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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 2: Domestic Partnerships

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

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About this publication

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

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

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

How to use this publication

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

Volume One: Sexual and Domestic Violence

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

Volume Two: Family and Property Issues

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

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

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

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

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

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

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

Volume Two Introduction

Women and HIV/AIDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Customary laws and women's rights issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The challenges of legislating for women's rights

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

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

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

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

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

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

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

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

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

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

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

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

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

Module 2: Domestic Partnerships

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Prefatory Note

Women, domestic partnerships and HIV/AIDS

Because of growing poverty, the devastation of HIV, evolving social customs and increasing urbanization, domestic partnerships will continue to increase as more couples enter a second union, cannot afford to marry, or simply do not want to enter into formal marriages.¹ In South Africa, some commentators have noted that a primary reason for the prevalence of such relationships is the extent of migrancy in the country.² In some cases, informal unions may be followed by formal marriage,³ or may gradually evolve into a relationship which is viewed by the community as having an equivalent status to a formal marriage.⁴ Despite the increasingly common formation of informal domestic partnerships in many countries, they remain unregulated for the most part. Partners in established but non-formalized relationships are therefore excluded from both the rights and obligations of marriage, despite the reality that such relationships often function in a similar manner to traditional marriages.⁵ Domestic partners, like some married spouses, may share accommodations, pool resources, depend on each other for emotional and financial support, and raise children. Some domestic partners become financially dependent on their partner, similar to some married spouses. Consequently, domestic partners often suffer hardships upon the breakdown of such relationships similar to those

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

² See, for example, B. Goldblatt, “Regulating domestic partnerships — a necessary step in the development of South African family law,” *South African Law Journal* 120 (2003): 610–629, at 610; South African Law Reform Commission, *Project 118: Report* (supra), p. 92; Women’s Legal Centre, *Domestic Partnership: Comments to the South African Law Commission Issue Paper 17*, 2001.

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

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

⁵ See South African Law Reform Commission, *Project 118: Report* (supra), p. 11; A. Molokomme, “Women’s law in Botswana: laws and research needs,” in J. Stewart and A. Armstrong (eds), *The Legal Situation of Women in Southern Africa* (Harare: University of Zimbabwe Publications), p. 13.

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

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

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

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

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

⁸ HIV prevalence was 34 percent among women in common law unions and 20 percent among women in legal marriages: S. Allen et al, “Human Immunodeficiency Virus and malaria in a representative sample of childbearing women in Kigali, Rwanda,” *Journal of Infectious Diseases* 164 (1991): 67–71.

⁹ HIV prevalence was 25.4 percent among cohabiting women and 14 percent among women in either polygamous or monogamous marriages: S. Kapiga et al, “Risk factors for HIV-1 seroprevalence among family planning clinics in Dar es Salaam, Tanzania,” *African Journal of Reproductive Health* 4 (2000): 88–99.

¹⁰ P. Mahraj and J. Cleland, “Condom use within marital and cohabiting partnerships in KwaZulu-Natal, South Africa,” *Studies in Family Planning* 35 (2004): 116–124.

¹¹ In the Kenyan study, poorer women were more likely to report multiple sexual partnerships, suggesting that economic hardship diminishes sexual exclusivity: M. Hattori and F. Ni-Amoo Doodoo, “Cohabitation, marriage, and ‘sexual monogamy’ in Nairobi’s slums,” *Social Science & Medicine* 64(5) (2007): 1067–1078; M. Carael et al, “Nuptiality and risk behaviour in Lusaka and Kampala,” *African Journal of Reproductive Health* 5 (2001): 83–89.

additional financial support as a result of having limited access to their partners' income. This need may be exacerbated where domestic partnerships are not regulated and women in those relationships have no access to property during the relationship, or property and maintenance if the relationship comes to an end. Research conducted in South Africa, for example, revealed that many poor women had little choice over the form of the relationship they were in or the financial arrangements; many wanted to marry but their male partners refused, "knowing that they would not be obliged by the law to 'share' any of their assets or income."¹² Giving formal recognition to domestic partnerships and enacting provisions for property and maintenance may help address the economic vulnerability many women find themselves in once the relationship ends. While courts may render progressive judgments that are favourable to women even in the absence of laws recognizing domestic partnerships as marriage-like relationships, reliance on piecemeal decisions by progressive judges obviously does not guarantee women's access to property or maintenance.¹³

Women, domestic partnerships and human rights

The absence of structured and legislated protection for the parties to a domestic partnership disproportionately affects women. Because women are more often in a weaker bargaining position and subject to discrimination in many aspects of their intimate relationships, women in domestic partnerships may be in a vulnerable economic and social position during their relationship.¹⁴ As one commentator has noted, "The lack of legal protection afforded to domestic partnerships increases the vulnerability of [women and children] living within such arrangements."¹⁵ In addition, women may be left in a vulnerable economic and social position if their relationship ends. For example,

¹² The (South African) Alliance for the Legal Recognition of Domestic Relationships, *Submission to the Department of Home Affairs* (supra), p. 2.

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

¹⁴ As the Women's Legal Centre of South Africa noted, "Until women's political, social and economical standing improves, legal protection of domestic partners is necessary, because without legal protection, women's poverty will be perpetuated": Women's Legal Centre, *Domestic Partnership* (supra).

¹⁵ B. Goldblatt, "Regulating domestic partnerships" (supra), at 611.

women may be at risk in regard to the division of assets of their former relationship.¹⁶ Accordingly, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has voiced its concerns in at least two jurisdictions where the rights of women in cohabitation remain unprotected by the legal system.¹⁷

Various international human rights instruments offer potential for the protection of women’s human rights in domestic partnerships. For example, under the *International Covenant on Civil and Political Rights* (ICCPR), states are obligated to guarantee women’s right to equality before the law, a right that is also recognized in numerous other regional and international treaties.¹⁸ Under the *International Covenant on Social, Economic, and Cultural Rights* (ICESCR), states are obliged to take steps towards the progressive realization of women’s rights to an adequate standard of living for themselves and their families, and to the highest attainable standard of health.¹⁹ The rights to an adequate standard of living and to health are particularly relevant to the issue of domestic partnerships because women in unregulated domestic partnerships may have no right to the family home during the relationship or rights to property, maintenance or inheritance if the relationship ends. This lack of protection may leave those women with few means to ensure a livelihood, affecting their ability to secure food, water and sanitation necessary for survival and to live with dignity in a safe and secure home free from violence.

¹⁶ South African Law Reform Commission, *Project 118: Discussion Paper on Domestic Partnerships*, March 2006, p. 194. This was noted in the Eritrean CEDAW Report of 2004, which observed that lack of regulation regarding unregistered unions can deny women the rights of succession, maintenance and community of property: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the *Convention on the Elimination of All Forms of Discrimination against Women*, Combined Initial, Second and Third Periodic Reports of States Parties: Eritrea,” CEDAW/C/ERI/1-2, 3 February 2004, p. 57. The Kenyan CEDAW Report of 2006 recognized that, when cohabitating couples separate, “women have had to bear the consequences of raising the children and fending for themselves where the man was the breadwinner”: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the *Convention on the Elimination of All Forms of Discrimination against Women*, Combined Initial, Second and Third Periodic Reports of States Parties: Kenya,” CEDAW/C/KEN/6, 16 October 2006, para. 169.

¹⁷ See, for example, CEDAW Committee, “Concluding Observations: Romania,” U.N. Doc. A/55/38, 22nd Session, 2000, para. 318; CEDAW Committee, “Concluding Comments: Saint Lucia,” CEDAW/C/LCA/CO/6, 35th Session, 2 June 2006, para. 35.

¹⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 3 and 26. See also *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; *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]; *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 13 September 2000, OAU Doc. CAB/LEG/66.6 (entered into force 25 November 2005) [Protocol on the Rights of Women in Africa], art. 2; and *African [Banjul] Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5 (entered into force 21 October 1986) [African Charter], art. 2 and 18(3).

¹⁹ ICESCR, art. 11 and 12. See also, Protocol on the Rights of Women in Africa, art. 14 (“Health and Reproductive Rights”); African Charter, art. 16.

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

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

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

²⁰ CEDAW, art. 16, 15(2) and 16(1)(h).

²¹ CEDAW Committee, “General Recommendation No. 21: Equality in Marriage and Family Relations,” U.N. Doc. A/49/38, 1994, para. 13.

²² *Ibid.*, para. 18.

²³ UNAIDS and Office of the High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, 2006, guideline 5(f).

²⁴ *Ibid.*, p. 86.

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

²⁶ Protocol on the Rights of Women in Africa, art. 16 (“Right to Adequate Housing”).

conditions, “States Parties shall grant to women, *whatever their marital status*, access to adequate housing.”²⁷ [emphasis added]

A. Criteria of Domestic Partnership

NOTE:

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

Article 1. Definition of domestic partnership

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

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

- (1) Two individuals shall be subject to the provisions set out in Articles 3 to 12 of this Act when they are in a domestic partnership for at least [period of time] without having contracted a valid marriage under the [relevant marriage legislation].
- (2) In determining whether two individuals are in a domestic partnership, the criteria listed in Article 2 shall be taken into account.

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

- (1) Two individuals shall be subject to the provisions set out in Articles 3 to 12 of this Act when they are in a domestic partnership without having contracted a valid marriage under the [relevant marriage legislation].
- (2) In determining whether two individuals are in a domestic partnership, the criteria listed in Article 2 shall be taken into account.

Article 2. Criteria of domestic partnerships

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

²⁷ Ibid.

- (a) whether the two persons live or lived together;
 - (b) the degree of emotional interdependence between the parties;
 - (c) the degree of financial dependence or interdependence, including any arrangements for financial support, between the parties;
 - (d) whether or not a sexual relationship exists or existed;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of any children of the current or past relationships;
 - (h) the performance of household duties;
 - (i) the public aspects of the relationship;²⁸ and
 - (j) the duration of the relationship.
- (2) (***Optional additional text where Article 1A is selected:*** With the exception of Article 2(1)(j) of this Act concerning the duration of the relationship,²⁹) No finding in respect of any of the matters mentioned in Section (1), or in respect of any combination of them, is to be regarded as necessary for the existence of a domestic partnership, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.³⁰
- (3) For further clarity, individuals need not represent themselves to third parties as being married in order to be recognized as domestic partners.³¹
- (4) A domestic partnership shall not, by itself, constitute a marriage or give rise to a presumption of marriage.

Commentary: Articles 1 and 2

Where countries have legislated in the area of domestic partnership, some have equated cohabitation with marriage through a rebuttable presumption of marriage,³² while others have chosen to define domestic partnership as a separate institution, with its own rights and obligations.³³ In this publication, the domestic partnership regime applies

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

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

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

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

³² See, for example, s. 160(1) of Tanzania, *Law of Marriage Act of 1971*; s. 22(5) of Malawi, *Constitution of the Republic of Malawi*, 1994; clause 13 of Uganda, *Domestic Relations Bill of 2003*.

³³ See, for example, “irregular unions” in Ethiopia, *Revised Family Code of 2000*; New South Wales, *Property (Relationships) Act of 1984*; New Zealand, *Civil Unions Act of 2004*; South Africa, *Domestic Partnerships Bill of 2008*; Angola, *Family Code of 1988*. See CEDAW Committee, “Consideration of

automatically to all couples who meet the threshold criteria for domestic partnership; there is no need for registration.³⁴ Only in the event of a dispute about the presumed status of a relationship, be that during the relationship or upon termination of the relationship, would the matter of the relationship's status be decided by a court, which would then evaluate the circumstances of the relationship according to Articles 1 and 2 to make a determination.³⁵

Under Option 1 (*Article 1A*), there is a requirement for individuals to be in a domestic partnership for a specified period of time before the domestic partnership law applies to them. This is intended to provide a clear and precise means of determining whether one is in a domestic partnership. The time period integrates some of the likely economic interdependence and mutual expectations that form over the course of enduring domestic partnerships.³⁶ As one commentator has noted, “Any argument based on functional similarity between common-law couples and married couples gains force only as the period of cohabitation lengthens,”³⁷ and a number of countries have implemented a system of domestic partnerships premised on a specific period of cohabitation.³⁸

Reports Submitted by States Parties under Article 18 of the *Convention on the Elimination of All Forms of Discrimination against Women*, Combined Initial, Second and Third Periodic Reports of States Parties: Angola,” CEDAW/C/AGO/1-3, 7 November 2002, pp. 10–11.

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

³⁵ South African Law Reform Commission, *Project 118: Report* (supra), p. 93.

³⁶ B. Cossman and B. Ryder, “What is marriage-like like? The irrelevance of conjugality,” *Canadian Journal of Family Law* 18 (2001): pp. 269–326, at 315–316.

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

³⁸ In Mozambique, art. 202 of *Lei de Familia of 2004* prescribes a requirement of one year. In Tanzania, s. 160(1) of the *Law of Marriage Act of 1971* provides, “Where it is proved that a man and woman have lived together for two years or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.” In Eritrea, cohabitation for at least 10 years entitles the parties to access to “compensation”: CEDAW Committee, “Consideration of Reports Submitted by States Parties under Article 18 of the *Convention on the Elimination of All Forms of Discrimination against Women*, Combined Initial, Second and Third Periodic Reports of States Parties: Eritrea,” CEDAW/C/ERI/1-2, 3 February 2004, p. 57. In Angola, a *de facto* union is when a woman and a man who have the capacity to marry have freely chosen to live together for more than three years and maintain exclusivity of the union: CEDAW Committee, “Consideration of

In contrast, Option 2 (*Article 1B*) provides the alternative of considering the length of the relationship as one of many factors to assess in determining whether a domestic partnership exists. This approach recognizes the often complex or non-conventional nature of domestic partnerships, which may in some cases be of shorter duration, but characterized nonetheless by significant emotional and financial interdependency.

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

To protect the economic interests of women in informal unions, the definition of domestic partnership does not rule out concurrent relationships (for example, a relationship involving two parties, one or both of whom is married), especially given the possibility that a domestic partner may not be aware of her or his partner's concurrent relationship.³⁹ (Article 2, however, does not preclude jurisdictions such as those prohibiting polygamy, from refusing to recognize domestic partnerships where there are multiple relationships involved, and courts may opt to consider the existence of other relationships in their determination of whether a domestic partnership exists.) As the Women's Legal Centre of South Africa has noted, “[D]ue to our history and migrancy, many men who come to work in urban areas get involved in domestic relationships, whilst having wives in the rural areas. Failure to acknowledge this reality and give protection to people in both these relationships will cause hardship for many women.”⁴⁰

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

³⁹ For example, in *Molly Patricia Zulu v. Thandiwe Phylis Zulu and 2 Others*, Case No. 17413/2005, 25 February 2008 (High Court of South Africa), the applicant was not aware of her deceased spouse's previous marriage and had married him in a civil marriage. The court deemed her marriage bigamous and thus void despite 19 years of cohabitation. The applicant was denied any interest in their property after his death. See also, the recommendations of the Law Reform Commission of New South Wales, *Report 36* (supra), ss. 17.14-17.17; Law Commission of the United Kingdom, *Cohabitation: The Financial Consequences of Relationship Breakdown*, 2007, s. 3.71.

⁴⁰ Women's Legal Centre, *Domestic Partnership* (supra). In one qualitative study in South Africa, one of three main types of cohabitation identified was a man with a “rural wife” who cohabits with a woman in an urban area in a long-term relationship. There are conflicting interests between the rural wife and the urban woman cohabitant over resources. Ongoing maintenance of the two households is “an area of conflict and

Critics of this provision may contend that it creates a conflict of rights between a lawful spouse and a domestic partner, and that the rights of the lawful spouse may be adversely and unfairly affected by the entitlement of the latter party, thereby undercutting the protection accorded to marriage and the rights of lawfully wedded spouses.

While this is a valid concern, the rationale underlying legal protection of individuals in domestic partnerships does not diminish in light of concurrent relationships. Where relationships are characterized by the criteria enumerated in Article 2, mutual rights and responsibilities should apply. In some cases, domestic partners may have had longer relationships and made greater contributions to family property than spouses.⁴¹ Significantly, a threshold needs to be met in order for a relationship to be classified as a domestic partnership; this threshold would exclude casual, short-term relationships with little financial or emotional interdependency, so as to discourage multiple competing claims for domestic partnerships. While it may be rare for a court to be satisfied that the concurrent relationships of a person satisfy the criteria of domestic partnership, the reality of lengthy separations between some spouses or partners suggests there may be cases where the criteria for domestic partnership are met. In these instances of recognized domestic partnership, the parties to the relationships should be protected where the relationships have led to economic dependency.

Defining domestic partnership in legal terms is a difficult exercise, and each criterion outlined in Article 2 will necessarily have different degrees of relevance in different jurisdictions. As the U.N. Human Rights Committee has noted, “[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and ... it is therefore not possible to give the concept a standard definition.”⁴² However, the Committee has also emphasized that, with respect to “unmarried couples and their children,” states parties should indicate “whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.”⁴³ Given the health and human rights concerns associated with informal unions, states should strongly consider enacting provisions protecting couples in such relationships.

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

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

⁴² U.N. Human Rights Committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” 39th Session, 1990, para. 2.

⁴³ *Ibid.*

NOTE:

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

Article 3. Domestic partnership agreements

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

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

- (2) Nothing in a domestic partnership agreement affects the power of the [relevant court] to make an order with respect to the right to custody of, maintenance of, access to, or otherwise in relation to, any minor or dependent children of the parties to the agreement.
- (3) On an application by a domestic partner, the [relevant court] may vary or set aside any one or more of the provisions of a domestic partnership agreement made between the domestic partners, where, in the opinion of the [relevant court]:
 - (a) the agreement was obtained through fraud, coercion, undue influence or domestic violence; or
 - (b) the circumstances of the domestic partners have so changed since the time when the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were to be enforced.⁴⁵

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

⁴⁵ This provision is derived from s. 49 of New South Wales, *Property (Relationships) Act of 1984*.

Commentary: Article 3

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

As with all contracts, a contract concluded at the outset of a relationship may fail to make provision for changed circumstances, or it may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children. Moreover, domestic partners may not bargain on an equal footing, or the terms of an agreement may be concluded as a result of fraud, coercion, undue influence or domestic violence that is in the financial interest of the economically stronger partner (usually the man).⁴⁶ Therefore, Article 3(3) allows a court to vary or set aside any one or more of the provisions of a domestic partnership agreement in cases of serious injustice and where fraud, coercion, undue influence or domestic violence was involved.

Article 4. Declaration of domestic partnership

- (1) A person who alleges that he or she is or was in a domestic partnership with another person may apply to the [relevant court] for a declaration as to the existence of a domestic partnership between the persons.
- (2) If, on an application under Section (1), it is proved to the satisfaction of the [relevant court] that the two persons are or were in a domestic partnership, the [relevant court] may make a declaration that persons named in the declaration are or were domestic partners, and include the date on which the domestic partnership began, or period during which the domestic partnership existed.
- (3) If the applicant or the person alleged to be the applicant's domestic partner is aware of another person with an interest in the making of a declaration under Section (2), in particular either person's spouse or domestic partner, he or she shall disclose this person to the [relevant court] in order for that person to be given an opportunity to be so present or represented at the hearing.
- (4) A declaration may be made under Section (2) whether or not the person named by the applicant as a domestic partner is alive.

⁴⁶ South African Law Reform Commission, *Project 118: Report* (supra), p. 121.

- (5) If, on the application of any person who is affected by a declaration made under Section (2), it appears to the [relevant court] that:
- (a) new facts or circumstances have arisen that have not previously been disclosed to the [relevant court]; and
 - (b) could not by the exercise of reasonable diligence have previously been disclosed to the [relevant court];
- the [relevant court] may make an order annulling the declaration.
- (6) A declaration which has been annulled pursuant to Section (5) shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.⁴⁷

Commentary: Article 4

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

Optional: Article 5. Registration of domestic partnership

- (1) Any two persons who are both 18 years of age or older may register their relationship as a domestic partnership as provided for in this Article (***optional additional conditions where polygamy is prohibited***): provided that neither party is:
- (a) already a partner to a registered domestic partner; or
 - (b) already married).⁴⁸
- (2) A registration officer must conduct the registration procedure in the manner provided for in this Article.
- (3) The prospective domestic partners must individually and in writing declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer.
- (4) The registration officer must sign the prescribed documents to certify that the declaration referred to in Section (3) was made voluntarily and in his or her presence.

⁴⁷ This provision is derived from s. 56 of New South Wales, *Property (Relationships) Act of 1984*.

⁴⁸ For further clarity, the text in parentheses should be retained only where polygamy is prohibited.

- (5) The registration officer must indicate the existence of a domestic partnership agreement, where applicable, on the registration certificate.
- (6) The registration officer must issue the partners with a registration certificate stating that they have registered their domestic partnership and, where applicable, attach a copy of the domestic partnership agreement to the registration certificate.
- (7) The registration certificate issued by the registration officer is *prima facie* proof of the existence of a registered domestic partnership between the parties.
- (8) When a registered domestic partnership terminates upon:
 - (a) the death of one or both registered domestic partners;
 - (b) mutual agreement, which may be provided for in a termination agreement; or
 - (c) court order, upon application by one or both registered domestic partners;⁴⁹

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

Commentary: Article 5

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

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

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

⁵¹ This is the case in Denmark and the Netherlands: B. Goldblatt, “Regulating domestic partnerships” (supra), p. 617; South African Law Reform Commission, *Project 118: Report* (supra), p. 93.

⁵² South African Law Reform Commission, *Project 118: Report* (supra), p. 316; Law Commission of the United Kingdom, *Cohabitation* (supra), s. 1.28.

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

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

B. Rights and Responsibilities of Domestic Partnership

NOTE:

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

Article 6. Duty to maintain domestic partner and children during relationship

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

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

- (2) Maintenance means the responsibility of each domestic partner to provide for the other partner’s living expenses which depend, *inter alia*, upon the capacity of the domestic partners and the needs of the family.⁵⁴

Article 7. Right of occupation of family home

- (1) The “family home” means the building(s) or part of a building in which the domestic partners ordinarily reside together and includes:
- (a) household goods and furnishings used in relation to the residence; and
 - (b) the surrounding residential land.⁵⁵
- (2) Each domestic partner has an equal right to occupy the family home during the existence of the domestic partnership, irrespective of which of the domestic partners owns or rents the property, subject to the provisions of the [relevant domestic violence legislation] and any protection orders issued pursuant to that.⁵⁶
- (3) The domestic partner who owns or rents the family home may not evict the other domestic partner from the family home during the existence of the domestic partnership.⁵⁷

Commentary: Articles 6 and 7

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

⁵⁴ This provision is derived, in part, from s. 1 of South Africa, *Domestic Partnerships Bill of 2008*.

⁵⁵ This provision is derived, in part, from s. 1 of Tanzania, *Law of Marriage Act of 1971*, defining the matrimonial home.

⁵⁶ This provision is derived from s. 19 of Ontario, *Family Law Act*, R.S.O. 1990, c. F.3. See also, art. 223 of Belgium, *Civil Code*. See LAC, *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, 2005, 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 resource) for further discussion of domestic violence legislation and protection orders.

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

⁵⁸ N. Bala, “Controversy over couples in Canada: the evolution of marriage and other adult interdependent relationships,” *Queen’s Law Journal* 29 (2003): 41–102, para. 26.

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

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

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

⁵⁹ B. Goldblatt, “Regulating domestic partnerships” (supra), p. 624.

⁶⁰ Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia: Final Report*, 1997, p. 21.

⁶¹ B. Goldblatt, “Regulating domestic partnerships” (supra), p. 615.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ For example, the family home may be registered solely in the male partner’s name, making the process by which a woman may prove her interest in that home onerous and uncertain: S. Chirawu, “Till death do us part: marriage, HIV/AIDS and the law in Zimbabwe,” *Cardozo Journal of Law & Gender* 13(1) (2006): 23–50, at 47.

⁶⁵ H. Conway and P. Girard, “‘No place like home,’ ” (supra), para. 21.

some women to insecurity, vulnerability, poverty and sexual violence.⁶⁶ Therefore, Article 7 prohibits one domestic partner from evicting the other from the family home during the relationship.

As discussed above, the ICESCR obligates states to take steps towards the progressive realization of women’s rights to an adequate standard of living for themselves and their families, and to the highest attainable standard of health.⁶⁷ According to the U.N. Committee on Economic, Social and Cultural Rights, the human right to adequate housing is “derived from the right to an adequate standard of living” and is “of central importance for the enjoyment of all economic, social and cultural rights.”⁶⁸ Similarly, to fulfill their obligation to realize women’s right to “acceptable living conditions in a healthy environment,” the Protocol on the Rights of Women in Africa urges states parties to “grant to women, whatever their marital status, access to adequate housing.”⁶⁹ The Committee on Economic, Social and Cultural Rights has stated that the right to adequate housing is “the right to live somewhere in security, peace and dignity,” which includes security of tenure.⁷⁰ It has also stipulated that “[t]he right to adequate housing applies to everyone.... Thus, the concept of ‘family’ must be understood in a wide sense.”⁷¹ In particular, the Committee has recognized that women suffer disproportionately from the practice of forced eviction, “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and [women’s] particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”⁷²

NOTE:

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

⁶⁶ V. Bennett, et al, “Inheritance law in Uganda: the plight of widows and children,” *Georgetown Journal of Gender and the Law* 7 (2006): 451–520, at 476.

⁶⁷ ICESCR, art. 11 and 12. See also, Protocol on the Rights of Women in Africa, art. 14 (“Health and Reproductive Rights”); African Charter, art. 16.

⁶⁸ U.N. Committee on Economic, Cultural and Social Rights, “General Comment No. 4: The Right to Adequate Housing (Article 11(1)),” U.N. Doc. A/43/8/Add.1, 13 December 1991, para. 1.

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

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

⁷¹ *Ibid.*, para. 6.

⁷² *Ibid.*, para. 10.

Article 8. Default property regime for domestic partnerships

- (1) Without prejudice to a domestic partnership agreement described in Article 3, when the domestic partnership ends, property acquired during the domestic partnership shall be considered to be held in accrual as set out in the [relevant marital property legislation].
- (2) For further clarity, the default property regime for domestic partnerships described in Section (1) does not preclude domestic partners from contracting any of the other property regimes set out in the [relevant marital property legislation].

Article 9. Variation of property consequences of domestic partnership

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

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

- (1) Where any person, in particular any other spouse or domestic partner of either of the domestic partners, whose interests would, in the opinion of the [relevant court], be affected by the proprietary consequences of a domestic partnership, the [relevant court] may, on application by that person, vary or set aside the proprietary consequences of the default property regime, the property regime elected or the domestic partnership agreement, where it would lead to serious injustice if those proprietary consequences were to be enforced, and make an order that it regards as just and equitable in the circumstances.⁷³
- (2) For further clarity, the existence of a concurrent civil, customary or religious marriage or domestic partnership does not preclude domestic partners from access to property or maintenance when the domestic partnership ends.
- (3) In its decision to vary or set aside the proprietary consequences of a domestic partnership as set out in Section (1), the [relevant court] shall take all the circumstances of the domestic partnership into account, including the factors enumerated in Article 2 of this Act, as well as the existence of a concurrent marriage or domestic partnership.

⁷³ Part of this section is derived from s. 29(3)(c) of South Africa, *Domestic Partnerships Bill of 2008*.

Option 2: Article 9B. Variation of proprietary consequences of domestic partnership where multiple relationships not permitted

- (1) Where any person whose interests would, in the opinion of the [relevant court], be affected by the proprietary consequences of a domestic partnership, the [relevant court] may, on application by that person, vary or set aside the proprietary consequences of the default property regime, the property regime elected or the domestic partnership agreement, where it would lead to serious injustice if those proprietary consequences were to be enforced, and make an order that it regards as just and equitable in the circumstances.
- (2) In its decision to vary or set aside the proprietary consequences of a domestic partnership as set out in Section (1), the [relevant court] shall take all the circumstances of the domestic partnership into account, including the factors enumerated in Article 2 of this Act.

Commentary: Articles 8 and 9 (both Article 9 options)

The practical result of establishing a permanent relationship for many domestic partners, as it is for many married spouses, is the sharing of a joint home and household goods. While some jurisdictions have allowed domestic partners to “opt-in” to the marital property schemes applicable to married couples,⁷⁴ many jurisdictions have chosen not to create any proprietary obligations between domestic partners, premised on the view that people who choose not to marry are exercising their freedom of choice and may wish to keep their property separate.⁷⁵ Yet in many domestic partnerships, women in long-term relationships may have made contributions, such as raising children, caring for elderly relatives, and discharging household duties, that are of a non-financial nature and which enabled her partner to earn an income and increase the family assets.⁷⁶ Whatever the expectations of the parties may have been at the beginning of the relationship, it is unfair to ignore the interdependencies and vulnerabilities that in fact arise.

In the absence of a legislative framework for domestic partnership, property rights between domestic partners can be determined by contract, though it has been contended that is “reserved largely for the sophisticated, literate middle class.”⁷⁷ The judiciary can also extend property rights to domestic partners through progressive judgments, but this

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

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

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

⁷⁷ South African Law Reform Commission, *Project 118: Report* (supra), p. 121.

is also not an adequate replacement for legislation regulating domestic partnerships.⁷⁸ Property disputes between domestic partners may be determined in accordance with legal principles that apply to disputes between strangers, taking no account of the intimate relationship between partners, and placing great emphasis on the formal title to disputed property.⁷⁹ Courts may not be permitted to recognize substantial indirect or non-financial contributions made by one partner to the well-being of the family generally, or to the other partner, which has prompted calls for reform in at least one jurisdiction.⁸⁰ Moreover, the extreme flexibility of the law of unjust enrichment, the emphasis on proving a contribution, the lack of any presumption of equal sharing and the need to prove all the details of the parties' economic lives make court processes costly and inaccessible for couples who wish to resolve a dispute over property.⁸¹ Relying on courts to determine the proprietary consequences of a domestic partnership would render the legal situation of parties to such relationships uncertain in terms of their obligations and rights towards each other.

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

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

⁷⁸ See, for example, Kenya, *CEDAW Report of 2006*, CEDAW/C/KEN/6, para. 171. In Tanzania, in the 1991 case of *Joseph Sindo v. Pasaka Mkondola*, the High Court ruled that cohabitants have the right to the same remedies available to married couples upon dissolution of the relationship, and granted the female petitioner an equitable share of the couple's jointly-acquired assets: *Joseph Sindo v. Pasaka Mkondola*, High Ct. Civ. App. 132 (1991) (Tanz.); B. Rwezaura, "Tanzania: building a new family law out of a plural legal system," *University of Louisville Journal of Family Law* 33 (1995): 523–540, at 530. Prior to the establishment of regulations regarding common property between domestic partners currently provided in some Canadian provincial legislation, domestic partners resolved property disputes in court through the law of unjust enrichment: the Law Reform Commission of Nova Scotia, *Reform of the Law* (supra), p. 18, which recommended that family property rights applicable to married persons should also apply to persons in domestic relationships.

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

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

⁸¹ Law Reform Commission of Nova Scotia, *Reform of the Law* (supra), p. 21.

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

In the context of HIV, access to property provides women with economic security, livelihoods and dignity. Numerous studies have demonstrated how poverty and insecurity drive women to remain in violent relationships or engage in behaviours that put them at increased risk of contracting HIV.⁸² Where women are involved in relationships characterized by mutual commitment and emotional and economic interdependency, they should be entitled to share in the gains to the property they likely contributed to acquiring or maintaining. As the CEDAW Committee has stated, “In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women, with or without children, should be revoked and discouraged.”⁸³

C. After the Relationship Ends

NOTE:

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

Article 10. Maintenance

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

⁸² For further discussion of the linkages between property rights and HIV, see Module 3 “Property in Marriage.” See also S. White, “Extreme poverty and its impact on women’s vulnerability to HIV transmission: a rights issue,” October 2007 [publication forthcoming]; Human Rights Watch (HRW), *Just Die Quietly: Domestic Violence and Women’s Vulnerability to HIV in Uganda*, August 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 81; J. Simmons et al, “A global perspective,” in P. Farmer et al (eds), *Women, Poverty and AIDS* (Monroe: Common Courage Press, 1996), p. 73; and M. Hattori and F. Ni-Amoo Doodoo, “Cohabitation, marriage, and ‘sexual monogamy’ ” (supra).

⁸³ CEDAW Committee, “General Recommendation 21” (supra), para. 33.

consideration of the factors set out in the spousal maintenance provisions in the [relevant divorce legislation].

- (2) Except as otherwise provided for by this Article, an application to a court for an order under Section (1) must be made within two years after the domestic partnership ends.
- (3) A court may, at any time after the expiration of the period referred to in Section (2), grant leave to an applicant to apply to the court for a maintenance order if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.⁸⁴

Commentary: Article 10

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

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

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

⁸⁶ South African Law Reform Commission, *Project 118: Report* (supra), pp. 74–75, citing Barlow et al, “Just a piece of paper? Marriage and cohabitation,” in A. Park et al, *British Social Attitudes: Public Policy, Social Ties* (London: SAGE Publications, 2001). In Barlow’s study, it was also found that 70 percent of current cohabitants thought that a cohabiting woman should have the same rights to financial support on relationship breakdown as a married woman. Nearly 97 percent of cohabitants thought that a woman should have the same rights as a married woman to remain in a house bought in the man’s name after his death without a will. Note, however, that the study was conducted in the U.K. and so may not reflect the views of domestic partners elsewhere.

Recognizing the economic vulnerability of women at the end of a domestic partnership, the CEDAW Committee has urged the consideration of “how women’s rights, including with regard to alimony and child custody, can be protected following dissolution of domestic partnerships.”⁸⁷ Therefore, Article 10 empowers courts to award maintenance in light of the factors set out in divorce legislation with respect to maintenance. There is a substantial element of judicial discretion to award maintenance, and this allows for accommodation of the vastly different scenarios courts may be confronted with in the context of domestic partnerships, particularly when there are multiple concurrent relationships involved. Notwithstanding that an explicit authorization for courts to award maintenance may provide more systematic protection of women when domestic partnerships end, it is also imperative to supplement this protective effort with judicial and public legal education, issues discussed more thoroughly in Module 6 “Implementation Provisions.”⁸⁸

Article 11. Child custody, access and maintenance

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

Commentary: Article 11

In terms of child custody and access and child maintenance, there is no reason to differentiate between domestic partnership and marriage. While courts may recognize the responsibility of a domestic partner to provide child support in the absence of specific legislative provisions authorizing such payments, there is no guarantee this will happen.⁸⁹

⁸⁷ CEDAW Committee, “Concluding Observations: Romania,” U.N. Doc. A/55/38, 22nd Session, 2000, para. 319.

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

⁸⁹ See, for example, the case of *JGM v. CNW*, Civil Appeal No. 40 of 2004 (Kenya, High Court at Nakuru) in which the appellant, who had cohabited with the respondent for years and had had two children, denied

Therefore, Article 11 authorizes the court to make any order it deems to be in the best interests of the child after consideration of the factors set out in the divorce legislation.

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

the existence of a marriage and consequently denied his obligation for child support. The High Court held that the Appellant had parental responsibility towards the children because a valid marriage was presumed between the couple, and the best interest of the children called for his parental responsibility. The case revealed a shortcoming of Kenya’s *Children Act*, which relieved fathers from an immediate parental obligation to support their children born out of wedlock. The Court held that such a law is discriminatory against children born out of wedlock and called for the legislature to consider amending the law.

⁹⁰ See article 18(2) of the *African Charter on the Rights and Welfare of the Child*, Organization of African Unity, OAU Doc. CAB/LEG/24.9/49 (1990), 29 November 1999, which refers in art. 18(2) to dissolution in the context of marriage, but in art. 18(3) stipulates that “[n]o child shall be deprived of maintenance by reference to the parents’ marital status.” Similarly, art. 23(4) of the ICCPR refers to dissolution in the context of marriage, but subsequently stipulates in art. 24 that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or *birth*, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” [emphasis added]

⁹¹ See art. 27(1) of the *Convention on the Rights of the Child*, 12 December 1989, 1577 U.N.T.S. 3, (entered into force 2 September 1990) [CRC] (with Annex); art. 11(1) of the ICESCR.

⁹² See art. 29(1) of the CRC.

⁹³ CEDAW Committee, General Recommendation 21” (supra), para. 19.

⁹⁴ See art. 18(3) of the *African Charter on the Rights and Welfare of the Child*.

Article 12. Inheritance rights of domestic partners

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

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

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

Option 2: Article 12B. Inheritance

- (1) In the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to maintenance from the estate, a court may, on application by the surviving domestic partner, make an order for the adequate, just and equitable provision of maintenance to the surviving domestic partner after consideration of the factors set out in the maintenance of dependants provisions in the [relevant inheritance legislation].
- (2) Further, in the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to the continuing occupation of the family home, if any, following the death of the domestic partner who is the owner of the family home, a court may, on application by the surviving domestic partner, make an order for the continuing occupation of the family home by the surviving domestic partner, having regard to the following factors:
 - (a) the best interests of the affected minor or dependent children, as defined in the [relevant divorce legislation];
 - (b) whether the family home is situated on family or traditional property, as defined in the [relevant marital property legislation]; and
 - (c) the financial position of the applicant.
- (3) Further, in the absence of an acceptable domestic partnership agreement between the domestic partners (as defined in Article 3) as to inheritance, a court may, on application by the surviving domestic partner, make an order for a just and equitable share of the residue of the estate, having due regard to the manner of distribution in the [relevant inheritance legislation] and the legitimate interests of the other beneficiaries of the estate.
- (4) If the deceased has left a will that addresses the inheritance rights of the domestic partner, the instructions in that will shall be duly considered by the court. Notwithstanding the provisions of the will, the court may make orders pursuant to Sections (1), (2) and (3) if equity and good conscience so dictate.

- (5) Except as otherwise provided for by this Article, an application to a court for an order under Sections (1), (2) and (3) must be made within six months after the death of the domestic partner.
- (6) A court may, at any time after the expiration of the period referred to in Section (5), grant leave to an applicant to apply to the court for a maintenance order if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.

Commentary: Article 12 (both options)

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

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

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

⁹⁵ See COHRE, *Bringing Equality Home* (supra), p. 43, describing the situation in Botswana.

⁹⁶ HRW, *Double Standards: Women’s Property Rights Violations in Kenya*, 2003, p. 23. In this report, Omwena Omung’ina describes being disinherited from her partner’s property despite having lived with her partner for nine years and having two children together. See also COHRE, *Bringing Equality Home* (supra), p. 43, which provides, “When male cohabitant dies, woman is usually an outcast and the male descendants take the property.”

⁹⁷ This is the approach contemplated in South Africa, *Domestic Partnerships Bill of 2008* with respect to maintenance after death and intestate succession for registered domestic partnerships: ss. 19–20. Separate schemes to apply for maintenance orders after the death of an unregistered domestic partner and for intestate succession when an unregistered domestic partner dies are laid out in ss. 29–31. Sierra Leone, *Devolution of Estates Act of 2007* also includes an interpretation provision which states that “spouse” means a person married to the deceased, but also an unmarried man or woman who has cohabited with an unmarried man or woman as if they were in law husband and wife for a period of not less than five years immediately preceding the death: s. 2.

beneficiaries of the estate. In exercising their discretion, judges should consider what constitutes an adequate, just and equitable order in the circumstances.

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