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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 1: Marriage

Canadian HIV/AIDS Legal Network
2009



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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) 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 1: Marriage

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Prefatory Note

Women, marriage and HIV/AIDS

In sub-Saharan Africa and around the world, many women's greatest risk of contracting HIV is through sexual intercourse with their husbands.¹ According to the United Nations Population Fund, more than four-fifths of new HIV infections in women worldwide occur in marriage or long-term relationships with primary partners.² In sub-Saharan Africa, an estimated 60–80 percent of HIV-positive women have been infected by their husbands.³ Studies in Africa indicate that young married women are at higher risk of infection than their unmarried counterparts.⁴ One hypothesis is that in many relationships men are contracting HIV outside marriage and transmitting the virus to their wives, a risk that may be heightened for women in polygamous unions.⁵

¹UNAIDS, United Nations Population Fund (UNFPA) and United Nations Development Fund for Women (UNIFEM), *Women and HIV/AIDS: Confronting the Crisis*, 2004; D. Smith, "Modern marriage, men's extramarital sex, and HIV risk in Southeastern Nigeria," *American Journal of Public Health* 97(6) (2007): 997–1005; J. Hirsch et al, "The inevitability of infidelity: sexual reputation, social geographies, and marital HIV risk in rural Mexico," *American Journal of Public Health* 97(6) (2007): 986–996; K. Mayer et al, "Marriage, monogamy and HIV: a profile of HIV-infected women in south India," *International Journal of STD & AIDS* 11(4) (2007): 250–253; L. Carpenter et al, "Rates of HIV-1 transmission within marriage in rural Uganda in relation to the HIV serostatus of the partners," *AIDS* 13(1) (1999): 1083–1089.

² UNFPA, *State of World Population 2005, The Promise of Equality: Gender Equity, Reproductive Health and the Millennium Development Goals*, 2005, p. 38, online via: www.unfpa.org.

³ Ibid. See also, L. Carpenter et al, "Rates of HIV-1 transmission" (supra).

⁴ For example, in Kisumu, Kenya, 33 percent of married girls were found to be HIV-positive, compared to 22 percent of sexually active unmarried girls the same age. In Ndola, Zambia, 27 percent of married girls were HIV-positive, compared to 16 percent of unmarried girls. In rural Uganda, 88.5 percent of HIV-infected women aged 15–19 were married, compared to 66.4 percent of HIV-negative women aged 15–19; and, in Ghana, married women are almost three times more likely to be HIV-infected than women who have never been married: J. Glynn et al, "Why do young women have a much higher prevalence of HIV than young men? A study in Kisumu, Kenya and Ndola, Zambia," *AIDS* 15(suppl. 4) (2001): S51–S60; R. Kelly et al, "Age differences in sexual partners and risk of HIV-1 infection in rural Uganda," *Journal of Acquired Immune Deficiency Syndromes* 32(4) (2003): 446–451; J. Glynn et al, "HIV risk in relation to marriage in areas with high prevalence of HIV Infection," *Journal of Acquired Immune Deficiency Syndromes* 33(4) (2004): 526–535; UNAIDS, *AIDS Epidemic Update: December 2006*, 2006, p. 22, citing Ghana Statistical Service, Noguchi Memorial Institute for Medical Research, and ORC Macro 2004, online: www.data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf.

⁵ See D. Smith, "Modern Marriage" (supra); J. Glynn et al, "HIV Risk in relation to marriage" (supra); S. Kapiga et al, "Risk Factors for HIV infection among women in Dar-es-Salaam, Tanzania," *Journal of Acquired Immune Deficiency Syndromes* 7(3) (1994): 301–309; L. Kelly, "Polygyny & HIV/AIDS: a health and human rights approach," *Journal for Juridical Science* 31(1) (2006): 1–12. See also, Center for Reproductive Rights, *Women of the World: Laws and Policies Affecting Their Reproductive Lives, Francophone Africa*, 1999, p. 191; Human Rights Watch (HRW), *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, Vol. 15, No. 15(A), 2003, p. 32, online via: www.hrw.org; HRW, *Policy Paralysis: A Call for Action on HIV/AIDS Related Human Rights Abuses Against Women and*

Gender inequalities in the context of marriage play a complex role in driving the epidemic among women.⁶ Social and economic power imbalances make it difficult for many married women to discuss safer sex with their husbands, to refuse sex or to leave abusive relationships. They may fear violence, rejection or abandonment.⁷ Particularly within an environment where fertility is of paramount importance and there is significant pressure to bear children, married women may believe that they do not have any right to refuse sex.⁸ In addition, the prevalence of domestic violence in marriage puts married women at risk of HIV infection.⁹

Discriminatory provisions in marriage laws, as well as longstanding practices and customs, contribute to the risk of HIV infection among married women.¹⁰ Even where statutory laws feature provisions reinforcing women's equality, the inaccessibility of administrative structures (for example, offices for marriage registration) or the exclusion of certain communities from the application of those statutory law provisions (for example, minimum age of marriage provisions) directly and indirectly render women vulnerable to the risk of HIV infection. However, these risks can be avoided. By reforming laws and practices around marriage, as well as ensuring the regulation of marriage as it is practiced in all communities, legislators can take an important step in the fight against HIV and in advancing women's rights.

Women, marriage and human rights

Because their legal, social and economic subordination renders women vulnerable to HIV infection, protecting and promoting the human rights of women is critical to an effective response to the HIV epidemic. In legislating in the area of marriage, countries must

Girls in Africa, 2003, p. 29, online via: www.hrw.org; D. Whelan, *Gender and HIV/AIDS: Taking Stock of Research and Programmes*, UNAIDS, 1999, p.12.

⁶ For example, a survey of women in Swaziland found that married women were twice as likely to report that they lacked control over whether and when to have sex, and whether or not to have unprotected sex, when compared with their unmarried counterparts. See Physicians for Human Rights, *Epidemic of Inequality: Women's Rights and HIV/AIDS in Botswana & Swaziland*, 2007, pp. 100–101.

⁷ UNAIDS, UNFPA and UNIFEM, *Women and HIV/AIDS* (supra).

⁸ E. Preston-Whyte, "Reproductive health and the condom dilemma: identifying situational barriers to HIV protection in South Africa," in J. Caldwell et al (eds), *Resistances to Behavioural Change To Reduce HIV/AIDS Infection in Predominantly Heterosexual Epidemics in Third World Countries* (Canberra, Australia: Australian National University, 1999), pp. 139–155, at 143; S. Clark, "Early marriage and HIV risks in sub-Saharan Africa," *Studies in Family Planning*, 35(3) (2004): 149–160, at 151; S. Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (Philadelphia: University of Pennsylvania Press, 2008), p. 630; and Physicians for Human Rights, *Epidemic of Inequality* (supra), p. 59.

⁹ Research in South Africa indicates that women with violent or controlling male partners are at increased risk of HIV infection. Domestic violence diminishes women's ability to negotiate safer sex. In addition, coerced or nonconsensual sex increases the risk of HIV transmission because abrasions and tearing during sexual intercourse are worsened when the vagina or anus is dry and force is used: K. Dunkle et al, "Gender-based violence, relationship power, and risk of HIV infection in women attending antenatal clinics in South Africa," *The Lancet* 363(9419) (2004): 1415–1421; and HRW, *Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence*, Vol. 16, No. 3(A), 2004, p.11, online via: www.hrw.org.

¹⁰ See, for example, commentaries on minimum age of marriage, widow inheritance and polygamy below.

necessarily have regard to their obligations under applicable international law. The *International Covenant on Civil and Political Rights* (ICCPR) requires states parties to take appropriate steps to “ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”¹¹ The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obligates states parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹² This obligation includes ensuring that women and men have the same rights to enter into marriage with their free and full consent and to choose a spouse, the same rights and responsibilities during marriage and at its dissolution, and the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property.¹³ Correspondingly, the *International Guidelines on HIV/AIDS and Human Rights* call for the review and reform of laws to ensure women’s equality in marital relations, so as to reduce women’s vulnerability to HIV infection and to the impact of HIV and AIDS.¹⁴

Some regional treaties also provide specific obligations with respect to women’s rights in marriage. 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) provides that women and men enjoy equal rights and are regarded as equal partners in marriage. Moreover, the Protocol says that states shall enact appropriate legislation to guarantee, amongst other things, that no marriage shall take place without the free and full consent of both parties, that the minimum age of marriage for women is 18 years, that monogamy is encouraged as the preferred form of marriage, and that all marriages are recorded and registered.¹⁵

With respect to marriage, women’s human rights may be violated in various ways, from the denial of their right to refuse a marriage to the denial of their sexual autonomy and reproductive rights. This, in turn, undermines their ability to refuse unwanted sex and to negotiate safer sex, as well as their ability to determine the number and spacing of their own children. Under international law, the normative content of the right to the highest attainable standard of physical and mental health contains the right of every person to

¹¹ *International Covenant on Civil and Political Rights*, 16 Dec 1966, 999 U.N.T.S. 171 (entered into force 23 March, 1976) [ICCPR], art. 23(4). See also, *International Covenant on Economic, Social and Cultural Rights*, 16 Dec 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], art. 2; *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 13 Sept 2000, OAU Doc. CAB/LEG/66.6, (entered into force 25 Nov 2005) [Protocol on the Rights of Women in Africa], art. 2; *African [Banjul] Charter on Human and Peoples’ Rights*, 27 June, 1981, OAU Doc. CAB/LEG/67/3 rev.5, (entered into force 21 Oct, 1986) [African Charter], art. 2 and 18(3).

¹² CEDAW, art. 16. See also, ICCPR, art. 26; Protocol on the Rights of Women in Africa, art. 8; African Charter, art. 3.

¹³ CEDAW, art. 16.

¹⁴ 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).

¹⁵ Protocol on the Rights of Women in Africa, art. 6 (“Marriage”).

control one's health and body, which includes the right to make autonomous decisions over one's sexuality without interference.¹⁶ As the Special Rapporteur on the Right to Health has underlined,

Discrimination based on gender hinders women's ability to protect themselves from HIV infection and to respond to the consequences of HIV infection. The vulnerability of women and girls to HIV and AIDS is compounded by other human rights issues including ... harmful traditional or customary practices affecting the health of women and children (such as early and forced marriage); and lack of legal capacity and equality in areas such as marriage and divorce.¹⁷

Numerous other human rights are relevant to women's rights in marriage. A woman's right to freedom of association is violated when she is forced into marriage and when she is unable to leave an unwanted marriage.¹⁸ Women's bodily integrity and rights to equality, to the highest attainable standard of health and to freedom from cruel, inhuman or degrading treatment or punishment are further violated in marriages involving domestic violence.¹⁹ Requiring women to enter or remain in abusive relationships against their will violates their right to life,²⁰ their right to freedom from cruel, inhuman or degrading treatment or punishment,²¹ their right to be free from slavery and servitude,²² their right to liberty and security of the person,²³ and their right to be protected from violence.²⁴ In countries where a man gains legal control over a woman and her property upon marriage, a woman's right to own property (as well as her right to

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

¹⁷ United Nations Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Health, *Report to the UN Commission on Human Rights*, U.N. Doc. E/CN.4/2004/49, 16 February 2004, at para. 34.

¹⁸ ICCPR, art. 22; African Charter, art. 10.

¹⁹ Protocol on the Rights of Women in Africa, art. 3 and 4. In particular, art. 3 requires states parties to adopt and implement appropriate measures "to prohibit any exploitation or degradation of women," and to protect women "from all forms of violence, particularly sexual and verbal violence." See also ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.

²⁰ ICCPR, art. 6; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 4.

²¹ ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 5.

²² ICCPR, art. 8; African Charter, art. 5.

²³ ICCPR, art. 9–10; Protocol on the Rights of Women in Africa, art. 4; African Charter, art. 6.

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

be free from slavery and servitude, and her right to liberty and security of the person) are violated.²⁵

A. Recognition of All Forms of Marriage

NOTE:

The following articles ensure that all marriages are regulated and that all forms of marriage are consistent with human rights norms.

Article 1. Forms of marriage

(1) A marriage which is contracted:

- (a) in civil form, as set out in Article 15 below;
- (b) according to the rites of a religious community, where one or both parties are members, as set out in Article 16 below; or
- (c) according to the rules of customary law, where one or both parties are members of a community which follows customary law, as set out in Article 17 below;²⁶

and which is in accordance with all essential conditions of marriage set out in Articles 4–12 of this Act is valid.²⁷

Article 2. Recognition of foreign marriages

(1) A marriage contracted in another country in accordance with the laws of that country shall be valid as long as it accords with the essential conditions of marriage set out in Articles 4–12 of this Act.²⁸

Article 3. Recognition of existing marriages

- (1) A marriage that is a valid marriage at civil, customary or religious law prior to this Act coming into force and existing at the time this Act comes into force is for all purposes recognized as a marriage.
- (2) For further clarity, a polygamous marriage that is valid at customary or religious law at the time this Act comes into force is for all purposes recognized as a marriage.²⁹

²⁵ CEDAW, art. 15(2) and 16(1)(h); African Charter, art. 14.

²⁶ This wording is derived in part from Tanzania, *Law of Marriage Act of 1971*, s. 25.

²⁷ Ibid.

²⁸ For further provisions on this issue, see s. 10(2) of Uganda, *Domestic Relations Bill of 2003*; art. 5 of Ethiopia, *Revised Family Code of 2000*; s. 36 of Tanzania, *Law of Marriage Act of 1971*.

Commentary: Articles 1–3

In some countries, several different types of marriages are practiced, including religious marriages and customary marriages according to the traditional practices of various communities.³⁰ While each form of marriage presents its own set of benefits and challenges for the realization of women’s human rights, the recognition of all forms of marriage protects nations’ religious and cultural pluralism, individuals’ right to religious freedom and correlative right to be married in the manner they wish, and the right to non-discrimination and equal protection of the law.³¹ However, as the U.N. Human Rights Committee has noted, the right to religious and cultural freedom does “not authorize any State, group or person to violate the right to the equal enjoyment by women of any [International Covenant on Civil and Political] rights.”³² Therefore, the recognition of all forms of marriage also facilitates the protection of vulnerable parties to marriage through the oversight and regulation of potentially harmful practices. In countries where only civil law marriages are regulated, women who marry according to custom may not enjoy the protections that a legally sanctioned marriage may offer.³³ Articles 1 and 2 ensure that all forms of marriage are recognized and regulated in a manner consistent with human rights.

Although some of the legislative provisions included in this publication specifically apply to heterosexual unions (for example, the provision on widow inheritance), same-sex marriages are not generally precluded.³⁴ Same-sex marriages have been legalized in a

²⁹ This wording is derived from s. 2 of South Africa, *Recognition of Customary Marriages Act of 1998*. For a discussion on polygamous marriage, see the commentary on Articles 9 and 10 below.

³⁰ For example, in South Africa, marriages by “African rites” were subject to customary law, and civil and Christian marriages were generally subject to the common law: South African Law Commission, *Project 90, Discussion Paper 74, The Harmonization of the Common Law and Indigenous Law: Customary Marriages*, 1997, p. 27.

³¹ See art. 18 and 27 of the ICCPR, and art. 8 of the African Charter. The U.N. Human Rights Committee has also stated that “the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages,” but that that marriage should not be “incompatible with the Covenant”: U.N. Human Rights committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” U.N. Doc. HRI/GEN/1/Rev.1 at 28, 39th Session, 1990, para. 4.

³² U.N. Human Rights Committee, “General Comment No. 28: Equality of Rights Between Men and Women (Article 3),” U.N. Doc. CCPR/C/21/Rev.1/Add.10, 68th Session, 2000, para. 32.

³³ Recognizing this, a number of countries in sub-Saharan Africa regulate customary marriage through the establishment of a minimum set of essential requirements for marriage. See, for example, South Africa, *Recognition of Customary Marriages Act of 1998*; Zimbabwe, *Customary Marriages Act of 2001*; Ethiopia, *Revised Family Code of 2000*. The CEDAW Committee has also urged a number of countries to “harmonize civil, religious and customary law with article 16 of the Convention” (referring to “marriage and family life”). See, for example, CEDAW Committee, “Concluding Comments: Ghana,” 36th session, CEDAW/C/GHA/CO/5, 25 August 2006, para. 36; CEDAW Committee, “Concluding Comments: Kenya,” 39th session, CEDAW/C/KEN/CO/6, 10 August 2007, para. 44.

³⁴ Ethnographic studies reveal that many African societies have practiced, and some continue to practice, “woman-to-woman” marriage, or marriage involving a “female husband,” whereby a woman marries another woman and assumes control over her and her offspring in order to have children, or to increase her lineage and social status, to secure rights over land, and for domestic help. According to Carrier and

number of countries.³⁵ Civil unions between same-sex couples, which offer some of the benefits and obligations associated with marriage, are available in numerous other countries.³⁶ In South Africa, same-sex marriage was legalized in 2006 after its Constitutional Court held that the failure of the common law and the national *Marriage Act* to provide same-sex couples with the same status, entitlements and responsibilities accorded to heterosexual couples through marriage constituted an unjustifiable violation of the right of same-sex couples to equal protection of the law and not to be discriminated against unfairly.³⁷ Under international law, the U.N. Human Rights Committee has held that existing protections against discrimination in Articles 2 and 26 of the ICCPR include sexual orientation as a protected status.³⁸

Murray, formalized, socially-recognized relations between two men also exist in Africa among the Zande, whereby a male warrior marries a teenage boy by paying bride price to the boy's parents. See R. J. Cadigan, "Woman-to-woman marriage: practices and benefits in sub-Saharan Africa," *Journal of Comparative Family Studies* 29(1) (1998): 89–98; B. Greene, "The institution of women-marriage in Africa: a cross-cultural analysis," *Ethnology* 37(4) (1998): 395–412; R. Oboler, "Is the female husband a man? Woman/woman marriage among the Nandi of Kenya," *Ethnology* 19(1) (1980): 69–88; J. Carrier and S. Murray, *Boy-Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin's Press, 1998), pp. 256–257.

³⁵ At the time of writing, same-sex marriages had been legalized in the Netherlands, Norway, Canada, Belgium, Spain, South Africa and some states within the United States of America.

³⁶ For example, civil unions have been legalized in many countries in Western Europe including Belgium, France, Germany, the Netherlands and Switzerland.

³⁷ *Minister of Home Affairs and Another v. Fourie and Another*, Constitutional Court of South Africa, Case CCT 60/04, 1 December 2005; *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, Constitutional Court of South Africa, Case CCT 10/04, 1 December 2005. South African Justice Edwin Cameron has cited the African concept of *ubuntu*, said to embrace all forms of expressive human flourishing that contribute to society and do not harm other humans, as the basis for the recognition of equality for individuals in same-sex relationships. See E. Cameron, "Constitutional protection of sexual orientation and African conception of humanity," *South African Law Journal* 118(4) (2002): 642–645.

³⁸ See *Toonen v. Australia*, U.N. Doc CCPR/C/50/D/488/1992 (4 April 1994) and *Young v. Australia*, U.N. Doc CCPR/C/78/D/941/2000 (12 August 2003), in which the Committee held that Australia, in denying pension rights to the surviving same-sex partner of a war veteran, violated art. 26 of the ICCPR. See also, U.N. Human Rights Committee, "Communication No. 1361/2005: Colombia," 14/05/2007/CCPR/C/89/D/1361/2005 (Jurisprudence), in which the Committee concluded that a distinction in Colombian law between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, constituted a violation of art. 26 of the ICCPR by denying a man's right to his male life partner's pension on the basis of his sexual orientation. At the time of this writing, all African countries had ratified the ICCPR, with the exception of Comoros and Guinea Bissau.

B. Essential Conditions of Marriage

NOTE:

A minimum age for marriage protects girls from the harmful consequences of early marriage and ensures that all marriages occur only with the “free and full consent” of both parties.³⁹

Article 4. Minimum age for marriage

- (1) The minimum age for a person to marry is 18 years.⁴⁰
- (2) Proof of age must be provided to the marriage officiator at the time of marriage, and may be established by:
 - (a) a valid birth certificate; or
 - (b) if no valid birth certificate exists, by medical records, school records or a certificate of identity and age issued by the [relevant state authority].⁴¹
- (3) Any person who willingly causes the marriage of a person under the age of 18 by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Commentary: Article 4

In a number of jurisdictions, marriage is permissible before the age of 18, and in many cases, the age of consent is different for men than for women.⁴² Customary and religious

³⁹ “Free and full consent” is mandated by art. 16(2) of the *Universal Declaration of Human Rights*.

⁴⁰ A number of countries in sub-Saharan Africa have already established a minimum age of at least 18 for both men and women to consent to marriage, though many permit exceptions to the minimum age with parental or guardian consent or for customary or religious marriages. See, for example, Nigeria (s. 18 of the *Marriage Act of 1990* requires parental consent for marriages under 21); Djibouti (art. 13 of the *Code de la Famille of 2001* requires both spouses to be 18 in order to contract a marriage, but allows for younger marriage with the consent of parents or grandparents); Botswana (s. 15 of the *Marriage Act of 2001* sets the marriage age for both men and women at 18 with parental consent and 21 without such consent, though it does not apply to customary or religious marriages); Namibia (s. 26 of the *Marriage Act of 1961*, as amended by s. 24 of the *Married Persons Equality Act of 1996*, establishes 18 as the minimum age of marriage, but allows those who are younger to marry with the government’s written permission); Malawi (art. 22(7) of Malawi’s *Constitution Act of 1994* allows persons between the ages of fifteen and eighteen years to marry only “with the consent of their parents or guardians”). S. 14 of Uganda’s long-debated *Domestic Relations Bill of 2003* also prescribes a minimum age of 18 for marriage without exceptions for parental or guardian consent.

⁴¹ This section is derived from s. 5(c) of a proposed *Age of Marriage Amendment Act of 2005* featured in T. Ezer et al, “Child marriage and guardianship in Tanzania: robbing girls of their childhood and infantilizing women,” *The Georgetown Journal of Gender and the Law* VII (2006): 359–439, at 428 (Appendix A).

marriages are often also not subject to the minimum age requirement.⁴³ But early marriage typically has negative consequences for girls: they are less likely to receive an education, they are more likely to have health problems arising from early pregnancies, and they are particularly vulnerable to abuse and social isolation.⁴⁴ In addition, early marriage has been shown in some settings to be linked to increased rates of HIV among women and girls. It has been noted that in developing countries, sexually active adolescent girls who are married have higher rates of HIV infection than sexually active girls who are not married. In a survey of adolescent girls in 21 developing countries, 80 percent of unprotected sexual encounters occurred in marriage.⁴⁵

Married girls' vulnerability to HIV may be linked to a number of factors. Numerous studies have suggested that married adolescent girls are more likely than their unmarried counterparts to have an HIV-positive partner, which has been attributed to the greater likelihood of married adolescent girls having older partners, who are more likely to be HIV-positive.⁴⁶ Biological factors may also increase girls' risk of HIV infection because they are more vulnerable to vaginal tearing and other injuries as a result of intercourse

⁴² For example, Tanzania's *Law of Marriage Act* permits marriage for girls at age 15, while boys are not permitted to marry until the age of 18: s. 13 of *Law of Marriage Act of 1971*. Kenya's law governing Hindu marriages permits marriages for girls at age 16, while boys are not permitted to marry until the age of 18: s. 3(c) of *Hindu Marriage and Divorce Act of 1960*, c. 157. Madagascar permits marriage for girls at age 14, while boys are not permitted to marry until the age of 17: art. 3 of Madagascar's *Family Code of 1963*. Burkina Faso permits marriage for girls at age 17 and for men at age 20: art. 238 of Burkina Faso's *Individual and Family Code of 1990*.

⁴³ For example, in Kenya, neither Islamic nor customary law specify a minimum age for marriage: Kenya, *Mohammedan Marriage and Divorce Registration Act of 1906* and *African Christian Marriage and Divorce Act of 1931*. In Tanzania, customary law permits the marriage of girls at puberty with their fathers' consent, and Islamic law permits the marriage of boys and girls at puberty with their fathers' or paternal grandfathers' 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]; Statements of Islamic Law, Government Notice 222 of 1967 in *Islamic Law (Restatement) Act*. In Ghana, customary law holds that children can marry as soon as they reach puberty: *Marriage of Mohammedens Ordinance of 1907*. S. 15 of Botswana's *Marriage Act of 2001* sets the marriage age for both men and women at 18, with parental consent, and at 21 without such consent, but it does not apply to customary or religious marriages.

⁴⁴ See UNICEF and Innocenti Research Centre, *Early Marriage: Child Spouses*, 2001, pp. 9–12.

⁴⁵ International Women's Health Coalition, *Child Marriage: Girls 14 and Younger at Risk*, 2008, online via: www.iwhc.org/resources/youngadolescents. Among girls who are sexually active and do not wish to get pregnant, married girls are more than 10 times more likely to have had unprotected sex in the previous week: International Women's Health Coalition, *IWHC Factsheet: Child Marriage*, 2005, online via: www.iwhc.org.

⁴⁶ A study by Clark indicates that in Kisumu, Kenya and Ndola, Zambia, approximately 30 percent of male partners of married adolescent girls were infected with HIV, while only 9–14 percent of the partners of unmarried girls were HIV-positive: S. Clark, "Early marriage and HIV risks in sub-Saharan Africa," p. 156. See also, C. Mgbako, J. Fenrich and T.E. Higgins, *We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi*, Leitner Center for International Law and Justice, 2007, p. 12.

(particularly if non-consensual).⁴⁷ Young brides' vulnerability to HIV is further increased if they have less negotiating power to refuse sex, to demand condom use or to decide when to have children.⁴⁸ With limited capacity to enter the paid labour force and earn an independent income, as well as diminished access to productive resources and education, young wives may have less ability to leave husbands if they wish to.⁴⁹

Furthermore, young wives often experience a sudden decline in their social networks upon marriage, which leaves them with few, if any, friends or peers.⁵⁰ Social isolation may be a predisposing risk factor for HIV because it curtails the social contacts and networks that play a vital role in transmitting HIV prevention information and supporting behaviour change.⁵¹ In most countries, married adolescent girls are less likely to have heard of HIV compared to single, sexually active girls and they are even less likely to know how to avoid HIV infection.⁵²

There is an emerging consensus in international law that 18 is the appropriate age of consent for marriage. The *Convention on the Rights of the Child* defines a child as a person under the age of 18,⁵³ while the *African Charter on the Rights and Welfare of the Child* provides that child betrothal and child marriage shall be prohibited and that action shall be taken by states parties to ensure that the minimum age of marriage is 18.⁵⁴ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) considers that the minimum age for marriage should be 18 years for both a man and a woman.⁵⁵ Moreover, the *International Guidelines on HIV/AIDS and Human Rights* call for the elimination of "early marriage."⁵⁶

⁴⁷ See E. Råssjö et al., "Vulnerability and risk factors for sexually transmitted infections and HIV among adolescents in Kampala, Uganda," *AIDS Care* 18(7) (2006): 710–716.

⁴⁸ See, for example, Leitner Center for International Law and Justice, *We Will Still Live* (supra), p. 12.

⁴⁹ J. Bruce and S. Clark, "The implications of early marriage for HIV/AIDS policy," paper presented at the WHO/UNFPA/Population Council Technical Consultation on Married Adolescents, 12 December 2003, Geneva, Switzerland, p. 8.

⁵⁰ J. Bruce, *Child Marriage in the Context of the HIV Epidemic*, Population Council, 2007, online: www.popcouncil.org/pdfs/TABriefs/GFD_Brief-11_CHILDMARRIAGEHIV.pdf.

⁵¹ International Council of AIDS Service Organizations, *Gender, Sexuality, Rights and HIV: An Overview for Community Sector Organizations*, p. 10.

⁵² J. Bruce and S. Clark, "The implications of early marriage" (supra), p. 8.

⁵³ Art. 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] provides, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." See also, art. 2 of the *African Charter on the Rights and Welfare of the Child*, 29 November 1999, Organization of African Unity, O.A.U. Doc. CAB/LEG/24.9/49 (1990), (entered into force 29 November 1999).

⁵⁴ *African Charter on the Rights and Welfare of the Child*, art. 21(2).

⁵⁵ CEDAW Committee, "General Recommendation No. 21: Equality in Marriage and Family Relations," U.N. Doc. A/47/38, 13th Session, 1994, para. 36.

⁵⁶ UNAIDS and OHCHR, *International Guidelines on HIV/AIDS and Human Rights* (supra), guideline 8.

NOTE:

Forced marriage violates women's right to refuse marriage. The following provisions ensure that the consent of both intending spouses is freely provided before a valid marriage takes place.

Article 5. Consent of spouses required

- (1) A valid marriage shall take place only when the intending spouses have given their free and full consent to the marriage and to the form of marriage.
- (2) The consent of individuals other than the intending spouses is not a requirement, nor shall it be sufficient, for a valid marriage (*optional additional text where polygamy is not prohibited*: with the exception of the spousal consent requirement for a subsequent polygamous marriage, as set out in *Articles 9B and 10A* of this Act).⁵⁷
- (3) Consent is vitiated as a result of:
 - (a) coercion, such as when consent is given by an intending spouse to protect himself or herself or another person from serious danger or threat of danger, economic blackmail or loss of livelihood;⁵⁸
 - (b) fraud;
 - (c) error as to the identity of the spouse;
 - (d) one or both parties being mentally incapable of understanding the nature and effect of marriage or of the marriage ceremony;
 - (e) one or both parties being mistaken as to the nature of the ceremony; or
 - (f) one or both parties being intoxicated or otherwise incapacitated so as not to appreciate the full nature of the ceremony.
- (4) Any person who willingly causes the marriage of a person without his or her free and full consent by requesting or contracting such a marriage, or by providing money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Article 6. Presence of both spouses at time of marriage

- (1) A valid marriage shall take place only when both of the intending spouses are present in person and affirm their consent to the marriage at the time and place of its solemnization.

⁵⁷ For further clarity, the text in the brackets should be retained only if *Articles 9B and 10B* of this Act are adopted.

⁵⁸ This language is drawn from art. 14 of Ethiopia, *Revised Family Code of 2000*.

- (2) Notwithstanding the provisions of Section (1), the [relevant state authority] may allow an intending spouse to consent to marriage through a representative in exceptional circumstances where requiring the presence of both intending spouses would impose undue hardship and the [relevant state authority] is satisfied that written consent, signed by two witnesses, was freely given by the person being represented.⁵⁹

Article 7. Prohibition of betrothal⁶⁰

- (1) For the purposes of this Act, a betrothal is the pledging of one person for marriage by another person by entering into an agreement on behalf of that person to be married without his or her free and full consent.
- (2) Any marriage arranged through the betrothal of an adult or child shall be of no effect.⁶¹

Commentary: Articles 5–7

Forced marriage occurs when the intending spouses have not provided their free and full consent to the marriage. The CEDAW Committee has noted that “there are countries which, on the basis of custom, religious beliefs, or the ethnic origins of particular groups of people, permit forced marriage or remarriages. Other countries allow a woman’s marriage to be arranged for payment or preferment.”⁶²

Numerous international conventions require the consent of both parties to marriage. The *Universal Declaration of Human Rights*, the CEDAW, the ICCPR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (Marriage Convention) all stipulate that both potential spouses should freely and fully consent to the marriage.⁶³ The *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (Supplementary Slavery Convention) considers any marriage that is forced upon a girl or woman by her family or

⁵⁹ This article is based on art. 12 of Ethiopia’, *Revised Family Code of 2000*.

⁶⁰ Because betrothal is associated with a distinct historical tradition in many parts of the world, it is featured in a separate Article. However, it is technically captured by Article 5, since the underlying harm is marriage without an individual’s free and full consent. Therefore, the punishment for betrothal is already reflected in Article 5(4) and courts should refer to this provision in criminal proceedings.

⁶¹ See art. 21(2) of the *African Charter on the Rights and Welfare of the Child*. Art. 16(2) of the CEDAW states that “the betrothal and the marriage of a child shall have no legal effect.”

⁶² CEDAW Committee, “General Recommendation No. 21” (supra), para. 15.

⁶³ *Universal Declaration of Human Rights*, U.N. General Assembly, GA Resolution 217A(III), 10 December 1948, art. 16; CEDAW, art. 16; ICCPR, art. 23; ICESCR, art. 10; *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (Marriage Convention), U.N. General Assembly, GA Res 1763A (XVII), 9 December 1964, art. 1.

guardians to be a practice similar to slavery.⁶⁴ In addition to being a violation of human rights, forced marriage has been associated with child marriage and widow inheritance (and the associated increased risk of HIV infection).⁶⁵ Therefore, Article 5 requires both parties to the marriage to provide their free and full consent, and enumerates circumstances in which their consent may be vitiated.

The involvement of family may be a critical and even determinative factor in the marriage decision, but the requirement for spousal consent should not be superseded by the wishes of others, including parents or guardians.⁶⁶ Article 5(2) protects against cases where the primacy of parental consent may lead to the betrothal of their children without their knowledge or against their wishes.⁶⁷ Requiring both spouses to be present at the time of marriage — Article 6(1) — further facilitates the expression of consent by enabling marriage officiators to ascertain such consent during the marriage ceremony.

NOTE:

Widow inheritance, a practice by which a widow marries the brother of her deceased husband or another male relative, may expose women to unprotected and unwanted sex and thus to the risk of HIV infection.⁶⁸ This provision makes widow inheritance an offence.

Article 8. Prohibition of widow inheritance

- (1) For the purposes of this Act, widow inheritance means a custom by which a relative of a deceased husband marries (or becomes the de facto spouse of) the deceased husband's wife.

⁶⁴ *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (Supplementary Slavery Convention), 226 U.N.T.S. 3, 30 April 1957, art. 1(c).

⁶⁵ See the relevant commentaries to these issues.

⁶⁶ T. Higgins, J. Fenrich and Z. Tanzer, "Gender equality and customary marriage: bargaining in the shadow of post-apartheid legal pluralism," *Fordham International Law Journal* 30 (2007): 1653–1708, at 1671.

⁶⁷ For example, art. 7 of Djibouti's, *Code de la Famille of 2001* requires the consent of both spouses as well as the "tutor" of the prospective bride in order to conclude a valid marriage ("Le mariage n'est formé que par le consentement des deux époux et du tuteur de la femme.")

⁶⁸ Considering widow inheritance as a form of marriage may not capture the nature of the union among some groups in sub-Saharan Africa. Among the Luo people in Kenya, for example, the union is not a marriage because the relative of the deceased man who marries the widow retains his own wife and family, or, if he is single, is still expected to marry and have children of his own. In some cultures, a widow continues to be considered the wife of the deceased and therefore cannot technically remarry. See K. E. Agot, *Widow Inheritance and HIV/AIDS Interventions in Sub-Saharan Africa: Contrasting Conceptualizations of "Risk" and "Spaces of Vulnerability,"* Ph. D. Geography Thesis, University of Washington, 2001 [unpublished].

- (2) Widow inheritance is prohibited.⁶⁹
- (3) Notwithstanding Section (2), a man may marry his relative's widow where both intending parties, with their free and full consent, contract any form of marriage conforming to all essential conditions of marriage set out in Articles 4–12 of this Act.⁷⁰
- (4) Any person who willingly causes the marriage of a person through the practice of widow inheritance, by requesting or contracting such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Commentary: Article 8

Widow inheritance originally arose as a social institution designed for men to take responsibility for their dead male relative's children and his household.⁷¹ Given today's extreme economic and cultural pressures the practice persists, limiting the choices many widows have following the death of their husbands.⁷² In countries where women's rights to own property or inherit from their deceased husbands are restricted, widow inheritance may be the only way for them to remain connected to their children, their community, and the land and home they were living in.⁷³

However, widow inheritance may reflect the view of women as chattel, especially insofar as the entitlement of the widow's new husband may be linked to the fact that his family had previously paid money to the widow's family as a precondition to marriage.⁷⁴

⁶⁹ Benin's *Personal and Family Code of 2004* abolishes "levirate marriage." See 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 Report of States Parties: Benin," 7 November 2002, CEDAW/C/BEN/1-3, p. 82; CEDAW Committee, "Concluding Observations: Benin," 33rd Session, CEDAW/C/BEN/CO/1-3, 22 July 2005, para. 21. S. 16 of Uganda', *Domestic Relations Bill of 2003* also criminalizes widow inheritance.

⁷⁰ This is derived from s. 16 of Uganda, *Domestic Relations Bill of 2003*.

⁷¹ P. Ehsanzeadeh Cheemeh et al, "HIV/AIDS in the Middle East: a guide to a proactive response," *Journal of the Royal Society of Health* 126(4) (2006): 165–171; C. Mgbako, J. Fenrich and T.E. Higgins, *We will still live* (supra), p. 14; and HRW, *Just Die Quietly* (supra), pp. 34–35.

⁷² I. Luginaah et al, "Challenges of a pandemic: HIV/AIDS-related problems affecting Kenyan widows," *Social Science and Medicine* 60(6) (2005): 1219–1228, at 1225; W. Ncube and J. Stewart (eds), *Widowhood, Inheritance Laws, Customs & Practices in Southern Africa, Women and Law in Southern Africa Research Project* (Harare: Jongwe Printers, 1995), p. 25.

⁷³ Even where women do have legal rights to inherit property, cultural and religious beliefs as well as social pressures may prevent them from making claims to property: S. Chirawu, "Till death do us part: marriage, HIV/AIDS and the law in Zimbabwe," *Cardozo Journal of Law and Gender* 13 (2006): 23–50; W. Ncube and J. Stewart (eds), *Widowhood*, (supra), p. 42.

⁷⁴ For example, s. 65 of Tanzania, Local Customary Law, provides that if a widow agrees to be inherited, "[t]he bridewealth that was paid by the deceased's husband is considered as if it was paid by that relative." See also, the Kenyan case *Okeyo v. Ogwayi*, Civil Suit No. 66 of 2001, Senior Resident Magistrate's Court at Homa Bay, 13 June 2002, in which the plaintiff Janet Okeyo's father-in-law had her arrested following her husband's death on the ground that because he had paid dowry for her, she should be living with her

Although there may be no formally stated consequences for refusing to be inherited, women may be harassed by the husband's family or the community if she does. Refusing remarriage may become a barrier to receiving an inheritance, to receiving further assistance from family members or to participating in certain community activities or rituals.⁷⁵ Widow inheritance has also been used as a pretext for in-laws to seize the deceased man's property.⁷⁶

Widow inheritance may also result in unprotected and unwanted sex and, thus, the risk of HIV infection.⁷⁷ A widow is at risk of infection when she is introduced into a sexual network consisting of her new husband, his wife or wives, and their extra-marital relationships.⁷⁸ A growing awareness of the inherent risk of HIV transmission in widow inheritance has encouraged some communities to modify their customs so as to replace sex with symbolic rituals. Furthermore, a number of jurisdictions have opted to ban widow inheritance after community consultations and education on the risks of HIV transmission.⁷⁹

children in the marital home. He also claimed that a relative of the deceased had inherited Okeyo. The Court held that forcing Okeyo to return to the marital home would violate her statutory rights of free association and movement, that since Okeyo did not choose to be inherited by a relative of the deceased, there was no proper marriage, and that any customary law requiring her return was repugnant to the written law.

⁷⁵ See I. Luginaah et al, "Challenges of a pandemic" (supra), pp. 1222 and 1225; and K. E. Agot, *Widow Inheritance and HIV/AIDS Interventions in Sub-Saharan Africa: Contrasting Conceptualizations of "Risk" and "Spaces of Vulnerability."*

⁷⁶ C. Mgbako, J. Fenrich and T.E. Higgins, *We will still live* (supra), p. 549; and I. Luginaah et al, "Challenges of a Pandemic" (supra), p. 1225.

⁷⁷ See I. Luginaah et al, "Challenges of a pandemic" (supra), p. 1226; and T. Okeyo and A. Allen, "Influence of widow inheritance on the epidemiology of AIDS in Africa," *African Journal of Medical Practice*, 1(1) (1994): 20–25, at 25. For example, commentators have suggested that safer sex is rarely practiced during "sexual cleansing," which refers to a ritual by which a widow is required to have sex with a relative of her deceased husband or a "professional" cleanser who is unrelated to the deceased. It is often connected to widow inheritance in that it marks the beginning of the levirate union, although they are not always practiced together. See W. Ncube and J. Stewart (eds), *Widowhood, Inheritance Laws, Customs & Practices in Southern Africa, Women and Law in Southern Africa Research Project*, p. 40; and F. Shu-Acquaye, "The legal implications of living with HIV/AIDS in a developing country: the African story," *Syracuse Journal of International Law and Commerce* 32(1) (2004): 51–86, at 55. J. Ntozi et al suggest that widows and widowers have a higher HIV prevalence than the general population, since more than one-third of the sample of widows and widowers in his study had lost their spouses to AIDS: "The effect of the AIDS epidemic on widowhood in northern Uganda," in I. O. Orubuloye, J. C. Caldwell and J. Ntozi (eds), *The Continuing African HIV/AIDS Epidemic* (Canberra, Australia: Australian National University, 1999), pp. 211–215).

⁷⁸ M. Bassett and M. Mhloyi, "Women and AIDS in Zimbabwe: the making of an epidemic," *International Journal of Health Services* 21(1) (1991): 143–156, at 146; T. Okeyo and A. Allen, "Influence of widow inheritance" (supra); M. Bulterys et al, "Traditional mourning customs and the spread of HIV-1 in rural Rwanda: a target for AIDS prevention?" *AIDS* 8(6) (1994): 858–859; M. Nyindo, "Complementary factors contributing to the rapid spread of HIV-1 in sub-Saharan Africa: a review," *East African Medical Journal* 82(1) (2005): 40–46.

⁷⁹ For example, some communities have adopted alternative, non-sexual rituals which have their roots in indigenous practices: J. Malungo, "Sexual cleansing (*kusalazya*) and levirate marriage (*kunjilila mung'anda*) in the era of AIDS: changes in perceptions and practices in Zambia," *Social Science & Medicine* 53

Widow inheritance violates a number of international conventions protecting the right to marry by choice and requiring states to eliminate customs and practices that discriminate against women.⁸⁰ In particular, the Protocol on the Rights of Women in Africa stipulates that widows are not to be subjected to inhuman, humiliating or degrading treatment, and that they have the right to remarry the person of their choice.⁸¹

NOTE:

Polygamous marriage contravenes women’s right to equality with men and may increase women’s risk of HIV infection. The following provisions provide options to either prohibit polygamy outright, or to regulate polygamy (so that women in polygamous marriages are not denied legal protection within marriage and upon divorce).

Article 9. Polygamous marriage

[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. Prohibition of polygamous marriages

- (1) A person shall not contract a marriage of any form if he or she is already married under any legally recognized form of marriage.
- (2) Any person who willingly causes a polygamous marriage by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction,

(2001): 371–382. A local ban on widow inheritance was issued in Nyanza province, Kenya, in 2000: T. Okoko, “Local ban on widow inheritance opens can of worms,” Panafican News Agency, 2 October 2000. In Malawi, women reported a decline in widow inheritance because of its perceived contribution to the spread of HIV and the public denunciation of the practice by chiefs at public meetings. Draft legislation has been proposed that would prohibit widow inheritance without consent. See UNAIDS, *Helping Ourselves: Community Responses to AIDS in Swaziland*, 2006, p. 45; Leitner Center for International Law and Justice, *We Will Still Live* (supra), p. 14.

⁸⁰ For example, art. 2 of the CEDAW requires all states parties “to take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” See also CEDAW Committee, “Concluding Comments: Malawi,” 35th Session, CEDAW/C/MWI/CO/5, 3 February 2006, para. 16, where the Committee urges the introduction of measures to “modify or eliminate customs and cultural and harmful traditional practices that discriminate against women,” such as “discriminatory widowhood inheritance practices.” Art. 2(1)(b) of the Protocol on the Rights of Women in Africa requires states to prohibit “all discrimination particularly those harmful practices which endanger the health and general well-being of women,” while art. 2(2) requires states to eliminate “harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

⁸¹ Protocol on the Rights of Women in Africa, art. 20(a) and (c).

to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.⁸²

Commentary: Article 9A

Polygamy operates to create concurrent sexual partnerships within marriage between the husband and each of his wives, in addition to any sexual relationships the spouses have outside of marriage. Sexual transmission of HIV can occur where the virus is introduced through a spouse's extra-marital sexual contacts or where a new wife who is already HIV-positive enters the polygamous union.⁸³

Although it has been suggested that polygamous unions may provide a closed sexual network with greater sexual exclusivity, thereby reducing the risk of HIV introduction, the evidence has not borne out this proposition.⁸⁴ Several studies demonstrate that women in polygamous relationships are more likely to be infected with HIV than those in monogamous relationships.⁸⁵ One study found that despite their trepidation about their

⁸² In Canada, s. 293 of the *Criminal Code* criminalizes polygamy, and those who are convicted of the practice are liable to imprisonment for a term not exceeding five years.

⁸³ The link between polygamy and HIV has been acknowledged by several sub-Saharan African countries, including Ghana, which has recognized that polygamy contributes to “the incidence and spread of HIV/AIDS”: Ghana, *CEDAW Report of 2005*, CEDAW/C/GHA/3-5. Ethiopia has included polygamy as a reproductive health concern to be addressed through its National Adolescent and Youth Reproductive Health Strategy, noting that “polygamy exposes women to increased risk of contracting sexually transmitted diseases”: Federal Democratic Republic of Ethiopia, Ministry of Health, *National Adolescent and Youth Reproductive Health Strategy 2007-2015*, 2006, p. 7. Swaziland has reported studies linking the spread of HIV in Swaziland with polygamy: UNDP Swaziland, *Swaziland Human Development Report: HIV and AIDS and Culture*, 2007, p. 6. The CEDAW Committee has stated that “polygamy ... may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases”: CEDAW Committee, “General Recommendation No. 24: Women and Health,” U.N. Doc. A/54/38/Rev.1 c. 1, 20th Session, 1999, para. 18.

⁸⁴ R. Kelly et al, “Network data in HIV epidemiologic research: sexual networks in rural Uganda,” paper presented at International Sunbelt Social Network Conference, 1999, Charleston, U.S. (abstract 19:44). Recent studies indicate that the argument that being Muslim in sub-Saharan Africa is a protective factor against HIV transmission is more likely associated with male circumcision than the practice of polygamy: J. Killewo et al, “Socio-geographical patterns of HIV-1 transmission in Kagera Region, Tanzania,” *Social Science and Medicine* 38(1) (1994): 129–134; K. E. Agot et al, “Risk of HIV-1 in rural Kenya: a comparison of circumcised and uncircumcised men,” *Epidemiology* 15(2) (2004): 157–163; P. Gray, “HIV and Islam: is HIV prevalence lower among Muslims?” *Social Science and Medicine* 58 (2004): 1751–1756. Studies have indicated that polygamous men are as likely to engage in extra-marital sex as monogamous men; and a connection between increased HIV transmission and expanded sexual networking through concurrent long-term polygamous and short-term extra-marital relationships has been documented: T. Lawoyin et al, “Sexual behavioural risks of married men in Oyo State, Nigeria,” *International Journal of STD & AIDS* 12 (2001): 63–64; T. Mitsunaga et al, “Extramarital sex among Nigerian men: polygyny and other risk factors,” *Journal of Acquired Immune Deficiency Syndrome* 39(4) (2005): 478–488; G. Reniers and R. Tfamily, *Polygyny and HIV in Malawi*, working paper, Institute of Behavioral Science, University of Colorado at Boulder, March 2008; M. Morris and M. Kretzschmar, “Concurrent partnerships and the spread of HIV,” *AIDS* 11 (1997): 641–648.

⁸⁵ See S. Kapiga et al, “Risk factors for HIV infection” (supra); L. Kelly, “Polygyny & HIV/AIDS” (supra); Center for Reproductive Rights, *Women of the World: Laws and Policies Affecting Their Reproductive Lives, Francophone Africa*, p. 191.

husbands having sex with other women, including women living with HIV, a fear of violence and abandonment compelled many women to remain in sexual relationships with polygamous husbands.⁸⁶ In addition, the practice of polygamy has been consistently associated with other HIV risk factors, such as early marriage and concurrent herpes simplex 2 infection.⁸⁷

Furthermore, polygamy often has negative financial consequences for women due to the necessity of sharing their husband's income with co-wives. The lack of adequate financial support that may arise from the conclusion of a second or further marriage may drive women to extramarital relations to gain access to needed resources, putting them at further risk of HIV.⁸⁸ Some empirical research indicates that in polygamous relationships where not all wives may have HIV, financial resources may be diverted away from children whose mothers are living with HIV.⁸⁹ In addition, according to a report by the International Center for Research on Women, "polygamy is often cited as [a] source of confusion over distribution of property at times of death or dissolution of marriage, and increasingly is being cited as a complicating factor in the spread of HIV/AIDS."⁹⁰

Both the CEDAW Committee and the U.N. Human Rights Committee have strongly criticized polygamous marriage.⁹¹ The CEDAW Committee has stated,

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal

⁸⁶ HRW, *Just Die Quietly* (supra), p. 32.

⁸⁷ See S. Clark, "Protecting young women from HIV/AIDS: the case against child and adolescent marriage," *International Family Planning Perspectives* 32(2) (2006): 79–88; K. Halton et al, "Herpes simplex 2 risk among women in a polygynous setting in rural West Africa," *AIDS* 17 (2003): 97–103.

⁸⁸ I.O. Orubuloye et al, "Sexual Networking in the Ekiti District of Nigeria," *Studies in Family Planning* 22(2) (1991): 61–73. Where informal polygamy or "second house relationships" is practiced, one study indicated that women are further driven to seek extramarital relations for financial support: M. Hattori and F. Ni-Amoo Doodoo, "Cohabitation, marriage, and 'sexual monogamy' in Nairobi's slums," *Social Science & Medicine* 64(5) (2007): 1067–1078.

⁸⁹ H. Brahmatt et al, "Polygyny, maternal HIV status and child survival: Rakai, Uganda," *Social Science & Medicine* 55(4) (2002): 585–592.

⁹⁰ R. Strickland, *To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*, International Center for Research on Women (ICRW) Working Paper, 2004.

⁹¹ In its 1998 concluding observations on Tanzania, the CEDAW Committee strongly criticized the fact that Tanzania allows polygamous marriages: CEDAW Committee, "Concluding Observations: United Republic of Tanzania," U.N. Doc. A/53/38/Rev.1, 19th Session, 10 July 1998, para. 229. See also, U.N. Human Rights Committee, "Concluding Observations: Uganda," U.N. Doc. CCPR/CO/80/UGA, 80th session, 4 May 2004, para. 9; U.N. Human Rights Committee, "General Comment No. 28: Equality of Rights Between Men and Women (Article 3)," para. 24; U.N. Human Rights Committee, "Concluding Observations: Togo," U.N. Doc. CCPR/CO/76/TGO, 76th session, 28 November 2002, para. 21.

or customary law. This violates the constitutional rights of women, and breaches the provisions of Article 5(a) of the Convention.⁹²

Option 2: Article 9B. Polygamous marriage only with agreement of both spouses

- (1) For the purposes of this Act, a customary or religious marriage is polygamous where one or both spouses are married to a third party or third parties at the time of marriage.
- (2) A customary or religious marriage is potentially polygamous where:
 - (a) neither party is married to a third party at the time of marriage; and
 - (b) both parties to the marriage freely and fully consent at the time of marriage to the subsequent marriage of either spouse or both spouses, which shall be demonstrated by the completion and submission of a prescribed consent form to the Registrar General prior to the marriage.

Subsequent marriages under Option 2 (Article 9B):

Article 10. Subsequent marriages

[Article 10 should only be used if Option 2 above — Article 9B — is selected. Two options for Article 10 are provided below — 10A and 10B. One or the other should be selected, but not both.]

Option 1: Article 10A. Affirmation of consent required for subsequent marriage

- (1) A spouse in a polygamous or potentially polygamous marriage must affirm the consent of any current spouse(s) at least [period of time] prior to entering into any subsequent customary or religious marriage, proof of which shall be demonstrated by the completion and submission of a prescribed consent form to the Registrar General.
- (2) For further clarity, a spouse in a polygamous or potentially polygamous marriage may not enter into any subsequent customary or religious marriage without affirming the consent of any current spouse(s) at least [period of time] before the subsequent marriage.
- (3) Any person who willingly causes a polygamous marriage in contravention of the conditions set forth in *Articles 9B and 10A* of this Act by requesting or contracting

⁹² CEDAW Committee, “General Recommendation No. 21” (supra), para. 14.

such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Option 2: Article 10B. Court approval required for subsequent marriage

- (1) A spouse in a customary or religious marriage who intends to marry a subsequent spouse shall make an application to the [relevant state authority⁹³] showing that:
 - (a) the applicant's marriage is polygamous or potentially polygamous as set out in *Article 9B* of this Act;
 - (b) the subsequent marriage is in accordance with the terms of existing marriage contracts, if any;
 - (c) the subsequent marriage will not prevent the applicant's current spouse(s) or children from having at least the same level of maintenance as at the time of the application;
 - (d) the applicant has made provision for a separate matrimonial home for the subsequent spouse, except in exceptional circumstances where the parties, including the current spouse or spouses, have agreed to live together in the same home;
 - (e) any property will be distributed equitably during and in the event of termination of any of the marriages as set out in the [relevant marital property legislation], with due consideration to the specified choice of marital property regime governing the current and subsequent marriage; and
 - (f) the subsequent marriage will not impose any other undue hardship on the applicant's current spouse(s) or children.
- (2) Where the [relevant state authority] is satisfied that the applicant has complied with all the conditions set out in Section (1), the [relevant state authority] shall approve the application for a subsequent marriage to take place under this Act.
- (3) Any determination under Section (2) may be appealed to a court of competent jurisdiction and the court may confirm, reverse or vary the decision.
- (4) Any person who willingly causes a polygamous marriage in contravention of the conditions set forth in *Articles 9B and 10B* of this Act by requesting or contracting such a marriage, or by providing or receiving money or other valuable payment to secure such a marriage, commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

⁹³ For example, Tanzania, *Law of Marriage Act of 1971* requires making an application to the Registrar General, while South Africa, *Recognition of Customary Marriages Act of 1998* requires making a court application.

Commentary: Article 10 (both options)

Polygamy is firmly rooted in the religious and customary practices of many countries, and an outright ban on polygamy where the practice is widespread may not prevent people from entering into polygamous relationships.⁹⁴ Criminal prohibitions against polygamy would, therefore, place women in illegal relationships where they may not be able to avail themselves of any legal or social protections such as spousal maintenance, child custody and support, inheritance, social security and health benefits. In some communities, prohibiting polygamy could have the unwanted effect of encouraging informal “second house” relationships, which provide no legal protection to women and children and may also result in the disinheritance of any children of the relationship.⁹⁵

Where a prohibition is politically and culturally unfeasible in the short-term, polygamy should be regulated.⁹⁶ The Protocol on the Rights of Women in Africa provides that while “monogamy is encouraged as the preferred form of marriage,” states shall ensure “that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and respected.”⁹⁷

Article 9B provides that customary or religious marriages can become polygamous only if *at the time of the marriage* neither party is already married to another person *and* both spouses consent to the possibility of the subsequent marriage of either spouse or both spouses. To provide additional protection in case circumstances have changed since the consent to a subsequent marriage was first provided, Article 10 requires the affirmation

⁹⁴ In sub-Saharan Africa, 35 percent of women live in polygamous unions and almost 50 percent will at some point in their lives: D. Tabutin and B Schoumaker, “La démographie de l’Afrique au sud du Sahara des années 1950 aux années 2000,” *Population* 59(3–4) (2004): 521–622, at 536. While there are total bans on polygamy in Madagascar and Cote d’Ivoire, the practice continues to increase and goes unpunished. For Madagascar, see art. 7 of the *Civil Code*, art. 340 of the *Penal Code*; CEDAW Committee, “Concluding Observations: Madagascar,” U.N. Doc. A/49/38, 1994, p. 225. For Cote d’Ivoire, see art. 390 of the *Penal Code*; H. French, “For women in Ivory Coast, new fight for equality,” *The New York Times*, 6 April 1996.

⁹⁵ See, for example, the Namibian case of *Makholiso and Others v. Makholiso and Others*, 1997 (4) SA 509 (Tk); Legal Assistance Centre of Namibia (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, 1999, p. 89. In the 2008 High Court of South Africa case *Hassam v Jacobs NO and Others*, (5704/2004) [2008] ZAWCHC 37 (18 July 2008), the Court recognized that surviving spouses of polygamous marriages, who were not contemplated under intestate and maintenance legislation, were discriminated against in that respect, and declared that those laws also applied to spouses in polygamous marriages. Thus, the legal recognition of polygamous marriage helped secure financial support for the potentially destitute surviving spouse.

⁹⁶ Some countries impose a notification requirement, while others impose a requirement to obtain permission from a governmental authority, a court or a quasi-judicial body. See, for example, Tanzania, *Law of Marriage Act of 1971* and South Africa, *Recognition of Customary Marriages Act of 1998*. An additional means of regulation is through the requirement of spousal consent to any subsequent marriages. Papua New Guinea’s Law Reform Commission recommended this requirement, hoping that this would discourage the practice of polygamy: Papua New Guinea Law Reform Commission, *Family Law Working Paper No. 9*, March 1978.

⁹⁷ Protocol on the Rights of Women in Africa, art. 6.

of spousal consent — *Article 10A* — or the oversight of a relevant authority for subsequent marriages — *Article 10B*.

The requirement of spousal consent facilitates women’s choice in determining the configuration of her marriage, which may help to ameliorate more harmful aspects of polygamy.⁹⁸ While it has been suggested that a spousal consent requirement may be a meaningless provision (since a first wife who failed to give her consent might instead face divorce or domestic violence),⁹⁹ to assume that there are no women who are able to consent may be too broad an assumption. Where feasible (i.e., the legal infrastructure governing marriage is more accessible), the second option requiring the oversight of the relevant authority — *Article 10B* — may better ensure that the subsequent marriage does not undermine the first wife’s wishes or compromise her standard of living.

NOTE:

Marriage payment potentially undermines women’s rights to consent to marriage and to divorce. The following provision stipulates that marriage payment shall not be a requirement for a valid marriage and prohibits the requirement to return marriage payment as a condition of divorce.

Article 11. Marriage payment not a requirement

- (1) Marriage payment means a payment (whether in cash or in kind) given by an intending spouse or the family of an intending spouse to the other intending spouse or the family of the other intending spouse to secure the marriage.
- (2) For further clarity, a gift may constitute marriage payment if it is given by an intending spouse or the family of an intending spouse to the other intending spouse or the family of the other intending spouse to secure the marriage.
- (3) In no case shall marriage payment be a requirement for contracting a valid marriage.
- (4) For further clarity, the transfer of marriage payment shall not be deemed to affect the respective property rights of either spouse in any way.
- (5) It is prohibited to demand the return of marriage payment as a requirement of divorce.¹⁰⁰

⁹⁸ LAC, *Proposals for Law Reform* (supra), pp. 92–93.

⁹⁹ South African Law Reform Commission, *Project 90* (supra), para. 6.1.17–6.1.19. In Algeria, for example, despite a requirement that a woman be informed of her husband’s intention to marry another wife, many men have circumvented this condition and turned to extramarital relationships or traditional or religious marriages: A. Mammeri, “Algerian women cite problems with implementation of new family code,” *Magharebia*, 15 February 2008.

¹⁰⁰ See Module 4 “Divorce” for the criminal provision pertaining to marriage payment.

Commentary: Article 11

Marriage payment generally refers to the practice of bride price (also known in various situations as bride wealth, *lobola* or *lobolo*), in which a prospective groom pays money or valuables to his intended bride's family as a precondition to marriage, which serves as compensation for the expense of raising a daughter and for the loss of her economic services.¹⁰¹ Marriage payment also encompasses the practice of dowry, which involves a sum of money paid by the bride and her family to the bridegroom, and is often regarded as the daughter's inheritance share.¹⁰² While in some circumstances bride price may represent, or may have in the past represented, a symbol of respect and friendship between two joining families, today the practice is viewed as curtailing women's decision-making about reproduction and in negotiating sexual relations.¹⁰³ As such, marriage payment has been associated with exposing women to greater HIV risk behaviour.

According to customary practice, the payment of bride price entitles men to control their wives' sexual and reproductive lives, including control over their wives' child-bearing capacity.¹⁰⁴ Bride price may also confer upon the husband a right to custody of the children upon marriage dissolution.¹⁰⁵ Moreover, bride price has been cited as the rationale for widow inheritance.¹⁰⁶ Various investigations and reports have linked both bride price and dowry to violence against women.¹⁰⁷ Research has also linked bride price

¹⁰¹ M. Borgerhoff Mulder, "Kipsigis bridewealth payments," in L. Betzig et al (eds.), *Human Reproductive Behavior: A Darwinian Perspective* (London: Cambridge University Press, 1988), pp. 65–82. T. Higgins, J. Fenrich and Z. Tanzer note that "[t]he woman's family may effectively veto a proposal by demanding a lobolo payment that the man's family cannot make. Conversely, the man's family can block a marriage by refusing to pay the lobolo demanded": "Gender equality and customary marriage" (supra), p. 1673.

¹⁰² The payment of dowry is not commonly practiced in Africa, but is carried out in Benin and Cameroon. A reverse form of dowry is also compulsory in *Sharia*, or Islamic law, where a dower ("mahr") is expected to be paid to a prospective bride for the marriage contract to be considered valid: J. Goody and S. J. Tambiah, *Bridewealth and Dowry, Cambridge Papers in Social Anthropology No. 7* (London: Cambridge University Press, 1973).

¹⁰³ D. Kaye et al, "Implication of bride price on domestic violence and reproductive health in Wakiso District, Uganda," *African Health Sciences* 5(4) (2005): 300–303. See also, Physicians for Human Rights, *Epidemic of Inequality* (supra), p. 75.

¹⁰⁴ S. Coldham, "Customary marriage and the urban local courts in Zambia," *Journal of African Law* 34(1) (1990): 67–75, at 73. See also, s. 52 of Tanzania, Local Customary Law, which stipulates that, in the case of divorce "without fault of either the wife or the husband," bridewealth shall be refunded only "if they are childless."

¹⁰⁵ 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*, Third and Fourth Periodic Report of States Parties: Zambia," CEDAW/C/ZAM/3-4, 12 August 1999, p. 66.

¹⁰⁶ South African Law Reform Commission, *Issue Paper 4, Project 90: Harmonisation of the Common Law and the Indigenous Law, 1996*, p. 28; T. Higgins, J. Fenrich and Z. Tanzer, "Gender equality and customary marriage" (supra), p. 1674.

¹⁰⁷ See HRW, *Just Die Quietly* (supra), p. 34; K. Fonck et al, "Increased risk of HIV in women experiencing physical partner violence in Nairobi, Kenya," *AIDS and Behaviour* 9(3) (2005): 335–339; S. Maman et al, "HIV-Positive women report more lifetime partner violence: findings from a voluntary counselling and testing clinic in Dar es Salaam, Tanzania," *American Journal of Public Health* 92(8)

with restrictions on women's ability to own land within a marriage or upon being widowed or divorced.¹⁰⁸

Bride price may result in discrimination against women upon marriage dissolution. Under some customary regimes, a woman's father must return the bride price to her husband if she seeks a divorce.¹⁰⁹ Where such customary practices are followed, wives cannot divorce their husbands without the consent of their fathers, whereas husbands are able to initiate divorce without obtaining anyone's consent. According to some commentators, the necessity of the "[r]efund of bride price(wealth) has hitherto kept women in bad marriages."¹¹⁰ Similarly, dowry has been linked to undermining women's ability to escape abusive relationships, because women's parents may be reluctant to allow their daughters to return home for fear of having to pay a second dowry.¹¹¹ To improve the welfare of women, therefore, some legal experts have suggested eliminating and criminalizing the requirement to refund bride price in order to terminate a marriage.¹¹²

The Supplementary Slavery Convention prohibits "any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a

(2002): 1331–1337; 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 and Second Periodic Report of States Parties: Mozambique," CEDAW/C/MOZ/1-2, 14 November 2006, p. 65. Dowry has been linked to spousal abuse and murder, arising out of a husband and his family's dissatisfaction with the amount of the bride's dowry or unmet demands for increased dowry after marriage: R. Verma and M. Collumbien, "Wife beating and the link with poor sexual health and risk behavior among men in urban slums in India," *Journal of Comparative Family Studies* 34(1) (2003): 61–75.

¹⁰⁸ According to a case study from Uganda, the payment of bride price deemed the bride the property of her husband, leading to the common sentiment from men that "property cannot own property": R. Giovarelli, "Customary law, household distribution of wealth, and women's rights to land and property," *Seattle Journal for Social Justice* 4 (2006): 801–825, at 809 and 819. In Zambia, women have been denied ownership of income and property earned from employment on the grounds that women must bring some benefit to her husband and his relatives by working for him if lobola was paid on marriage: C. Himonga et al, "An outline of the legal status of women in Zambia," in A. Armstrong et al (eds), *The Legal Situation of Women in Southern Africa* (Harare, Zimbabwe: University of Zimbabwe Publications, 1990), pp. 156–157.

¹⁰⁹ See, for example, Law Reform Commission of Tanzania, *Inquiry and Report on the Law of Marriage Act, 1971*, 1994, p.10, online: www.lrc.tz/documents/marriage.pdf; s. 37 of Tanzania, Local Customary Law.

¹¹⁰ Uganda, *CEDAW Report of 2000*, CEDAW/C/UGA/3 at 69. See also, LAC, *Proposals for Divorce Law Reform in Namibia*, 2000, p. 13; Y. Jansen, "Unifying Babylon: can post-colonial states successfully unify a plural (legal) society?" *Widener Law Journal* 16 (2006): 71–110, at 96; T. Higgins, J. Fenrich and Z. Tanzer, "Gender equality and customary marriage" (supra), p. 1674.

¹¹¹ The Center for Health and Gender Equity, *Population Reports: Ending Violence Against Women*, Vol. XXVII, No. 4, 1999, p. 10.

¹¹² This was the view of the Ugandan Law Reform Commission. See 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*, Third Periodic Report of States Parties: Uganda," CEDAW/C/UGA/3, 3 July 2000, p. 69. The response in India has been to prohibit the practice of dowry: Law Commission of India, *91st Report on Dowry Deaths and Law Reform*, 10 August 1983.

consideration in money or in kind.”¹¹³ Bride price may also violate the right to equality within marriage, and has been found to interfere with equality between men and women with respect to entering into marriage, freely choosing a spouse, and at the dissolution of a marriage.¹¹⁴ Where bride price entitles men to control their wives’ sexual and reproductive lives, it is also a violation of women’s right to control their fertility and to decide whether to have children, the number of children and the spacing of children.¹¹⁵ The CEDAW Committee has stated that bride price is the “transfer of productive and reproductive services to the man’s family,” a practice which “undermines women’s dignity and welfare.”¹¹⁶

Prohibiting marriage payment may not reduce or eliminate its practice, since “[some] women still prefer parental consent and thus the payment of lobola before they enter into marriages.”¹¹⁷ Some researchers have also contended that the tradition of bride price benefits women by inducing men to “choose their brides carefully” and stay in marriages, given the financial investment they have made in their wives.¹¹⁸ Marriage payment holds cultural significance for many communities and may confer potential benefits for marriage stability. However, women’s human rights may be violated and their vulnerability to HIV heightened when the exchange of bride price or dowry violates their right to consent to marriage and hinders their ability to leave abusive or unwanted relationships. Article 11 regulates marriage payment by ensuring its exchange is neither a requirement of marriage nor of divorce, without correspondingly criminalizing a custom which is practiced across ethnic groups and which enjoys widespread support.

¹¹³ Supplementary Slavery Convention, art. 1(c)ii. Uganda recognized this aspect of bride price, noting that “forcing a woman to live under an intolerable and hostile family environment subjects her to servitude and slave-like conditions”: 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*, Third Periodic Report of States Parties: Uganda” (supra), p. 68. In Mauritania, it has been reported that what used to be a cultural practice where only symbolic gifts were exchanged has turned into a business in which mostly poor urban families try to sell their daughters to wealthy families in marriage: “Mauritania: Child marriage tradition turns into trafficking,” *IRIN Africa*, 9 December 2008.

¹¹⁴ For example, Uganda stated in its CEDAW report of 2000 that “cases may arise whereby a spouse is chosen for a woman provided the man can pay the amount of bride price required.... This shows that women do not have a right to enter with their free and full consent.” The right to equality within marriage is further eroded where men feel that they have different rights during marriage from those of women because they have paid a bride price: 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*, Third Periodic Report of States Parties: Uganda.”

¹¹⁵ See art. 14 of the Protocol on the Rights of Women in Africa.

¹¹⁶ 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*, Third Periodic Report of States Parties: Uganda” (supra), p. 68.

¹¹⁷ 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*, Initial Report of States Parties: Zimbabwe,” CEDAW/C/ZWE/1, 20 July 1996, p. 60.

¹¹⁸ See, for example, J. Tolan, “Married women and AIDS vulnerability: moving toward female-controlled prevention,” *Roosevelt Review* (2005): 71–84, at 76.

NOTE:

Mandatory premarital testing for HIV and/or for virginity violate numerous human rights and have not been proven to reduce HIV transmission. The following provisions prohibit such testing.

Article 12. Prohibition of mandatory premarital testing for HIV or for virginity

- (1) Mandatory premarital HIV testing is prohibited.
- (2) Mandatory premarital virginity testing is prohibited.
- (3) Any person who willingly causes a premarital HIV test or a premarital virginity test without the free and full consent of the individual being tested commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount] or to imprisonment not exceeding [period of time] or both.

Commentary: Article 12

A number of jurisdictions have implemented mandatory premarital HIV screening legislation, and a number of faith-based organizations, including churches have instituted mandatory premarital HIV testing among couples seeking to be married.¹¹⁹ Where mandatory premarital HIV testing has been imposed, there is little evidence demonstrating its effectiveness as a tool of HIV prevention. In two states in the United States, for example, legislation was quickly abandoned after numerous individuals opted to marry in neighbouring states and few new HIV infections were being detected despite the high costs associated with the testing policy.¹²⁰ In northern Ghana, where prospective spouses must bear the cost of the HIV test as a condition to a church-sanctioned marriage, the expense has hampered couples from marrying.¹²¹ Other factors undermining the perceived public health benefit of mandatory premarital HIV testing include the possibility of inaccurate or inconclusive results; the possibility of acquiring HIV after

¹¹⁹ Faith-based organizations in Ghana, Nigeria, Burundi, Kenya and Goma in the Democratic Republic of Congo have instituted mandatory premarital HIV testing among their congregations. The Nigerian government publicly endorses the practice, although there is no national legislation regarding premarital HIV testing: C. Uneke, M. Alo and O. Ogbu, “Mandatory pre-marital HIV testing in Nigeria: the public health and social implications,” *AIDS Care* 19(1) (2007): 116–121. States or provinces in India, Malaysia, China, Mexico and the U.S. have formally introduced mandatory premarital HIV testing policies and/or legislation, and Guinea’s HIV law requires mandatory premarital HIV testing: art. 28, *La loi relative a la prévention, la prise en charge et le contrôle du VIH/SIDA of 2005*.

¹²⁰ Illinois adopted mandatory premarital HIV testing from 1988 to 1989, during which time the number of marriages performed in Illinois dropped by 14 percent and there was a marked increase in marriages performed in neighbouring states. Louisiana also adopted mandatory premarital HIV testing in 1988 but repealed the legislation after seven months: B. Turnock and C. Kelly, “Mandatory premarital testing for human immunodeficiency virus, the Illinois experience,” *Journal of the American Medical Association* 261 (1989): 3415–3418.

¹²¹ I. Luginaah et al, “From mandatory to voluntary testing: balancing human rights, religious and cultural values, and HIV/AIDS prevention in Ghana,” *Social Science & Medicine* 61 (2005): 1689–1700.

marriage; and the possibility of compromising the confidentiality of persons undergoing the HIV test (given the public nature of the results).

Mandatory premarital HIV testing violates individuals' rights to privacy and to marry and found a family; reinforces discrimination against, and stigmatization of, people living with HIV; and is ultimately counterproductive to the aims of HIV prevention.¹²² The *International Guidelines on HIV/AIDS and Human Rights* also affirm that the right to marry is infringed by mandatory premarital testing for HIV/AIDS or the requirement of "AIDS-free certificates."¹²³

The practice of virginity testing has undergone a recent revival in some southern African countries, most notably in South Africa, by traditional leaders concerned with the HIV epidemic in their communities.¹²⁴ Historically, virginity testing was practiced to ascertain the sexual purity of unmarried girls, with the result often dictating the amount of bride price paid or even being determinative of marriage. The recent revival in testing arises from the belief that testing will encourage abstinence and curtail HIV transmission among young people.¹²⁵

While there have yet to be studies conducted on the overall impact of virginity testing on HIV transmission, some commentators have argued that virginity testing does not reduce girls' vulnerability to HIV because they opt to engage in oral or anal sex instead of vaginal intercourse in order to "preserve" their virginity.¹²⁶ Virginity testing is also a violation of girls' right to privacy and bodily integrity and is a form of gender discrimination.¹²⁷ Although the accuracy of the tests itself is questionable, girls who fail

¹²² See Center for the Right to Health, *HIV/AIDS and Human Rights in Nigeria*, 2003, p. 15; UNAIDS and OHCHR, *Handbook on HIV and Human Rights for National Human Rights Institutions*, 2007, p. 8, which refers to art. 23 of the ICCPR, recognizing the right of men and women to marry and found a family, and affirms that "[m]andatory premarital testing as a precondition for marriage ... would violate these (and other) rights"; HRW, *AIDS Conference: Drive for HIV Testing Must Respect Rights*, 10 August 2006, online via: www.hrw.org.

¹²³ UNAIDS and OHCHR, *International Guidelines on HIV/AIDS and Human Rights* (supra), p. 89.

¹²⁴ Contemporary virginity testing may take place in settings ranging from the family home to community centres to large public sports stadiums, and may be carried out by family members of the intended husband or professional virginity "testers." When carrying out testing, virginity testers do not apply a standard medically accepted test for virginity, but rather assess physical markers of virginity derived from folk constructs of health and illness. For example, some testers determine girls' virginity by the presence of a "white lacy barrier" in the vaginal canal: E. George, "Like a virgin? Virginity testing as HIV/AIDS prevention: human rights universalism and cultural relativism revisited," unpublished at the time of writing, 2007, p. 10.

¹²⁵ South Africa Commission for Gender Equality and the South Africa Human Rights Commission, *Report on Consultative Conference on Virginity Testing*, 12–14 June 2000. See also, R. Mukumbira, "Virginity and HIV tests before marriage," *NEWSfromAFRICA*, March 2004.

¹²⁶ See K. Kinoti, *Virginity Testing and the War Against AIDS*, Association for Women's Rights in Development, 2005, online: www.awid.org/go.php?stid=1515; C. Bower, *Virginity Testing — In Whose Interest? Resources Aimed at the Prevention of Child Abuse and Neglect*, 2005, online via: www.rapcan.org.za.

¹²⁷ *Ibid.*

the test may experience stigma, violence, and psychological and emotional trauma, and their perceived marital value may fall.¹²⁸ The U.N. Committee on the Rights of the Child has condemned the practice of virginity testing and has proclaimed that virginity testing “threatens the health, affects the self-esteem, and violates the privacy of girls.”¹²⁹ The South African Commission on Gender Equality similarly concluded that virginity testing undermines principles of equality, freedom and human dignity and declared that it did not support the practice.¹³⁰

NOTE:

Marriages that contravene Articles 4–12 are either void or voidable. The following provisions specify which marriages are void and which marriages are voidable.

Article 13. Void marriage

- (1) A marriage that takes place after the commencement of this Act is void only in any of the following cases — i.e., where:

(Two options are provided below for Subsection (a). One or the other should be selected, but not both. The first option should be selected if Article 9A is being used. The second option should be selected if Article 9B is being used.)

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person;¹³¹
OR
 (a) either of the parties is, at the time of the marriage, in another marriage which is not polygamous or potentially polygamous;
- (b) either of the parties is, at the time of the marriage, below the age of 16; or
 (c) either of the parties did not consent to the marriage, which includes marriage by betrothal or by widow inheritance, or the consent of either party to the marriage was vitiated as set out in Article 5(3) of this Act.

- (2) A void marriage is invalid from the date of the marriage ceremony.

¹²⁸ South Africa Commission for Gender Equality and the South Africa Human Rights Commission, *Report on Consultative Conference on Virginity Testing* (supra).

¹²⁹ The Committee further recommended that South Africa introduce sensitization and awareness-raising programs for practitioners and the general public to change traditional attitudes and to discourage its practice: U.N. Committee on the Rights of the Child, “Concluding Observations: South Africa,” 23rd Session, 28 January 2000, U.N. Doc. CRC/C/15/Add.122, para. 33.

¹³⁰ South Africa Commission for Gender Equality and the South Africa Human Rights Commission, *Report on Consultative Conference on Virginity Testing* (supra), p. 19.

¹³¹ This article is derived from s. 3 of Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990*.

- (3) Nothing in this Article shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity for a void marriage has not been granted.
- (4) The fact that the marriage is void operates without prejudice to any property and maintenance entitlements that the parties to the marriage might have under the [relevant domestic partnership legislation], and does not affect any maintenance and inheritance entitlements minor or dependent children of the relationship might have under the [relevant divorce and inheritance legislation].

Article 14. Voidable marriage

- (1) A marriage that takes place after the commencement of this Act shall be voidable on application by the parties to the marriage only in the following cases — i.e., where:
 - (a) marriage payment was paid as a requirement of the marriage;
 - (b) both parties were not personally present at the time and place of the solemnization, notwithstanding exceptions granted under Article 6(2);
 - (c) either of the parties was, at the time of the marriage, older than 16 but below the age of 18;
 - (d) premarital HIV testing or virginity testing was a requirement of the marriage;

(Optional additional sub-sections where polygamous marriage is permitted:)

(Two options are provided below for Subsection (e). One or the other should be selected, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

- (e) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and affirmation of spousal consent was not obtained; or
OR
 - (e) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and court approval was not obtained; or
 - (f) either of the parties is lawfully married to some other person in a polygamous or potentially polygamous marriage and a court has not approved a written contract that will regulate the future marital property regime of the current and prospective marriage.
- (2) A decree of nullity under this Act of a voidable marriage shall dissolve the marriage from and including the date on which the decree becomes absolute.¹³²
 - (3) Where both a petition for a decree of nullity of a void marriage and a petition for a decree of nullity of a voidable marriage are before the [relevant court], the [relevant

¹³² This article is derived from s. 38 of Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990*.

court] shall not make a decree of nullity of a voidable marriage unless it has dismissed the petition for a decree of nullity of a void marriage.¹³³

- (4) The fact that the marriage is voidable operates without prejudice to any property and maintenance entitlements that the parties to the marriage might have under the [relevant domestic partnership legislation], and does not affect any maintenance and inheritance entitlements the minor or dependent children of the relationship might have under the [relevant divorce and inheritance legislation].

Commentary: Articles 13 and 14

The remedy of nullity is concerned with whether a marriage legally exists and not whether a marriage should be dissolved due to its breakdown. There is a clear legal difference between a valid marriage which ends and a marriage which was flawed from its inception. Therefore, a marriage can be nullified either because it is so flawed from its inception that it never legally existed, which is termed a “void” marriage, or because it contained a deficiency or deficiencies from its inception that permits one or both parties to request that it be declared void from that date forward, which is termed a “voidable” marriage. Any interested person may take proceedings to declare a marriage void and, legally, no decree of nullity is necessary because the marriage does not legally exist.¹³⁴ On the other hand, an application must be made to the court to nullify a voidable marriage. Until such time as a court determines that a marriage is in fact voidable and issues a decree of nullity, it is considered a legally valid marriage. In effect, there is no practical difference between a marriage that complies with all the legal requirements and a voidable marriage that no one ever challenges.

The grounds for void marriages tend to largely reflect public policy on marriage, including matters that concern the parties themselves but have wider ramifications for public policy and the social understanding of marriage.¹³⁵ It is important to note, therefore, that the social context plays an important role in delineating whether a marriage should be deemed void or voidable. Article 13 renders a marriage void if any of the three essential conditions of marriage are contravened — i.e., where a spouse is under the age of 16; where the marriage is polygamous, or where the polygamy is unauthorized; or where either of the parties did not consent to the marriage.

¹³³ This article is derived from s. 29 of Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990*.

¹³⁴ A summary of void and voidable marriages can be found in S. Cretney, J. Masson and R. Bailey-Harris, *Principles of Family Law* (London: Sweet & Maxwell, 2003); H. Hahlo, *Nullity of Marriage in Canada* (Toronto: Butterworths, 1979).

¹³⁵ This is exemplified by the changing minimum age of marriage. For example, in England and Canada, the minimum age was determined initially by ecclesiastical principles, with marriage conducted under that age as voidable. As the social context has changed and public policy has discouraged child marriages, the focus has changed to one of promoting stability of marriage, leading to increased minimum age and the voiding of child marriages: Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 10: Nullity of Marriage*, 2003, p. 3; S. Cretney, J. Masson and R. Bailey-Harris, *Principles of Family Law*, pp. 46–47.

Where either of the parties to the marriage is under the age of 16 or did not consent to the marriage, the marriage is rendered void (under Article 13) because of the numerous health and human rights concerns associated with child marriage and forced marriage (see discussion above).¹³⁶ However, in Article 14, individuals who married under the age of 18 but over the age of 16 are provided with the option to declare the marriage voidable, so the risks of child marriage may be weighed against an older youth's desire to remain married. With respect to polygamy, it may be most appropriate to render a polygamous marriage void in a country where polygamy is not widespread and is prohibited, in order to send a strong message that polygamy is not socially acceptable.¹³⁷ Where polygamy is common, if a polygamous marriage were to be deemed void from its commencement, women in such relationships could be placed at greater disadvantage, with few legal rights other than those attached to domestic partnerships. In this context, it may be preferable for a potentially polygamous marriage, if conducted without the affirmation of spousal consent or court approval, to be voidable on the application of a spouse.

In order to discourage marriages which violate social norms or the human rights of intending spouses (but for which there is less consensus or evidence of the associated harms), contravention of the remaining essential conditions of marriage render a marriage voidable under Article 14. Accordingly, the parties to the marriage can choose whether to apply for a decree of nullity and have the marriage nullified from that point forward.¹³⁸ This provides a degree of choice: whether to apply for a decree of nullity to avoid the social stigma of divorce, or to apply for divorce, which offers greater access to marital property and spousal support.

Marriages which otherwise satisfy the essential conditions of marriage should not be made void on purely procedural or administrative grounds, such as non-registration or a marriage performed by an unofficial marriage officiator. Especially in a context where, for example, marriage officiators are poorly regulated or the registration system may not be fully accessible to all, voiding marriages on purely procedural grounds could put women's rights at further risk.¹³⁹ Significantly, there is (deliberately) nothing in the language of Articles 13 and 14 that states that a spouse's HIV-positive status is a ground for voiding a marriage. Voiding a marriage on the ground of a spouse's HIV-positive status would reinforce stigmatization and discrimination against persons living with HIV. Further, legislation that voided a marriage because of a spouse's HIV-positive status

¹³⁶ Similarly, in Burkina Faso, a marriage that is entered into without the consent of one of the spouses shall be declared null and void: art. 281 of Burkina Faso, *Individual and Family Code of 1990*.

¹³⁷ Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 10* (supra), pp. 8–9.

¹³⁸ Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 10* (supra), pp. 2–3. In a number of countries, the annulment of a voidable marriage does not operate retrospectively, such that the marriage is treated as if it had existed up to the point at which the decree of nullity is granted. For example, the annulment of a voidable marriage does not operate retrospectively in England, Ireland and Nigeria: H. Hahlo, *Nullity of Marriage in Canada* (supra), p. 5; Nigeria, *Matrimonial Causes Act, Chapter 220, of 1990*.

¹³⁹ See, for example, the commentary for Articles 19–21 in this module.

would leave vulnerable parties without the legal protections of marriage and might inhibit individuals from voluntarily seeking HIV testing.

C. Formalities of Marriage

NOTE:

The following provisions prescribe the formalities for civil, religious and customary marriages and set out the regulation of marriage officiators to promote compliance with the essential conditions of marriage.

Article 15. Civil marriage

- (1) A marriage officiator for civil marriages is a person designated by the [relevant state authority] to perform civil marriages.
- (2) Prior to the marriage, the civil marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.
- (3) A civil marriage shall be effected by a declaration by the intending spouses, before a civil marriage officiator and two witnesses, that they consent to be married and that the marriage is in accordance with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

Article 16. Religious Marriage

- (1) A marriage officiator for religious marriages is a person designated by the [relevant religious/state authority] to perform religious marriages.
- (2) Prior to the marriage, the religious marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.
- (3) A religious marriage shall be performed in the presence of a religious marriage officiator and the formalities for a religious marriage shall be prescribed by the religion concerned insofar as those formalities comply with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

(Optional section where polygamous marriage is permitted:)

- (4) A religious marriage officiator presiding over a polygamous marriage is responsible for verifying that:
 - (a) the marriage is polygamous or potentially polygamous; and

(Two options for Subsection (b) are shown below. One or the other should be used, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

(b) affirmation of spousal consent for the subsequent marriage has been obtained

OR

(b) affirmation of court approval for the subsequent marriage has been obtained

as set out in Article 10.

Article 17. Customary Marriage

(1) A marriage officiator for customary marriages is a person designated by the [relevant customary/state authority¹⁴⁰] to perform customary marriages.

(2) Prior to the marriage, the customary marriage officiator shall be responsible for informing the intending spouses of the different marital property regimes available.

(3) A customary marriage shall be performed in the presence of a customary marriage officiator and the formalities for a customary marriage shall be prescribed by the custom of the community concerned insofar as those formalities comply with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

(Optional section where polygamous marriage is permitted:)

(4) A customary marriage officiator presiding over a polygamous marriage is responsible for verifying that:

(a) the marriage is polygamous or potentially polygamous; and

(Two options for Subsection (b) are shown below. One or the other should be used, but not both. The first option should be selected if Article 10A is being used. The second option should be selected if Article 10B is being used.)

(b) affirmation of spousal consent for the subsequent marriage has been obtained

OR

(b) affirmation of court approval for the subsequent marriage has been obtained

as set out in Article 10.

¹⁴⁰ S. 5 of Namibia, *Traditional Authorities Act of 2000* authorizes members of a “traditional community” to designate the chief or head of the traditional community, subject to the approval of the minister responsible for Regional and Local Government and the recognition of the President. S. 4 of South Africa, *Traditional Courts Bill of 2008* permits the Minister to consult with the Premier of the province in question or with the President, to designate a “senior traditional leader” or a “king or queen” as “presiding officer of a traditional court,” in respect of which such senior traditional leader or such king or queen has jurisdiction.

Article 18. Marriage officiators

- (1) All marriage officiators designated in terms of Articles 15–17 must, as soon as practicable after they have been so designated, but within a period of at least 12 months after such designation, attend a training course prescribed by the [relevant state authority] which shall educate marriage officiators regarding the provisions of this Act, with an emphasis on Articles 4–12, as well as regarding the different marital property regimes available under the [relevant marital property legislation].
- (2) The [relevant state authority] may suspend or revoke any designation made under Articles 15–17 if the designated marriage officiator fails to attend the prescribed training course contemplated in Section (1) within 12 months without reasonable excuse.¹⁴¹
- (3) A marriage officiator who performs a marriage and:
 - (a) knew or had reason to know that either of the parties to the marriage was under the age of 18 at the time of marriage;
 - (b) knew or had reason to know that either of the parties to the marriage did not provide their free and full consent to the marriage, including by reason of betrothal or widow inheritance;

(Three options for Subsection (c) are shown below. Only one of the three should be used. The first option should be selected if Article 9A is being used. The second option should be selected if Articles 9B and 10A are being used. The third option should be selected if Articles 9B and 10B are being used.)

- (c) knew or had reason to know that either of the parties to the marriage was married to a third party at the time of marriage;

OR
- (c) knew or had reason to know that at the time of marriage the marriage was not polygamous or potentially polygamous, or that the marriage was polygamous or potentially polygamous but either of the parties to the marriage did not affirm spousal consent prior to the marriage;

OR
- (c) knew or had reason to know that at the time of marriage the marriage was not polygamous or potentially polygamous, or the marriage was polygamous or potentially polygamous but either of the parties to the marriage did not obtain court approval prior to the marriage;
- (d) requires marriage payment as a condition of performing the marriage; or
- (e) requires a premarital HIV or virginity test as a condition of performing the marriage;

shall have his or her designation to perform marriages revoked.

¹⁴¹ Art. 24(1) and (2) are derived from ss. 4(5) and 4(6) of South Africa, *Traditional Courts Bill of 2008*.

- (4) The [relevant state authority] must establish and keep a prescribed register of all marriage officiators designated in terms of Articles 15–17, specifying those who have completed the prescribed training course contemplated in Section (1) and those whose designation has been suspended or revoked in terms of Sections (2) and (3).¹⁴²
- (5) A person performing civil, religious or customary marriage who has not been designated by the [relevant authority] to perform said marriage commits an offence and is liable, on conviction, to a fine not exceeding [monetary amount].

(Optional additional section:)

- (6) A marriage performed in the presence of a marriage officiator who has not been designated by the [relevant authority] to perform marriages does not render the marriage void or voidable if it is otherwise in accordance with the essential conditions of marriage prescribed by Articles 4–12 of this Act.

Commentary: Articles 15–18

Marriage officiators play a crucial role in ensuring the essential conditions of marriage have been met in the marriages over which they preside. To promote compliance with these conditions, Articles 15–18 require all marriage officiators to be designated by the relevant state, religious or customary authority and educated about the marriage law so they are well-equipped to identify violations of the essential conditions of marriage. Educating marriage officiators about the different marital property regimes allows them to explain and respond to questions about the regimes available to couples, thus enabling prospective spouses to make more informed choices about the material consequences of their relationship.

Regulation of marriage officiators also enables the state to revoke the authority of a marriage officiator to perform marriages where he or she knowingly participates in a violation of the essential conditions of marriage. In Article 18, an optional additional section is provided which stipulates that marriages performed by a marriage officiator who has not been designated to perform marriages should not be rendered void or voidable if it is otherwise in accordance with the essential conditions of marriage. This option may be appropriate where the regulation of marriage officiators (and in particular, customary marriage officiators) is fairly new, the infrastructure for regulation is still being developed, or designated marriage officiators may not be fully accessible to all.

NOTE:

All marriages, whether civil, customary or religious, should be registered in order to ensure that marital status is certain and easy to establish. The following provisions set out a process for registration.

¹⁴² Section 4 is adapted from Sections 4(7) and 4(8) of South Africa, *Traditional Courts Bill of 2008*.

Article 19. Duties of relevant state authority to create and maintain registration infrastructure

- (1) The [relevant state authority] shall appoint a central Registrar General.
- (2) The Registrar General shall establish and make public the information and supporting documentation necessary to register a valid marriage.
- (3) The country shall be sub-divided into marriage districts to ensure that registration can be carried out locally.
- (4) These districts should coincide with existing administrative districts to the greatest degree possible.
- (5) A district registrar shall be appointed for each marriage district, who shall be responsible for appointing local registering officers in his or her respective marriage district.
- (6) District registrars shall ensure that an official record of marriage registrations is accessible for viewing at reasonable hours.
- (7) The district registrar or local registering officer shall be responsible for issuing to spouses within [number] days (*option if Article 20A is being used*) **OR** immediately (*option if Article 20B is being used*) after registration a certificate of registration bearing the identity of the spouses, the date of the marriage and the marital property regime elected.

(Optional additional section:)

- (8) The [relevant state authority] shall establish mobile registration units to be deployed in rural areas to record new marriages as well as record late and delayed registrations.¹⁴³

(Optional additional section where polygamy is not prohibited:)

- (9) The Registrar General shall be responsible for maintaining a record of potentially polygamous marriages comprised of individuals who have completed and submitted a prescribed consent form indicating their free and full consent to a subsequent marriage on the part of either spouse.

¹⁴³ This section is derived from s. 13(a) of the proposed *Age of Marriage Amendment Act of 2005* featured in T. Ezer et al, “Child marriage and guardianship in Tanzania” (supra), p. 428.

Article 20. Registering a marriage

[Two options for Article 20 are provided below — 20A and 20B. One or the other should be selected, but not both.]

Option 1: Article 20A. Duty of officiator to register marriage

- (1) When a marriage is contracted by a designated marriage officiator, it shall be the duty of that marriage officiator to register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer.
- (2) When a marriage has been contracted before the commencement of this Act, and is not registered in terms of any other law, it shall be the duty of both spouses to apply for registration, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer within a period of [number] months after that commencement.
- (3) The district registrar or the local registering officer must, if satisfied that the spouses contracted a valid marriage, register the marriage and issue to the spouses a certificate of registration bearing the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, within [number] days after registration.
- (4) A certificate of registration of a valid marriage issued under this section or any other law providing for the registration of marriages constitutes proof of the existence of the marriage and of the particulars contained in the certificate.¹⁴⁴
- (5) Failure of the marriage officiator to register the marriage with the district registrar or the local registering officer will result in a fine not exceeding [monetary amount].

(Optional additional section:)

- (6) When a marriage is contracted according to customary law and there is no customary marriage officiator present, it shall be the duty of both spouses to register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, with the district registrar or the local registering officer within 30 days after the marriage.¹⁴⁵

¹⁴⁴ The wording of this section is derived from s. 4 of South Africa, *Recognition of Customary Marriages Act of 1998*.

¹⁴⁵ This section is derived from Tanzania, *Law of Marriage Act of 1971*, s. 43.

Option 2: Article 20B. Duty of spouses to register marriage

- (1) Both spouses have the duty to ensure that their marriage is registered with the district registrar or the local registering officer.
- (2) Either spouse may apply for the registration of his or her marriage and must furnish the district registrar or the local registering officer with the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted.
- (3) Any marriage contracted before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of [number] months after that commencement.
- (4) Any marriage contracted after the commencement of this Act must be registered within a period of [number] days after the conclusion of the marriage or within such longer period as the [relevant state authority] may from time to time prescribe.
- (5) The district registrar or the local registering officer must, if satisfied that the spouses contracted a valid marriage, register the marriage, indicating the identity of the spouses, the date of the marriage and the marital property regime elected or antenuptial agreement contracted, and immediately issue to the spouses a certificate of registration bearing the prescribed particulars.
- (6) A certificate of registration of a valid marriage issued under this section or any other law providing for the registration of marriages constitutes proof of the existence of the marriage and of the particulars contained in the certificate.¹⁴⁶

Article 21. Consequences of non-registration

- (1) Failure to register a marriage does not affect the validity of that marriage.¹⁴⁷
- (2) If for any reason a marriage is not registered, any person who satisfies the [relevant court] that he or she has a sufficient interest in the matter may apply to the [relevant court] in the prescribed manner to enquire into the existence of the marriage.
- (3) The [relevant court] may, at any time upon application made to that court and upon investigation instituted by that court, order the registration of a marriage by the district registrar, upon being satisfied that the essential conditions of marriage have been met and that a valid marriage exists or existed.

¹⁴⁶ The wording of this section is derived from s. 4 of South Africa, *Recognition of Customary Marriages Act of 1998*.

¹⁴⁷ See South Africa, *Recognition of Customary Marriages Act of 1998*.

Commentary: Articles 19–21

Unregistered marriages may not be recognized as marriages for legal purposes and may render it difficult for people who are married to claim property or maintenance rights connected to marriage. This is of particular importance for customary marriages where the validity of a spousal relationship may be questioned because of the different practices and traditions that may exist under customary laws.¹⁴⁸ Registration of marriage provides a marriage certificate, which can be used as evidence of a union. Registration of marriages also provides a means to oversee the fulfillment of the essential conditions.

Research has indicated that women may wish to register their marriages so that they can secure full legal protection within marriage, and that women who are able to register their marriages generally feel more secure and empowered.¹⁴⁹ However, registration of customary marriages has posed particular difficulties in some jurisdictions, a fact reflected in low compliance with registration requirements. Because customary marriages in many African countries have only recently gained formal recognition, the registration regimes were tailored mostly to registration of civil or religious marriages, and there has been little to no registration of customary marriages to date.¹⁵⁰ As has been noted by the Law Reform Commission of Tanzania, “Research has revealed that most of the problems that are blamed upon the institution of customary law marriages are in fact caused by ineffective control of the practice stemming from non-registration and poor administration of these marriages.”¹⁵¹

The U.N. Human Rights Committee has expressed concern about unregistered marriages, noting “the deprivation of rights that women and children experience as a consequence, in particular with regard to inheritance and land ownership.” Accordingly, the Committee recommended “effective measures to encourage registration of customary marriages and to grant the spouses and children of registered customary marriages the

¹⁴⁸ For example, the wife of an unregistered customary marriage may have difficulty accessing property on the death of her husband, especially in communities where customary inheritance laws are discriminatory towards women: South African Law Reform Commission, *Project 90* (supra), para. 4.5.1; LAC, *Proposals for Law Reform* (supra), paras. 9.21–9.23. While some judges in Zimbabwe have allowed individuals whose marriages are not registered to benefit from each other’s estates upon separation or death through the notion of unjust enrichment or “tacit universal partnership,” there is a lack of judicial consensus on the appropriateness of either of those two principles as a basis for effecting a division of assets between parties to an unregistered customary union: Law Development Commission of Zimbabwe, *Division of Property on Dissolution of Unregistered Customary Unions*, 2002.

¹⁴⁹ South African Law Reform Commission, *Project 90* (supra), para. 4.5.9; Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, 2004, p. 120.

¹⁵⁰ See South African Law Reform Commission, *Project 90* (supra); LAC, *Proposals for Law Reform* (supra).

¹⁵¹ Law Reform Commission of Tanzania, *Re: Inquiry and Report on the Law of Marriage Act, 1971*, 1986, p. 17, online: www.lrc-tz.org/pdf/marriage.pdf.

same rights as those married under civil law.”¹⁵² As well, the CEDAW Committee has stated,

States Parties should ... require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy, and the protection of the rights of children.¹⁵³

There is no consensus on the best practice to ensure registration of marriages. Some countries require marriages to be registered by the spouses, others by the marriage officiator. Of the two options featured in Article 20, requiring the marriage officiator, rather than the spouses, to register marriages may ultimately be more protective of women, as it removes the onus of registration from the couple, who may be constrained by finances or geography from registering themselves. Research in South Africa has indicated that where spouses have the responsibility to register their marriage, men are often reluctant to do so due to insufficient incentives.¹⁵⁴

Placing the onus of registration on both spouses may circumvent the lack of control that women currently have over the process of registration. Nevertheless, creating a legal obligation on spouses to register their marriage may cause difficulties where there is insufficient infrastructure for registration. A commonly identified problem with registration is that the registering officer is too far removed from where marriages are normally contracted. Marriages contracted under customary law are often performed in remote locales that are not readily accessible to registration authorities.¹⁵⁵ If the obligation to register a marriage is placed on the parties, “these marriages more often than not become [a] secret affair, as far as the state authorities are concerned.”¹⁵⁶ This difficulty may be partially mitigated by the immediate issuing of a marriage certificate upon registration so couples need not return to the registration office to retrieve the certificate.

Although registration should be required by law, failure to register should not affect the validity of the union nor should other penalties be imposed on couples for non-registration.¹⁵⁷ Rendering unregistered unions void would deprive many existing

¹⁵² U.N. Human Rights Committee, “Concluding Observations: Namibia,” U.N. Doc. CCPR/CO/81/NAM, 81st Session, 30 July 2004, para. 9. The low compliance with registration regimes in sub-Saharan Africa also reflects the need for public education campaigns to disseminate both the requirements for registration and the location of local registering officers.

¹⁵³ CEDAW Committee, “General Recommendation No. 21” (supra), para. 39.

¹⁵⁴ Centre for Applied Legal Studies, University of the Witwatersrand, *Gender Research Project: Final Report on Gender, Citizenship and Governance Project*, 2002, p. 32.

¹⁵⁵ Law Reform Commission of Tanzania, *Re: Inquiry and Report* (supra), pp. 16–17.

¹⁵⁶ *Ibid.*, p.17.

¹⁵⁷ See COHRE, *Bringing Equality Home*, p. 63, discussing a 1991 amendment to Ghana’s *Customary Marriage and Divorce (Registration) Law of 1995*, making registration optional instead of mandatory in

marriages of their validity, as well as create undue hardship for individuals who do not know about the registration requirement or who are under pressure not to register their marriage. Widows and their children could be unfairly penalized in terms of not being able to access property, inheritance and other rights.¹⁵⁸ Registration of marriage, therefore, should be encouraged and required, but there should be no legal ramifications for failure to register. However, after the expiry of a specific time period for registration, registration of any marriage should be carried out through an application to a court, rather than through the district registrar. This is to ensure that the registrar is not burdened with the task of seeking the evidence required to determine the validity of marriages contracted considerably earlier.

D. Regulation of the Marriage Relationship

NOTE:

Marital powers are clear violations of women's rights to equality and non-discrimination. The following provisions abolish marital powers and guarantee the full legal capacity of women.

Article 22. Full legal capacity of women

A woman in any form of marriage has full legal status and capacity, including capacity to own and inherit property and to acquire assets and to dispose of them, to enter into contracts (including to obtain credit) and to litigate, in addition to any other rights she might have under civil, customary or religious law.¹⁵⁹

Optional (for countries that recognize marital powers): Article 23. Abolition of marital powers

- (1) The common law or statutory rule according to which a husband obtains marital powers over the person and property of his wife is repealed.

light of concerns about those who were unable to benefit from protections that depended on the registration of marriage.

¹⁵⁸ This is illustrated by the 1995 Zimbabwean case *Katiyo v. Standard Chartered Zimbabwe Pension Fund*, (1995 (1) ZLR 225 (HC), in which a widow was denied access to her deceased husband's pension fund because her customary marriage was never registered. See also, the case of *Singh v. Ramparsad* (KZN 564/2002) [2007] ZAKZHC 1 (22 January 2007) (South Africa, High Court), in which the defendant husband had refused, for the duration of his marriage to the plaintiff, to register the marriage and claimed he was not "legally" married to the defendant upon separation. The plaintiff sought an order declaring provisions of the South African marriage and divorce legislation unconstitutional, as they did not recognize unregistered religious marriages as legally valid. The Court held that the legislation was constitutional because it applied to all South African couples, it respected couples' right to marry in accordance with their own religious rituals, and the registration requirement was reasonable.

¹⁵⁹ This language is drawn from s. 6 of South Africa, *Recognition of Customary Marriages Act of 1998*.

- (2) Any marital powers which a husband has over the person and property of his wife prior to the date of coming into operation of this provision is hereby abolished.¹⁶⁰

Article 24. Equal status of spouses in management of the family

- (1) The spouses shall have equal rights in the management of the family under all forms of marriage, notwithstanding any custom to the contrary, including:
- (a) joint and equal parental authority over any minor or dependent children of the marriage; and
 - (b) joint and equal authority over the matrimonial home.¹⁶¹

Article 25. Duties to maintain spouse and children during marriage

- (1) Spouses have a reciprocal duty concerning maintenance of one another, and share the obligation to maintain their minor and dependent children.
- (2) For further clarity, the duty of the spouses to maintain their minor and dependent children is identical for children born in and out of marriage.
- (3) The determination of responsibility for maintenance during the marriage depends, *inter alia*, upon the capacity of the spouses and the needs of the family.
- (4) Non-monetary contributions, including contributions made by looking after the home, caring for the family or performing other domestic duties should also be taken into account when determining a spouse's contribution to the maintenance of one another and the family.
- (5) Upon failure of the responsible party to adequately maintain his or her spouse, an aggrieved spouse may apply to the [relevant court] for an order directing payment or providing direct payment from the responsible spouse's employment.

Commentary: Articles 22–25

In some countries, civil or customary laws support “marital powers,” whereby a husband gains legal control over his wife and any marital property. This practice entrenches the “repugnant notion that women should not be allowed to acquire and hold land and

¹⁶⁰ See also, s. 5 of Botswana, *Abolition of Marital Power Act of 2004*, which provides, “The effect of the abolition of marital power is to remove the restrictions which the marital power places on the legal capacity of a wife and abolishes the common law position of the husband as head of the family.”

¹⁶¹ This article is derived in part from Ethiopia, *Revised Family Code of 2000*, s. 54.

housing in their own right, on the grounds that they are helpless to administer it without their husbands.”¹⁶²

The U.N. Human Rights Committee has stated, “During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets.”¹⁶³ Marital powers violate married women’s rights to equality, non-discrimination and self-determination; their rights to own property, to the highest attainable standard of health, and to liberty and security of the person; and their rights to be free from degrading treatment, and from slavery and servitude.¹⁶⁴ Marital powers have also been found to violate an individual’s rights to human dignity, life, freedom of trade, occupation, profession and housing.¹⁶⁵ Where marital powers are exercised to prevent women from travelling, such as requiring adult women to obtain the consent of a third party prior to the issuance of a travel document, the U.N. Human Rights Committee has described marital powers as a restriction on “women’s right to freedom of movement.”¹⁶⁶

¹⁶² COHRE, *Bringing Equality Home* (supra), p. 46.

¹⁶³ U.N. Human Rights Committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” para. 8. The CEDAW Committee has also suggested marital powers are discriminatory, and recommended the amendment of a provision in Burundi’s *Code des Personnes et de la Famille* indicating that the man is the “head of the household”: CEDAW Committee, “Concluding Comments: Burundi,” 40th Session, CEDAW/C/BDI/CO/4, 8 April 2008, para. 12.

¹⁶⁴ In particular, marital powers violate art. 16 of the CEDAW, which requires states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. In *Moaki v. Moaki and Others* (CIV/APN/279/86) [1986] Lesotho High Court 117 (1 October 1986), marital powers were used to justify the male applicant’s right to determine where his wives could live; and in *Elizabeth Gumede (born Shanga) v. President of the Republic of South Africa and Others*, Case CCT 50/08 [2008] ZACC 23, 8 December 2008, the South African Constitutional Court held that the codified customary law of marriage in KwaZulu-Natal, which subjected a woman married under customary law to the marital power of her husband, was discriminatory on the ground of gender.

¹⁶⁵ See *Prior v. Battle and Others*, [1999] (2) SA 850, Case No. 0405/98, High Court, Transkei Division, South Africa, as described in Centre for Reproductive Rights and International Programme on Reproductive and Sexual Health Law, Faculty of Law, University of Toronto, *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts*, 2005, pp. 19–20.

¹⁶⁶ U.N. Human Rights Committee, “General Comment No. 28: Equality of Rights Between Men and Women (Article 3),” para. 16.