once enjoyed.¹⁸

Failures of customary law to meet evolving social conditions have some of their gravest consequences in the context of the HIV epidemic. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that it is “alarmed at the rising trends in HIV/AIDS infection rates of women and the direct linkage between harmful traditional practices and the spread of HIV/AIDS.”¹⁹ In the context of marriage, for example, the practice of widow inheritance, which originally arose as a social institution designed for men to take responsibility for their dead male relative’s children and his household, may now expose women to unprotected and unwanted sex and thus to the risk of HIV infection.²⁰ In the context of inheritance, as AIDS-related deaths affect more family members, the search for a male heir may result in increasingly distant relatives inheriting or administering estates. These distant relatives may also be less inclined to assume maintenance and support obligations, or to see to the best interests of the deceased’s dependants.²¹

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

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

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

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

²¹ See, for example, COHRE, *Bringing Equality Home* (supra), p. 44. Among Tswana people (who live mostly in Botswana and South Africa), most property, including cattle, goes to a deceased’s eldest son, on the premise that if it were given to daughters or wives, it would be lost to the family upon a subsequent marriage. The family home is given to the youngest son, on the premise that he will look after his aging mother. It has been observed that in the context of HIV/AIDS, many families may have lost all male members, and, as a result, the land and cattle may be passed on to a distant relative: COHRE, *Bringing Equality Home* (supra), p. 45.

While legislative prohibitions are no panacea for changing firmly entrenched customs, law does have a role to play.²² Law plays a normative role in defining legitimate behaviour in a society. Therefore, prohibitions of certain customary practices, to the extent that they violate women's human rights, may be an important step towards changing the way these customs are viewed.²³ In some cases, prohibitions may also be a requirement of international law — for example, in the case of forced marriage.²⁴

If a legal regime that departs too radically from the accustomed practice is imposed upon customary communities, there is a possibility that the law will be ignored, circumvented or result in greater rights violations for the communities it is intended to protect.²⁵ One response is to ensure, wherever possible, that statutory reforms take into account customary norms and structures and, in the process, strengthen women's rights within those systems, while ensuring that rules and practices that perpetuate gender inequalities are eliminated.²⁶ This may involve, for example, empowering customary courts to

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

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

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

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

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

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

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

The challenges of legislating for women's rights

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

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

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

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

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

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

Governments should specifically invest in strategies to educate judges, magistrates, police and customary leaders to underscore linkages between HIV/AIDS, gender equality, gender-based violence, poverty and human rights. Community-based education initiatives and engagement opportunities should be designed to facilitate input from different communities and encourage ownership over law reform processes on the part of those most impacted by the laws, including grassroots women.³⁰

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

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

²⁹ For example, Namibia noted in its CEDAW report the clear need for public education campaigns that focus on the legal consequences of marriage:

For both women and men in Namibia, the right to enter into marriage freely is qualified by a lack of information about the legal consequences of marriage. Without a clear understanding of the ramifications of the different marital property regimes or the effects of an antenuptial agreement, it is difficult for women or men to make an informed choice. This is a problem which can best be addressed by public education campaigns.

See Namibia, *CEDAW Country Report*, CEDAW/C/Nam/1, 1997, p. 172. Zambia's public education program to discourage bride price has also apparently seen early success. See Zambia, *Combined Third and Fourth CEDAW Report*, CEDAW/C/ZAM/3-4, 1999, p. 65.

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

Module 3: Property in Marriage

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Prefatory Note

Women, property and HIV/AIDS

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

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

¹ See, for example, C. Sweetman, “How title deeds make sex safer: women’s property rights in an era of HIV,” *From Poverty to Power*, Background Papers, Oxfam International, 2008; L. Farha, *Women and Housing Rights*, Centre on Housing Rights and Evictions (COHRE), 2000, p. 11; Committee for the Elimination of Discrimination against Women (CEDAW Committee), “Responses to the List of Issues and Questions with Regard to the Consideration of the Combined Second and Third Periodic Reports: Cameroon,” pre-session working group, 42nd session, CEDAW/C/CMR/Q/3/Add.1, 10 November 2008, p. 30; and 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 457.

² CEDAW Committee, “General Recommendation No. 19: Violence Against Women,” U.N. Doc. A/47/38, 1993. See, for example, Zimbabwe, *Married Person’s Property Act of 1929*; Tanzania, *Law of Marriage Act of 1971*; s. 24 of the *Constitution of the Republic of Malawi of 1994*, as it has been interpreted by Malawi’s courts.

³ CEDAW Committee, “General Recommendation No. 21: Equality in Marriage and Family Relations,” U.N. Doc. A/49/38, 1994, para. 30.

⁴ See COHRE, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, 2004, pp. 7 and 20–21; A. Mason, *Engendering Development Through Gender Equality in Rights, Resources, and Voice*, World Bank, 2001, p. 4.; and Human Rights Watch (HRW), *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa*, 2003, p. 41. In Cameroon, a survey by the National Institute of Statistics revealed that the proportion of women who own a house is higher among those who have been married or have cohabited with a partner compared with those who are currently married or cohabiting and those who have never been married: CEDAW Committee, “Responses to the list of issues...” (supra), pp. 29–30.

women's inheritance through lineage has declined and available land has become scarcer.⁵ Therefore, how the property of married couples is administered, used, owned and distributed during and at the end of a relationship has considerable relevance for women's rights. In the context of HIV, the laws governing women's property rights take on even more significance.

In general terms, protecting women's property rights has both *preventive* and *mitigating* impacts in the context of the HIV epidemic.⁶ On the *preventive* side, security of tenure over housing and land provide women with economic security, livelihoods and dignity. Numerous studies have demonstrated how poverty and insecurity drive women to remain in violent relationships or to engage in behaviours that put them at increased risk of contracting HIV.⁷ As the U.N. Commission on Human Rights has affirmed, "the lack of adequate housing can make women more vulnerable to various forms of violence, including domestic violence, and in particular ... the lack of housing alternatives may limit many women's ability to leave violent situations."⁸ Ostensibly, women with access to resources (including land, financial resources and supportive social networks) are better able to negotiate condom use in their sexual relationships, to leave abusive partners, and to provide for their own and their children's needs.

In terms of *mitigation*, property rights can help ease the impact of HIV and AIDS on individuals and families.⁹ Failing to recognize women's interest in marital property can have particularly harsh consequences for women affected by HIV, who may face stigma,

⁵ 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, at 30.

⁶ R. Strickland, *To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*, International Center for Research on Women (ICRW) Working Paper, 2004, p. 10.

⁷ See, for example, S. White, "Extreme poverty and its impact on women's vulnerability to HIV transmission: a rights issue," October 2007 [publication forthcoming]. In Malawi, White reports that due to high levels of poverty, most women in Malawi cannot afford the luxury of exercising choice and autonomy over matters relating to their sexuality, and engage in high risk behaviours such as providing sex in exchange for firewood, fish and working in the tea industry. See also HRW, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, Vol. 15, No. 15(A), 2003, p. 32; T. Lindgen et al, "Malawi women and HIV socio-cultural factors and barriers to prevention," *Women & Health* 41(1) (2005): 69–86, at 8; J. Simmons et al, "A global perspective," in P. Farmer et al (eds), *Women, Poverty and AIDS* (Monroe: Common Courage Press, 1996), p. 73; M. Hattori and F. Ni-Amoo Dodoo, "Cohabitation, marriage, and 'sexual monogamy' in Nairobi's slums," *Social Science & Medicine* 64(5) (2007): 1067–1078. In the latter study, poorer women were more likely to report multiple sexual partnerships, suggesting that economic hardship diminishes sexual exclusivity.

⁸ U.N. Commission on Human Rights, "Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing," Resolution 2005/25, U.N. Doc. E/CN.4/2005/RES/25, 15 April 2005.

⁹ See, for example, R. Strickland, *To Have and To Hold* (supra), who provides at p. 1, "There is growing evidence to suggest that where women's property and inheritance rights are upheld, women acting as heads and/or primary caregivers of HIV/AIDS-affected household are better able to mitigate the negative economic and social consequences of AIDS."

discrimination and forced eviction as a result.¹⁰ In households affected by HIV/AIDS, it has been estimated that household incomes can drop by 80 percent, food consumption by 15 to 30 percent, and primary school enrolment by 20 to 40 percent.¹¹ The impact of HIV/AIDS on poorer rural households with small land holdings is even harsher than on wealthier ones.¹² Another important aspect of mitigation is the ability to plan for the future of one's children. Women are better able to secure their children's future when they have secure property rights.¹³ Moreover, access to shelter, clean water and services helps to keep those infected with HIV healthy.¹⁴

Women, property and human rights

As the U.N. Commission on Human Rights has recognized, there is a linkage between the growing prevalence of HIV/AIDS among women and “laws that inhibit the full enjoyment of women's rights to land ownership and inheritance.”¹⁵ Therefore, “positive change and attention to women's empowerment and protection of women's housing and land rights” is necessary “to make women less vulnerable to HIV/AIDS.”¹⁶ In the context of marriage, laws must recognize men and women's equal claims on marital assets in the context of the mutual rights and responsibilities spouses have towards one another.

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

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

¹¹ A. Whiteside, “Poverty and HIV/AIDS in Africa,” *Third World Quarterly* 23(2) (2002): 313–332.

¹² S. Drimie, *The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho and South Africa: A Synthesis Report Prepared for the South African Regional Office of the Food and Agricultural Organization of the United Nations (FAO)*, Integrated Rural and Regional Development, Human Sciences Research Council, 2002, p. 4; K. Izumi (ed), *Reclaiming Our Lives* (supra), p. 14.

¹³ N. Duvvury, “Women's property rights, HIV and AIDS, and domestic violence: emerging findings from sub-Saharan Africa and South East Asia,” ICRW, paper presented at The Technical Consultation on Gender, Property Rights and Livelihoods in the Era of AIDS, FAO, 2007, Rome, Italy.

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

¹⁵ U.N. Commission on Human Rights, “Women's Equal Ownership” (supra).

¹⁶ *Ibid.*

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

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

¹⁷ See, for example, *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. 3; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 2; *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [CEDAW], art. 2; *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. 2 and 18(3).

¹⁸ CEDAW, art. 16.

¹⁹ CEDAW, art. 16(1)(h).

²⁰ CEDAW Committee, “General Recommendation No. 21” (supra), para. 28.

²¹ See, for example, ICESCR, art. 3; ICCPR, art. 3, 23(4) and 26; CEDAW, art. 15; African Charter on Human and Peoples’ Rights, art. 3.

²² U.N. Human Rights Committee, “General Comment 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses),” 39th session, 1990, para. 6.

²³ On the right of women to have equality with men before the law, the CEDAW Committee has noted in its General Recommendation No. 21 that the right to equality before the law and equality in marriage and family relations overlap and complement each other. The Committee explains that when a woman requires her husband’s or a male relative’s permission to enter into a contract or access credit, she is denied legal autonomy. The right to own, manage, enjoy and dispose of property is central to a women’s right to enjoy financial independence, to earn a livelihood and to provide for herself and her family. These rights should be guaranteed regardless of a women’s marital status: CEDAW Committee, “General Recommendation No. 21” (supra), paras. 7, 26, 28 and 29.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) recognizes specific rights of women with respect to marital property in Africa.²⁴ It obliges states parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.²⁵ In particular, it includes obligations to enact appropriate national legislative measures to guarantee that the husband and wife shall by mutual agreement choose their matrimonial regime and place of residence, and that during marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.²⁶

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

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

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

²⁵ Art. 6.

²⁶ Art. 6(e) and (j).

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

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

²⁹ *Ibid.*, para. 8.

³⁰ L. Farha, *Women and Housing Rights* (supra), p. 25.

³¹ ICESCR, art. 12; CEDAW, art. 12; Protocol on the Rights of Women in Africa, art. 14; African Charter, art. 16. See United Nations Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health,” 22nd Session, E/C.12/2000/4, 11 August 2000, para. 8.

freedom from cruel, inhuman or degrading treatment or punishment;³³ the right to be free from slavery and servitude;³⁴ the right to liberty and security of the person;³⁵ and the right to life.³⁶ As the CEDAW Committee has noted, the “right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.”³⁷ This statement underscores the interdependence of rights related to women’s access to marital property. For example, a right to marital property will require legal protection against domestic violence (which is linked to rights to liberty and security of the person, to life, and to be free from cruel, inhuman or degrading treatment or punishment), and all of these rights are essential to realize the highest attainable standard of health.

A. Protected Property

NOTE:

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

Article 1. Definition of the matrimonial home

- (1) The “matrimonial home” means the building(s) or part of a building in which the spouses ordinarily reside together and includes:
 - (a) household goods and furnishings used in relation to the residence; and
 - (b) the surrounding residential land.³⁸

³² Protocol on the Rights of Women in Africa, art. 15 (“Right to Food Security”) and 16 (“Right to Adequate Housing”).

³³ ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.

³⁴ ICCPR, art. 8; African Charter, art. 5.

³⁵ ICCPR art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.

³⁶ ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.

³⁷ CEDAW Committee, “General Recommendation No. 21” (supra), para. 26.

³⁸ This provision is derived in part from s. 1 of Tanzania, *Law of Marriage Act of 1971*.

Article 2. Rights and duties with respect to the matrimonial home

- (1) Each spouse has an equal right to possession, use and enjoyment of the matrimonial home, subject to the provisions of the [relevant domestic violence legislation] and any protection orders issued pursuant to that Act.³⁹
- (2) Both spouses have a reciprocal duty to contribute to the upkeep of the matrimonial home, including through the performance of household duties and in proportion to their respective financial positions.⁴⁰
- (3) A spouse shall not be evicted from the matrimonial home during the subsistence of the marriage:
 - (a) by or at the instance of the other spouse, except in accordance with an order of a court; or
 - (b) by any person except on the sale of any estate or interest in the matrimonial home in execution of a decree, by a trustee in bankruptcy or by a mortgagee or charge in exercise of a power of sale or other remedy given under any law.⁴¹
- (4) Where any interest in the matrimonial home is owned by either spouse, that spouse shall not, while the marriage subsists and without the prior and written consent of the other spouse, dispose of or encumber any interest in the matrimonial home.⁴²
- (5) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of Section (4):
 - (a) the transaction may be revoked by an application from the other spouse; or
 - (b) the interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until the marriage is dissolved pursuant to the [relevant divorce legislation] and the court orders that this right has been terminated;

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

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

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

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

⁴² This section is adapted from s. 29 of Tanzania, *Law of Marriage Act of 1971* and s. 21(1) of Ontario, Canada, *Family Law Act of 1990*.

- (6) Where an unauthorized transaction is not revoked pursuant to Section (5), and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse:
- (a) upon division of the joint estate; or
 - (b) upon demand of the other spouse at any time during the subsistence of the marriage.⁴⁴

Article 3. Applicability of provisions regarding matrimonial home

- (1) Article 2 regarding the matrimonial home applies irrespective of the marital property regime elected, the terms of any antenuptial agreement, or, in the case of communal land, the relevant communal land law or practice.
- (2) Spouses are not permitted to contract out of Article 2.⁴⁵

Commentary: Articles 1–3

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

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

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

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

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

⁴⁷ See V. Bennett et al, “Inheritance law in Uganda” (supra), p. 476; L. Farha, *Women and Housing Rights* (supra), p. 13.

⁴⁸ U.N. Committee on Economic, Social and Cultural Rights, “Concluding Observations: Algeria,” CESCR E/1996/22, 8 December 1995, para. 294.

⁴⁹ See, for example, s. 59 of Tanzania, *Law of Marriage of 1971*; art. 123 and 125 of Burundi, *Code Civil*; art. 238 of the draft revisions to Rwanda, *Family Code*; Ireland, *Family Home Protection Act*; art. 215 of France, *Civil Code*; ss. 19, 21 and 24 of Ontario, Canada, *Family Law Act of 1990*. The treatment of the matrimonial home at the dissolution of a marriage is addressed in Module 4 “Divorce” and Module 5 “Inheritance.”

irrespective of the couple's chosen marital property regime, antenuptial agreement or communal land right reinforces the importance of these protections.

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

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

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

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

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

⁵² U.N. Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The Right to Adequate Housing (Article 11(1))," (Sixth session, 1991), U.N. Doc. A/43/8/Add.1, 13 December 1991, para. 7.

⁵³ *Ibid.*, para. 18.

Optional: Article 4. Family and traditional property

- (1) Notwithstanding the provisions governing the administration and division of property in this Act, the following property will remain the separate property of the spouse in question and the power of the court to make an order for the administration and division of the property of the spouses shall not extend to any property which is proved, to the satisfaction of the court, to be:
- (a) property inherited before or during the marriage and held in trust by the spouse in question in terms of customary law for the benefit of other members of the spouse’s kin group; or
 - (b) traditional property acquired before or during the marriage which in terms of the relevant customary law must be held separately by the spouse in question.
- (2) The maximum value of property which is exempted from the joint estate in accordance with Section (1) is equal to 50 percent of the sum of:
- (a) the total value of the joint estate; and
 - (b) the property which is eligible for exemption;
- as calculated at the time of the division of the estate. Any property in excess of this value must be treated as part of the joint estate in accordance with the marital property regime elected by the spouses.
- (3) The onus of proving that any property falls within the exempted categories pursuant to Section (1) falls on the party who is claiming that the property is exempted.⁵⁴

Commentary: Article 4

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

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

⁵⁵ L. Mbatha, “Reflection on the rights created by the Recognition of Customary Marriages Act,” *Agenda Special Focus (Gender, Culture and Rights)* (2005): 42–47, at 46.

Because land is often the principal source of wealth of a married couple, Article 4(2) sets a maximum value in terms of the property that can be exempted. This ensures that the exemptions for family and traditional property do not leave the spouse who has less access to such property (usually the wife) without a significant share of property upon marriage dissolution.⁵⁶ Article 4(2) is therefore an attempt to achieve a workable balance between respect for traditional property systems and the need for an equitable division of property between spouses. Furthermore, the distinction between different categories of property is not always clear, and how property is classified may depend on the function it serves and the family status of the person to whom the property has been allocated.⁵⁷ To ensure individuals are protected from the possible abuse of a provision excluding family and traditional property from the joint estate, Article 4(3) requires the person seeking the exclusion to prove that it is indeed family or traditional property. Because men more often control family and traditional property, this provision may offer women important protection against illegitimate claims.

B. Choice of Marital Property Regime

NOTE:

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

Article 5. Antenuptial agreements

- (1) Nothing in this Act shall preclude the parties to a marriage from concluding an antenuptial agreement pertaining to the division of property between them.
- (2) An antenuptial agreement shall be dated, signed on each page by the spouses and by two witnesses and registered in the same manner prescribed for the registration of marital property regimes.
- (3) An antenuptial agreement shall not absolve a spouse from his or her legal duties to the other spouse or any minor or dependent children of the marriage.
- (4) A court may vary or set aside any written agreement pertaining to the division of property between spouses if it is satisfied that the agreement has been obtained through fraud, coercion, undue influence or domestic violence.

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

⁵⁷ See, for example, LAC, *Marital Property* (supra), pp. 148–149; W. Ncube, “Underprivilege and inequality: the matrimonial property rights of women in Zimbabwe,” in A. Armstrong (ed), *Women and Law in Southern Africa* (Harare: Zim Publishing House, 1987), p. 6; W. Ncube, “Re-allocation of matrimonial property at the dissolution of marriage in Zimbabwe,” *Journal of African Law* 34 (1990): 1–8, at 6.

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

Commentary: Article 5

Antenuptial agreements provide couples with significant freedom to determine the proprietary consequences of their marriage. To ensure such agreements are accessible, the requirements for making binding antenuptial agreements should not be onerous, and they should be registered in the same manner prescribed for the registration of marital property regimes. At the same time, requiring the agreement to be signed, witnessed and registered provides greater certainty as to its legitimacy, which benefits both spouses and the interest of creditors.⁵⁸ Spouses should not be permitted to contract out of their legal duties to each other or to any minor or dependent children because duties of mutual support and child maintenance facilitate an adequate standard of living for the family.⁵⁹ Therefore, Article 5(3) prohibits such agreements.

Commentators have noted that some women may not negotiate contracts from a position of strength and may be pressured to conform to their husband’s desires.⁶⁰ To protect women from antenuptial agreements which may leave them economically and socially vulnerable, Article 5(4) authorizes courts to vary or set aside antenuptial agreements where there is evidence of fraud, coercion, undue influence or domestic violence.⁶¹ In such circumstances, Article 5(5) provides that the couple’s property shall be treated as if they have chosen modified community of property, the default marital property regime, to ensure the rights of both spouses are protected.

NOTE:

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

⁵⁸ LAC, *Marital Property* (supra), p. 228.

⁵⁹ See the corresponding commentaries in Module 1 “Marriage” and Module 4 “Divorce” for a further discussion of duties of spousal and child maintenance.

⁶⁰ Gender Project, Community Law Centre (University of the Western Cape) and Gender Unit, Legal Aid Clinic (University of Western Cape), *Submissions on South African Law Commission’s Issue Paper No. 15: Islamic marriages and Related Matters*, 2000, p. 6.

⁶¹ See *Ratanee v. Maharaj and Another* 1950 (2) SA 538 (D), as cited in LAC, *Marital Property* (supra), p. 172, for an example of pressure on a wife to enter into an antenuptial agreement which did not reflect her true wishes. The court held that the evidence showed the relationship between husband and wife to be such that she was incapable of resisting his will and that she was entitled to relief even in the absence of a finding of undue influence.

Article 6. Choice of marital property regime

- (1) The parties may, at the time of marriage and by mutual consent, choose to be governed by any of the three marital property regimes set out in Articles 8–24 of this Act.
- (2) The parties shall register their choice of marital property regime on their marriage certificate as set out in the [relevant marriage legislation].
- (3) If the parties to a marriage fail to elect a marital property regime or fail to conclude a valid antenuptial agreement, they will be deemed to have chosen to be governed by a modified community of property regime as set out in Articles 10–18 of this Act.

Article 7. Change of marital property regime

- (1) The parties may, at any time during the marriage and by mutual consent, choose to change the marital property regime they elected under Article 6 by concluding and registering a postnuptial agreement with the [Registrar General / district registrars / local registering officer].
- (2) The postnuptial agreement shall be dated, signed on each page by the spouses and by two witnesses, and registered in the same manner prescribed for the registration of marital property regimes.
- (3) The [Registrar General / district registrar / local registering officer] shall only register the change to the marital property regime if:
 - (a) both spouses have during separate consultations with the [Registrar General / district registrar / local registering officer] indicated that the change is by mutual consent and that each spouse understands the effect of the proposed change;
 - (b) the proposed changes will not prejudice the rights of any minor or dependent children of the marriage; and
 - (c) the proposed changes will not absolve a spouse from his or her legal duties to the other spouse or any minor or dependent children of the marriage.
- (4) A court may vary or set aside any postnuptial agreement proposing to change the elected marital property regime if it is satisfied that the agreement has been obtained through fraud, coercion, undue influence or domestic violence, and the spouses will continue to be governed by the marital property regime they chose at the time of marriage.

(Optional additional sections where polygamy is not prohibited:)

- (5) In the case of a polygamous marriage, any change in marital property regime must be made by application by one of the spouses to the court. The court may approve the

change in marital property regime, subject to any condition it may deem just, if satisfied that:

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

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

- (6) All persons having a sufficient interest in the matter, and in particular the applicant's other spouse or spouses, must be granted standing to participate in any proceedings instituted under Section (5).
- (7) If a court grants an application under Section (5), the [relevant court official] must furnish each spouse with an order of the court, and the applicant spouse shall register the new marital property regime with the [Registrar General / district registrars / local registering officer].⁶²

Commentary: Articles 6 and 7

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

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

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

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

(option (c) above).⁶³ If legislators choose to only include one possible marital property regime, or not to designate a default regime in the country's marriage legislation, the provisions should be revised accordingly.

Spouses may find after marrying that they made the wrong choice regarding a suitable marital property regime because they were unaware of their options, because they had the wrong information or misunderstood the legal position, because their actual circumstances after marriage were different from what they had anticipated, or because of unforeseen changes in their circumstances during the marriage.⁶⁴ Article 7, therefore, allows spouses to change their marital property regime after marriage, with court oversight as a safeguard against abuse.

While having a choice between marital property regimes provides couples with greater flexibility, education on the details and consequences of each regime is necessary to ensure that the selected regime is appropriate. Women and men must be able to engage equally in the decision-making process, with full knowledge of the regimes and their consequences.⁶⁵ To that end, Modules 1 and 6 (on "Marriage" and "Implementation Provisions," respectively) include provisions for accessible marriage registration, public legal education and judicial training (which can be adapted for the purposes of a marital property regime framework).

C. Marital Property Regimes

NOTE:

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

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

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

⁶³ The modified community of property regime is discussed in the commentary to Articles 10–13 below.

⁶⁴ *Women & the Law in South Africa: Empowerment Through Enlightenment*, Unit for Gender Research in Law, University of South Africa (UNISA) (Kenwyn: Juta & Co, 1998), pp. 56–57.

⁶⁵ COHRE, *Bringing Equality Home* (supra), p. 176.

⁶⁶ For other jurisdictions with the option of a full community of property marital property regime, see South Africa, *Recognition of Customary Marriages Act of 1998*; Namibia, *Married Persons Equality Act of 1996*; Botswana, *Married Persons Property Act of 1971*.

- (2) All income earned by each of the spouses shall be deemed to be part of the joint estate.
- (3) Property donated or bequeathed conjointly to the spouses shall be deemed to be part of the joint estate, unless otherwise stipulated in the act of donation or relevant testamentary document.⁶⁷
- (4) Each spouse shall own an undivided half share of the joint estate.

Article 9. Full community of property and debts of spouses

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

Commentary: Articles 8 and 9

As the CEDAW Committee has noted,

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

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

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

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

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

⁷⁰ See, for example, Zimbabwe, *Married Person’s Property Act of 1929*; Tanzania, *Law of Marriage Act of 1971*; Botswana, *Married Persons Property Act of 1971*; Senegal, *Family Code of 1972*. Some countries in which this regime existed have since found the separate property regime faulty in practice and have attempted to modify it because it does not provide a fair solution to property division between spouses, given the difficulty of proving contribution to a specific property without record. See COHRE, *Bringing Equality Home* (supra), pp. 68, 92 and 119.

provide courts with records of their possessions and contributions to the family's property, women have little to claim as their own upon marriage dissolution.⁷¹ Moreover, because women's domestic and caregiving work is not often recognized as an economic activity and is difficult to quantify, husbands more often can claim ownership of the assets that they personally purchased.⁷² Courts have held that "an inference of joint ownership of property is not to be made from a mere fact of marriage"; to claim a share in property (on marriage dissolution) that is not registered in a wife's name, her financial contribution must be demonstrated.⁷³ Therefore, the "out of community of property" regime does not recognize spouses' equal claims on marital assets in the context of mutual rights and responsibilities and implies that women make a lesser, secondary contribution.

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

⁷¹ Law Reform Commission of Tanzania, *Inquiry and Report on the Law of Marriage Act, 1971*, 1994, p. 7.

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

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

⁷⁴ COHRE, *Bringing Equality Home* (supra), pp. 92 and 119.

under other marital property regimes.⁷⁵ More generally, research has indicated that increasing the assets controlled by women in marriage increases their bargaining power within the household and results in better education and health for their children.⁷⁶

Under international law, the Protocol on the Rights of Women in Africa calls for states to adopt legislation and “take the necessary measures to recognize the economic value of the work of women in the home.”⁷⁷ Similarly, the CEDAW Committee has recommended that the “[f]inancial and non-financial contributions [of women in marriage] should be accorded the same weight.”⁷⁸ As such, the U.N. Human Rights Committee has stated,

To fulfil their obligations under article 23, paragraph 4 [equality of rights and responsibilities of spouses] States must ensure that the matrimonial regime contains equal rights and obligations for both spouses, with regard to ... the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property...⁷⁹

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

- (1) In a marriage in modified community of property, all of the assets and liabilities acquired by or accruing to either spouse on or after the date of the marriage shall be deemed to constitute one joint estate, even if registered in the name of only one of the spouses.⁸⁰
- (2) All income earned by each of the spouses on or after the date of the marriage shall be deemed to be part of the joint estate.
- (3) Property donated or bequeathed conjointly to the spouses on or after the date of the marriage shall be deemed to be part of the joint estate, unless otherwise stipulated in the act of donation or relevant testamentary document.⁸¹

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

⁷⁶ A. Quisumbing and R. Meinzen-Dick, “Strengthening women’s assets,” *IFPRI Forum*, 2009, p. 7.

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

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

⁷⁹ U.N. Human Rights Committee, “General Comment 28: Equality of Rights Between Men and Women,” 68th Session, CCPR/C/21/Rev.1/Add.10, 2000, para. 25.

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

⁸¹ This section was adapted from art. 62 of Ethiopia, *Revised Family Code of 2000*.

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

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

- (1) Any property possessed by a spouse before the date of his or her marriage shall be deemed that spouse's separate property, and any debt incurred prior to the date of marriage shall be deemed the sole responsibility of that spouse.
- (2) Property acquired in exchange for payment by one of the spouses after marriage shall also be deemed separate property of that spouse where the acquisition has been made by exchange for property owned separately, or with money owned separately or derived from the sale of property owned separately.⁸²
- (3) Any property acquired by a spouse as a gift, whether before or during the marriage, shall remain the separate property of that spouse.

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

- (1) Each spouse married in modified community of property:
 - (a) shall administer his or her respective separate property and receive the income thereof; and
 - (b) may freely dispose of his or her respective separate property.⁸³

Article 13. Modified community of property and debts of spouses

- (1) Any debt incurred by one spouse prior to the date of marriage or with respect to that spouse's separate property shall be settled from the separate property of the indebted spouse.
- (2) Any debt incurred by one spouse without the prior written consent required under Article 15 shall be settled from the separate property of the indebted spouse.
- (3) Where the indebted spouse has no separate property or insufficient separate property to settle such debt as referred to in Sections (1) and (2), upon the division of the joint estate an adjustment in respect of the amount paid out of the joint estate in settlement

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

⁸³ This section was adapted from art. 59 of Ethiopia, *Revised Family Code of 2000*.

of the debt shall be effected in favour of the other spouse or his or her estate, as the case may be.⁸⁴

- (4) Where debt has been incurred in the interest of the household and with the consent of both spouses, it shall be deemed to be the joint and several obligation of both spouses and may be recovered from the joint estate or from the separate property of either of the spouses.⁸⁵

Commentary: Articles 10–13

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

In terms of married women’s access to property, many of the arguments supporting a full community of property regime similarly apply to a modified community of property regime. The sole distinction is the fact that spouses can deal independently with property possessed before the marriage, which may better reflect the wishes of the prospective spouses. Some commentators have noted that a modified community of property strikes the appropriate balance between respecting individuals’ autonomy with respect to property acquired before marriage and property acquired as gifts, while recognizing spouses’ unpaid contributions during marriage, such as providing support, childcare and household labour.⁸⁶ For this reason, the modified community of property regime is designated as the default regime for the purposes of this module.

NOTE:

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

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

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

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

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

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

- (a) to dispose of the assets of the joint estate;
- (b) to contract debts for which the joint estate is liable; and
- (c) to administer the joint estate.⁸⁷

Commentary: Article 14

In some countries, including those where “marital powers” is in existence, men have had exclusive legal authority to determine how property is used.⁸⁸ Even though many countries have legal protections against discrimination on the basis of race, sex, religion and other grounds, such protection is often weak in practice. As the CEDAW Committee has noted, “Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man.”⁸⁹ In order to overcome cultural practices, religious beliefs and social attitudes that may continue to discriminate against women with respect to the use and management of marital property, explicit protections of their equal capacity should be provided in legislation.⁹⁰ Accordingly, Article 14 underscores that all spouses, male and female, are subject to identical powers and restraints.

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

- (1) Subject to the provisions of Section (2), a spouse married in full or modified community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.⁹¹
- (2) A spouse married in full or modified community of property shall not without the prior and written consent of the other spouse:

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

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

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

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

⁹¹ This Section is derived from s. 15(1) of South Africa, *Matrimonial Property Act of 1984*.

- (a) alienate, burden or in any way confer to another party any real right in immovable property that forms part of the joint estate, except through the making of a will;
 - (b) alienate, burden or in any way confer to another party any movable property or securities that form part of the joint estate the value of which exceeds [monetary amount];
 - (c) donate any part of the joint estate that exceeds [monetary amount];
 - (d) borrow any money that exceeds [monetary amount];
 - (e) stand as a surety for a debt exceeding [monetary amount] for another person; or
 - (f) buy or agree to buy any immovable property.⁹²
- (3) Where one of the spouses has entered into a transaction in violation of the provisions of Section (2), the [relevant court] may, upon the application of the other spouse, revoke such transaction and recover relevant assets from the person with whom the transaction was made, unless that person does not know and cannot reasonably know that the transaction was entered into without the consent required in terms of Section (2).⁹³
- (4) Where an unauthorized transaction is not revoked by the [relevant court] pursuant to Section (3), and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse:
- (a) upon division of the joint estate; or
 - (b) upon demand of the other spouse at any time during the subsistence of the marriage.⁹⁴
- (5) An application under Section (3) to revoke a transaction may not be made later than [period of time] after the day on which the applicant spouse became aware of such transaction, and, in any case, no later than [period of time] after such transaction arises.⁹⁵
- (6) When a spouse withholds the consent required in terms of Section (2) or when for any other reason that consent cannot be obtained, the [relevant court] may, on the application of the spouse wishing to conduct the transaction, give him or her permission to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.⁹⁶

⁹² This Section is derived from s. 15(2) of South Africa, *Matrimonial Property Act of 1984*, s. 7 of Namibia, *Married Persons Equality Act of 1996* and s. 7 of Lesotho, *Legal Capacity of Married Persons Act of 2006*.

⁹³ This provision is derived from art. 69 of Ethiopia, *Revised Family Code of 2000* and s. 21(2) of Ontario, Canada, *Family Law Act of 1990*.

⁹⁴ This provision is derived from s. 8 of Namibia, *Married Persons Equality Act of 1996*.

⁹⁵ This provision is derived from art. 69(2) of Ethiopia, *Revised Family Code of 2000*.

⁹⁶ This provision is derived from s. 10 of Namibia, *Married Persons Equality Act of 1996*.

- (7) If a court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may upon the application of that spouse suspend for a definite or an indefinite period any power which the other spouse may exercise under this Act.⁹⁷
- (8) The [relevant state ministry] may vary the monetary amounts fixed in Section (2) by notice in the [Gazette or other relevant parliamentary publication for official notices].

Article 16. Full or modified community of property and power of court where consent for transaction obtained by fraud, coercion, undue influence or violence

- (1) Where a court is satisfied that the consent of one spouse as required pursuant to Article 15(2) was obtained by fraud, coercion, undue influence or domestic violence, either at the time of negotiations or at any time before the consent was given, and that it would cause serious injustice to enforce the consent given or any of its terms, such court may:
 - (a) issue an order revoking or setting aside the transaction;
 - (b) issue an order for the recovery of assets or losses from third parties in any case where the third party knew or ought reasonably to have known that the consent was improperly obtained;
 - (c) issue an order for an appropriate adjustment to the property of the respective spouses or to their shares in the joint estate;
 - (d) in the case of a marriage in modified community of property, issue a warrant of execution against the separate property of the spouse who obtained consent by fraud, coercion, undue influence or domestic violence in order to make restitution for loss to the other spouse resulting from the transaction in question; or
 - (e) make any other order which the court deems appropriate.⁹⁸

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

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

⁹⁷ This provision is derived from s. 10 of Namibia, *Married Persons Equality Act of 1996*.

⁹⁸ This approach is drawn from LAC, *Marital Property* (supra), pp. 171–174.

⁹⁹ The language for this article is derived from s. 20 of South Africa, *Matrimonial Property Act of 1984*.

Article 18. Full or modified community of property and accounting in respect of joint estate

- (1) One of the spouses shall, at the request of the other spouse, notify the latter of any income and assets received by him or her which form part of the joint estate and of any debts against the joint estate.
- (2) The court may, upon the application of one spouse, compel the other spouse to notify the applicant spouse of the income and assets received by him or her, and of any debts incurred against the joint estate, if it is satisfied that the interest of that spouse in the joint estate is being or may be adversely affected by the conduct or proposed conduct of the other spouse.¹⁰⁰

Mod. 3

Commentary: Articles 15–18

A legal entitlement to property on its own may not be sufficient to guarantee that women are able to access, use and transact with respect to that property. Inadequate safeguards against manipulation and abuse of the joint estate, coupled with family or community pressures, may prevent some women from exercising their right to their property during marriage. According to the CEDAW Committee, “In many States, including those where there is a community property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or *de facto* relationship is sold or otherwise disposed of. This limits woman’s ability to control disposition of the property and the income derived from it.”¹⁰¹ In order to provide greater clarity as to the administration of property of the joint estate, it is essential not only that legislation designate ownership of the assets, but also that provisions are included with respect to: limitations on what a spouse can do independently with property; remedies, if these limitations are not respected; duties of financial disclosure between spouses; and procedures for division or adjustment of the joint estate where there is the likelihood of serious prejudice to one spouse.

Articles 15 and 16 provide remedies where property is administered without the prior and written consent of the other spouse, and where consent to a transaction is obtained by fraud, coercion, undue influence or violence. Prior and written consent is important to dissuade spouses from entering into major financial transactions without first consulting their partners. Explicitly acknowledging domestic violence as a ground of relief also recognizes it as a distinct and important issue, which may not be the case if the issue is subsumed under general law principles on contracts. Women who have suffered domestic violence and know they are entitled to marital property reportedly do not attempt to claim their share of the property because of a fear of further attacks.¹⁰² To the very limited extent that survivors of domestic violence will challenge agreements made with violent partners, there needs to be clear and explicit recognition of the relevance and

¹⁰⁰ This provision is derived from art. 64 of Ethiopia, *Revised Family Code of 2000*.

¹⁰¹ CEDAW Committee, “General Recommendation No. 21” (supra), para. 31.

¹⁰² HRW, *Double Standards* (supra), pp. 25–26.

impact of domestic violence on the fairness of the bargain and its enforceability, such that a court has express power to vary or set aside an agreement where it is satisfied that the applicant signed the agreement because of actual or threatened violence.¹⁰³ Further, where one spouse is repeatedly entering into transactions without the required consent of the other spouse, or is recklessly squandering the joint estate, Article 17 authorizes a court to order the immediate division of the joint estate or an adjustment in favour of the applicant spouse.

Some women may not be aware of the property their spouse owns or the transactions they engage in. As a result, women may not be able to prevent their spouse from disposing of marital property and their own interests may be diminished by the actions of their spouse.¹⁰⁴ In cases where a spouse is not aware of the property comprising the joint estate, Article 18 authorizes a court to compel the other spouse to notify the applicant spouse of its particulars. This may be an important tool where women are not privy to information related to the income and assets of their spouse. Given the various forms this notification could take, the details of such notification should be determined by each individual country.

Article 19. Accrual and separation of all property during marriage

- (1) In a marriage subject to accrual, the spouses shall retain separate ownership and administration of all property acquired by each of them before the marriage and during the marriage.¹⁰⁵

Article 20. Calculation of accrual

- (1) The accrual of the estate of a spouse is the amount by which the net value of his or her estate at the dissolution of the marriage exceeds the net value of his or her estate at the commencement of that marriage.
- (2) At the dissolution by divorce or by the death of one or both of the spouses of a marriage subject to accrual, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse or his or her estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
- (3) Subject to the provisions of Article 24, a claim in terms of Section (2) arises at the dissolution of the marriage.

¹⁰³ Law Reform Commission of New South Wales, *Discussion Paper 44 — Review of the Property (Relationships) Act 1984 (NSW)*, 2002, paras. 4.94–4.95.

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

¹⁰⁵ The accrual approach is drawn from ss. 2–10 of South Africa, *Matrimonial Property Act of 1984*. Some of the procedural and technical details have been omitted here.

- (4) The right of a spouse to share in the accrual of the other spouse's estate during the subsistence of the marriage is not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.¹⁰⁶

Article 21. Property subject to accrual

- (1) In the determination of the accrual of the estate of a spouse:
- (a) any amount which accrued to that estate by way of damages, other than damages for loss of wages, profit or income, is excluded from the estate;
 - (b) an asset which has been excluded from the accrual of the estate of a spouse in terms of the antenuptial agreement of the spouses, as well as any asset which he or she acquired by virtue of his or her possession of an asset excluded in terms of an antenuptial agreement, is not taken into account as part of that estate at the commencement or the dissolution of the marriage; and
 - (c) the net value of that estate at the commencement of that spouse's marriage is calculated with due allowance for any difference which may exist in the value of the currency at the commencement and dissolution of the marriage.
- (2) The accrual of the estate of a deceased spouse is determined before effect is given to any bequests or instructions left in a will, gifts given in anticipation of death or distribution of that estate in terms of the law of intestate succession.¹⁰⁷
- (3) All property acquired by the spouses during marriage by gift and property that remains separate property according to Article 4 does not form part of the accrual of the estate of a spouse, except insofar as the spouses may stipulate otherwise in their antenuptial agreement or will.
- (4) All debts and liabilities incurred by either spouse before, on or after the date of marriage remain the sole responsibility of that spouse.

Article 22. Accrual and proof of commencement value of estate

- (1) A party to an intended marriage may for the purpose of proof of the net value of his or her estate at the commencement of the marriage declare that value:
- (a) before the marriage is entered into, with their marriage certificate in accordance with the [relevant marriage legislation]; or
 - (b) within six months after the date of the marriage in a statement which is signed by both spouses and filed with their marriage certificate;

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

¹⁰⁷ Sections 1–3 of Article 21 are derived from s. 4 of South Africa, *Matrimonial Property Act of 1984*.

which shall serve as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of the marriage.

- (2) The net value of the estate of a spouse at the commencement of his or her marriage is deemed to be nil for the purpose of determining the amount of accrual upon dissolution of his or her marriage if:
 - (a) the liabilities of that spouse exceed his or her assets at such commencement; or
 - (b) the value of the estate was not declared by either of the methods set forth in Section (1) and it is not proved that the net value of the estate at the commencement of marriage exceeds nil.¹⁰⁸

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

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

Article 24. Power of court to order division of accrual

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

Commentary: Articles 19–24

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

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

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

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

¹¹¹ COHRE, *Bringing Equality Home* (supra), p. 119. This regime is available in South Africa and a similar system exists in Ontario, Canada: South Africa, *Matrimonial Property Act of 1984*; Ontario, *Family Law Act of 1990*.

gift, and any property that remains separate property. This is consistent with the basic principle of the accrual model which is that assets are only included in accrual calculations if they have come to the spouses by their own efforts. The accrual system is generally considered to be one of the fairest approaches to property in marriage, achieving a balance between autonomy and interdependence of spouses.¹¹²

It has been suggested that the accrual approach may perpetrate gender inequality, as the male spouse is more likely to bring assets of greater value into the marriage at the outset, given gender-based economic inequalities that persist more generally, so that a woman would, upon dissolution of the marriage, have an entitlement only to her own separate property and to half of the value of the increase in assets acquired by either spouse during the marriage.¹¹³ In comparison to a community of property regime, the accrual approach does provide a lesser share of the total estate. However, the automatic sharing of accrual entitles a spouse who cannot obtain or increase her own separate estate during the marriage to a legal right to a share in the growth of the other spouse's estate and to a form of recognition of the unpaid contribution the spouse may have made to the estate in terms of providing support, childcare and household labour.¹¹⁴ The accrual system also gives some protection to spouses against liability for their spouse's debts: Only the separate property of the spouse who incurred the debts can be used for debt payment.

Another potential disadvantage to women married under the accrual system is that neither spouse has any say over the manner in which the other deals with his or her own assets, even if this takes place in a reckless or intentionally vindictive manner. This would disproportionately impact women, who in most cases will have fewer assets entering marriage.¹¹⁵ Article 24 therefore provides some protection for a spouse whose share in the accrual of the other spouse's estate is being endangered. A prejudiced spouse can request a court to order an immediate division of the accrual, which could potentially prevent a husband, for example, from reducing his spouse's share in the accrual any further.

¹¹² LAC, *Marital Property* (supra), p. 182.

¹¹³ *Ibid.*, p. 205.

¹¹⁴ *Women & the Law in South Africa* (supra), p. 53.

¹¹⁵ See for example HRW, *Double Standards*, (supra), p.10; A. Quisumbing and R. Meinzen-Dick, "Strengthening women's assets" (supra), p. 7.

D. Polygamous Marriages

NOTE:

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

Article 25. Division of property

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

Option 1: Article 25A. Serial division of property

- (1) Where a party has more than one spouse in a polygamous marriage, ownership of property between that party and each spouse shall be determined as follows:
 - (a) all of the assets and liabilities acquired by or accruing to the party and the first spouse before, on or after the date of the marriage, and acquired or accrued before the party married the second spouse, shall be owned in equal shares between the party and the first spouse;
 - (b) any property acquired by or accruing to the party after he or she marries the second spouse shall be owned in equal shares between the party, the first spouse and the second spouse, and the same principle shall be applied to any other subsequent spouse or spouses; and
 - (c) any property acquired by or accruing to the spouses of the party after the first marriage shall be their respective separate property and they have the right to administer and freely dispose of it.¹¹⁶

Commentary: Article 25A

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

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

¹¹⁷ See, for example, COHRE, *Bringing Equality Home* (supra), p. 175; and the case of *Maryam Mbaraka Saleh v. Abood Saleh Abood*, Appeal No. 1 of 1992 (Court of Appeal of Tanzania Civ.), as cited in B. Rwezaura, "Tanzania: building a new family law out of a plural legal system," *University of Louisville Journal of Family Law* 33(2) (1995): 523–540, at 530. In that case, a senior co-wife was unsuccessful in re-opening divorce proceedings involving her husband and a former co-wife, who had won her case before the Court of Appeal, which held that she was entitled to forty percent of the marital property based on her contribution. The fact that the husband was engaged in a polygamous marriage was never raised until the

face economic uncertainty because of the possibility of future co-wives and the necessity of sharing their husband's income and assets with these other wives. Evidence linking polygamous marriage with women's social and economic vulnerability as well as HIV infection further reinforces the need to ensure women in polygamous unions have adequate financial autonomy.¹¹⁸ For example, one study found women living in settings where there are higher rates of polygamy were less likely to work outside the home; to work in the formal sector in professional, managerial, technical or clerical occupations; or to be working for themselves — and consequently they were less likely to earn wages than women in lower polygamy settings.¹¹⁹ The financial autonomy of women in polygamous marriages is enhanced where a legal framework exists to provide greater clarity to those in polygamous relationships and where this framework ensures that women have access to, and ownership of, property during marriage and upon divorce.

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

remaining co-wife sought to secure her share of the assets. The Court of Appeal declined the senior co-wife's request for relief because she was not a party to the original divorce proceedings. The court's ruling effectively gave divorcing co-wives a superior interest in matrimonial property to wives still married, a gap in the *Law of Marriage Act of 1971* that seemingly arose because it only contemplates the divorce of couples who are monogamously married.

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

¹¹⁹ V. Agadjanian and A. Chika Ezeh, "Polygny, gender relations, and reproduction in Ghana" (supra), pp. 427–441.

¹²⁰ South African Law Reform Commission, *Project 90: The Harmonization of the Common Law and the Indigenous law, Report on Customary Marriages*, 1998, pp. 115–116, which describes South Africa's National Human Rights Trust, Gender Research Project, Rural Women's Movement, Commission on Gender Equality and Women's Lobby as being amongst the organizations calling for a default regime of community of property for polygamous marriages.

share of it.¹²¹ Option 1 (*Article 25A*) provides for a form of community of property regime, in the form of a serial division of marital property. This default regime does not necessarily require court intervention.

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

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

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

Article 26. Second further marriage¹²²

- (1) A person in a potentially polygamous marriage who has obtained either the consent of the first spouse or court approval for the subsequent marriage, and who wishes to enter into a subsequent marriage with another person must make an application to the

¹²¹ Nevertheless, some legal experts have contended that a marital property regime in which each spouse retains separate ownership and administration of all property acquired by each of them before and during the marriage would be most compatible with polygamous marriage, given the complexity of dividing property in unions involving more than one wife: South African Law Reform Commission, *Project 90* (supra), p. 115. In Senegal, for example, there is the option of an “out of community of property” regime for polygamous marriages. Under this regime, each spouse maintains his or her property that was brought into the marriage: art. 380 and 384 of Senegal, *Family Code of 1996*.

¹²² For further clarity, Articles 26 and 27 should be retained only if *Article 25B* is selected.

court to approve a written agreement which will regulate the future marital property regime of the marriages.

- (2) When considering the application in terms of Section (1), a court must:
 - (a) determine whether the consent of the first spouse or court approval for the subsequent marriage has been obtained by the spouse making the application;
 - (b) terminate the marital property regime or antenuptial agreement which is applicable to the marriage;
 - (c) determine the equitable apportionment of the property according to the applicable marital property regime or the antenuptial agreement; and
 - (d) take into account all the relevant circumstances of the existing spouse and minor or dependent children which would be affected if the application is granted.
- (3) When considering the application in terms of Section (1), a court may:
 - (a) allow such further amendments to the terms of the agreement as it may deem just;
 - (b) grant the order subject to any condition it may deem just; or
 - (c) refuse the application if in the court's opinion the interests of any of the parties would not be sufficiently safeguarded by means of the proposed agreement.
- (4) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse and the applicant's prospective spouse, must be granted standing to participate in any proceedings instituted by Section (1).
- (5) If a court grants an application pursuant to Section (3), the [relevant court official] must furnish each spouse with an order of the court, including a certified copy of any agreement approved by the court, and must ensure that a copy of the agreement is included in the marriage register.¹²³

Article 27. Penalties

- (1) Where a person in a potentially polygamous marriage enters into a subsequent marriage with another person without having made an application to the court as contemplated in Article 26:
 - (a) the subsequent marriage is voidable at the option of the existing spouse; and
 - (b) the spouse who fails to make the application commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

¹²³ This article is derived from s. 7 of South Africa, *Recognition of Customary Marriages Act of 1998*.

Commentary: Articles 25B, 26 and 27

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

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

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

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

¹²⁵ South African Law Reform Commission, *Project 90* (supra), p. 116.

¹²⁶ *Ibid.*