



**Convention on the Elimination
of All Forms of Discrimination
against Women**

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**Committee on the Elimination of Discrimination
against Women**

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**GENERAL RECOMMENDATION ON
ECONOMIC CONSEQUENCES OF MARRIAGE AND ITS DISSOLUTION**

CONCEPT NOTE

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INTRODUCTION

1. Inequality in the family is the most damaging of all forces in women's lives, underlying all other aspects of discrimination and disadvantage, and is sheltered by ideologies and cultures. Religious, customary, and state laws allow women to be pressured or forced into marriage too young and against their will, ending their education and starting their childbearing long before their bodies and minds are ready; provide wives with limited property rights or none at all during marriage and upon divorce or widowhood; and reinforce the privilege of husbands and fathers to control women's mobility, economic welfare and family decision-making.

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² I wish to acknowledge the input of Professor Marsha Freeman, Senior Fellow and Director, International Women's Rights Action Watch, into this note.

2. article 16 of the Convention on the Elimination of All Forms of Discrimination against Women provides for the elimination of discrimination against women at the inception of marriage, during marriage, and at its dissolution by divorce or death. In 1994, the Committee on the Elimination of Discrimination against Women adopted General Recommendation No. 21³, which elaborated upon many aspects of article 16 as well as its relationship to articles 9 and 15. As noted in General Recommendation No. 21, article 16 specifically refers to the economic dimensions of marriage and its dissolution.

3. The Beijing Platform for Action adopted in 1995 underscored the importance of law and policy reform to women's economic well-being, noting specifically that women must have "full and equal access to economic resources, including the right to inheritance and to ownership of land and other property . . ." ⁴ The Platform pointedly stated that governments must "review national laws, including customary laws and legal practices in the area of family . . . law" and "revoke any remaining laws that discriminate on the basis of sex and remove gender bias in the administration of justice." ⁵ The Millennium Development Goals, adopted in 2000, further confirm women's right to equality in sharing the benefits of economic development. ⁶ The CEDAW Committee's Concluding Observations now regularly include reference to States parties' commitments under the Beijing Platform for Action and the Millennium Development Goals and request information on states' efforts to live up to these commitments.

³ (Thirteenth session, 1994), U.N. Doc. A/49/38 at 1, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003). Hereinafter referred to as GR 21.

⁴ *Beijing Platform for Action*, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), para. 61 (Critical Area of Concern: Women and Poverty).

⁵ *Beijing Platform for Action*, para. 232(d) (Critical Area of Concern: Human Rights of Women).

⁶ *United Nations Millennium Declaration*, A/RES/55/2 (18 September 2000); see also The Millennium Project, Goal 3, <http://www.unmillenniumproject.org/goals/index.htm>.

4. Since 1994, the Committee has reviewed many States parties' second, third, and subsequent periodic reports and has noted the perpetuation of inequality in the family. Many states have implemented only incremental legal changes, if any, and fall short with respect to addressing discriminatory family laws, traditional or customary patterns of marriage and marital behavior that clearly disadvantage women, and the discriminatory attitudes of courts and other tribunals that deal with family issues. Laws relating to women's ownership and management of property, at all stages of marriage and at its dissolution, have changed very slowly. Some of the states with the greatest inequality have not addressed marital property and inheritance issues for decades. Others have addressed the issues only formally, without examination of the substantive equality issues related to women's unpaid contribution to marital property and family economic well-being—which are clearly stated in Convention article 16(h). And even positive legal changes can fail to have an impact on women's lives if information about the law is not adequately disseminated and because women frequently lack access to legal assistance in claiming their rights.

5. In view of global developments since 1994, including the increasing impact of the global market economy, the entry of growing numbers of women into the paid work force, increases in income inequality within states and between states despite overall economic growth, growth in divorce rates and in *de facto* family formation, and above all the persistence of women's poverty, the economic aspects of article 16 have become increasingly important.

6. As stated in the Universal Declaration of Human Rights, the family is the basic unit of society.⁷ It is a social and a legal construct, and to many, it is also a religious construct. But beyond that, it is an

⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), article 16(3).

economic construct. Family-market relations have long been the subject of study and research, and it is well established that family structures, gendered labor division within the family, and family laws affect women's economic well-being no less, and probably even more, than labour market structures and labor laws. It is also well established that the economic aspects of family formation and dissolution are not experienced on an equal basis by men and women in any country in the world. More precisely, women often do not equally enjoy their family's economic gains, and they usually bear a much higher cost upon breakdown of the family.

7. The economic consequences of divorce have been of growing concern to social scientists and policy makers. Research in industrialized countries has demonstrated that while men usually experience minimal income losses after divorce, most women experience a substantial decline in household income and an increased dependence on social welfare where it is available. Throughout the world, female-headed households are the most likely to be poor. Regardless of the vast range of family economic arrangements all women, whether in low-income or in high-income countries, share the experience of being worse off economically than men in family relationships and following dissolution of those relationships.

8. Notwithstanding the centrality of marriage and of family laws to women's lives and to their economic wellbeing, the subject has not generated as much attention and concern in the work of the Committee as one would have expected. While General Recommendation No. 21 drew a broad vision of egalitarian family law, reference to it in the Committee's work has been less than consistent. Moreover, General Recommendation No. 21 itself did not address the economic aspects of marriage and its dissolution comprehensively.

9. Various reasons can be suggested for this apparent relative neglect of family laws in general and of the economic aspects of family relations in particular. A partial explanation lies in the very prosaic fact that article 16 is the last in the substantive sections of the Convention, and is therefore the last to be addressed during the constructive dialogue process, when time frequently runs short and may be insufficient particularly in light of the article's length and its largely legal content. The general nature of the article 16 and General Recommendation No. 21 provisions, particularly as to the economic issues, may also contribute to the difficulty of ensuring adequate discussion. article 16(h) simply stipulates that States parties should ensure "on a basis of equality of men and women...[t]he same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable consideration." This provision must be read with reference to article 16(c) to apply comprehensively to all economic consequences of marriage, including dissolution through death or divorce. General Recommendation No. 21 makes this link, but it does so (in paragraphs 38-41) only by describing existing discriminatory legal norms and practices and calling for their eradication. It does not contain any substantive suggestions as to the content of appropriate provisions in this area.

10. An overview of the Committee's work through several sessions, from 2000 onwards, clearly demonstrates the relatively minimal discussion in this area, in the State Parties' reports, in the Committee's constructive dialogues, and as reflected in the Concluding Observations. For example, at its twenty-third session (June 2000), in which seven States parties reported, only two of the concluding observations (Cuba and Romania) mentioned issues pertaining to the economic aspects of marriage and

its dissolution.⁸ Indeed, among the reporting States in that session, only Cameroon had addressed any of these questions, reporting alarmingly discriminatory property laws,⁹ of which there was no specific mention in the Committee's Concluding Observations.

11. Given the fundamental nature of marriage and its intrinsic relationship to women's economic equality, and in light of the apparent need to deepen the States parties' and CEDAW's engagement in this matter, a General Recommendation on the economic consequences of marriage and its dissolution would be most useful to States parties and to the women who reside in them. This General Recommendation will serve as a guide for States parties in achieving an egalitarian legal regime under which the economic benefits of marriage and the costs and economic consequences of marital breakdown are equally borne by men and women. It will establish the norm for evaluating States parties' implementation of the CEDAW Convention with respect to economic equality in the family. It will be drafted with reference to General Recommendation No. 21, updating its content in light of the CEDAW Committee's reviews of State party compliance and other relevant developments since its adoption.

THE LEGAL FRAMEWORK

⁸ CEDAW, Concluding comments: Cuba, A/55/38, 23rd Session (2000) para. 268: "The Committee encourages the Government to monitor carefully the implementation of divorce by consent, and in particular any negative impact this option might have for women with regard to issues such as alimony payments, custody and maintenance of children and distribution of property."

Concluding comments: Romania, A/55/38, 23rd Session (2000), para. 319: "The Committee invites the Government to consider how women's rights, including with regard to alimony and child custody, can be protected following dissolution of domestic partnerships."

⁹ Concluding comments: Cameroon, A/55/38, 23rd Session, (2000), para. 32: "According to articles 1421 and 1428 of the Civil Code, women were not fully entitled to use, enjoy or sell their property, although those rights were stipulated in the Constitution. In this context, article 1421 granted the husband the right to administer communal property, thereby giving him the right to sell or mortgage the couple's property without the wife's consent. articles 108 and 215 of the Civil Code granted the husband the sole right to determine the family domicile, and article 361 of the Penal Code defined the crime of adultery in terms more favourable to men than women."

A. Family law regimes

12. Rights and responsibilities relating to property arrangements and other economic matters at the time of marriage, during marriage, and at its dissolution are governed by a multitude of laws, customs and practices. Some States have a single marriage and divorce law that applies to all persons regardless of their religious, ethnic, or other identity. But universal civil marriage does not necessarily result in economic equality between the spouses because the law may not provide for equal management of marital property, equal distribution upon divorce, and inheritance by widows. Even where the formal law provides nominally for equal rights to acquire and manage property, for equal distribution of property upon divorce, and for widows' inheritance rights, poor implementation of these laws still may produce an unequal economic result.¹⁰

13. Many States parties have multiple legal systems, in which marriage and divorce may be undertaken according to civil law, religious law, or ethnic or indigenous custom. The CEDAW Committee frequently has cited such multiple systems as inherently discriminatory.¹¹ Some States parties do not have a civil marriage law at all, requiring all individuals to marry according to an identity-based rite. These States also may not have civil divorce and inheritance laws, thereby leaving all marital property

¹⁰ CEDAW, Concluding Observations: Benin, CEDAW/C/BEN/CO/1-3(2005), paras. 19-22; Concluding Observations: Burkina Faso, CEDAW/C/BFA/CO/4-5 (2005), paras. 27-28.

¹¹ CEDAW, Concluding Observations: Republic of Congo, A/58/38 (2003), paras. 160-61; Concluding Observations: Lebanon, CEDAW/C/LBN/CO/3 (2008), paras. 18-19 (and referring to CEDAW/C/LBN/CO/2 (2005) on the same subject); Concluding Observations: Equatorial Guinea, A/58/38 (2003), para. 191; Concluding Observations: Malaysia, CEDAW/C/MYS/CO/2 (2006), paras. 13-14; Concluding Observations: Philippines, CEDAW/C/PHI/CO/6 (2006), paras. 11-12; Concluding Observations: Kenya, CEDAW/C/KEN/CO/6 (2007), paras. 43-44; Concluding Observations: Greece, CEDAW/C/GRC/CO/6 (2007), paras. 33-34; Concluding Observations: Niger, CEDAW/C/NER/CO/2 (2007), paras. 15-16; Concluding Observations: Canada, CEDAW/C/CAN/CO/7 (2008); Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6 (2008), [A/63/38] paras 146-147; Concluding Observations: Cameroon, CEDAW/C/CMR/CO/3 (2009), para. 15.

matters to be determined according to the law or custom of religious and ethnic communities. Many such laws and customs are unwritten, with knowledge limited to a few elders or other authorities, generally male. Moreover, implementation of these laws and customs is often delegated to or claimed by religious or customary tribunals, which usually are made up entirely of men. The CEDAW Committee has noted that such tribunals perpetuate discrimination.¹²

14. Some States parties recognize marriages and divorces undertaken according to custom or religious law without requiring that such marriages be licensed, registered, or otherwise sanctioned directly by the State. Even states that require registration may not have a comprehensive formal system providing for equal property rights during marriage and upon divorce or death of a spouse. The devastating consequences for women are discussed in sections D, E, F, and G below.

15. A few States parties have attempted to consolidate or harmonize their diverse marriage laws and, at the same time, address fundamental inequalities that women experience in marriage, including property issues. The CEDAW Committee has noted such efforts as positive, but States parties have an obligation to revisit their laws to eliminate all discriminatory practices that remain permissible under such systems.¹³

B. Constitutional issues

¹² CEDAW, Concluding Observations: Zambia, A/57/38 (2002), paras. 230-31; Concluding Observations: Malawi, CEDAW/C/MWI/CO/5 (2005), paras. 17-18; Concluding Observations: Pakistan, CEDAW/C/PAK/CO/3 (2007), paras. 24-25.

¹³ CEDAW, Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6 [A/63/38] (2008), paras 146-147.

16. A number of States parties' constitutions provide that personal status laws (relating to marriage, divorce, inheritance, guardianship, and adoption) are exempt from constitutional provisions prohibiting discrimination. This means that constitutional equal protection provisions and anti-discrimination provisions do not protect women from the discriminatory effects of marriage under ethnic custom or religious law. The CEDAW Committee has recommended that these States parties amend their constitutions to eliminate this exemption.¹⁴

17. Some States parties have adopted constitutions that include equal protection and non-discrimination provisions but have not adopted legislation to eliminate the discriminatory aspects of their family law regimes.¹⁵ Others have not amended their constitutions but have adopted laws that attempt to ameliorate (but do not eliminate) discrimination against women in the family.¹⁶ The Committee notes these inadequacies and inconsistencies as a fundamental issue of Convention implementation.

C. The economics of marriage formation

18. The Committee has consistently noted with concern the economic aspects of marriage formation that discriminate against women. General Comment No. 21 alludes to the arrangement of marriage "by payment or preferment" as a violation of women's right to freely choose a spouse.¹⁷ The Committee has expressed concern over any requirement of bridewealth or bride price (a payment of cattle, goods,

¹⁴ CEDAW, Concluding Observations: Gambia, CEDAW/C/GMB/CO/1-3 (2005), paras. 19-20; Concluding Observations: Zambia, A/57/38 (2002), paras. 230-231.

¹⁵ CEDAW, Concluding Observations: Uganda, A/57/38 (2002), paras. 129-130; Concluding Observations: South Africa, A/53/38 (1998), para. 115; Concluding Observations: India, CEDAW/C/IND/CO/3 (2007), paras. 10-11.

¹⁶ See, for example, Tanzania, Law of Marriage Act 1971 (available at http://www.law.yale.edu/rcw/rcw/jurisdictions/afe/unitedrepublicoftanzana/tanz_marriage_act.pdf), referred to in Concluding Observations: Tanzania, CEDAW/C/TZA/CO/6 (2008) [A/63/38].

¹⁷ GR 21, para. 16.

or other assets by a prospective husband's family to the family of the prospective wife) to complete a marriage, and recommends that the requirement be abolished.¹⁸ Similarly, the Committee is concerned over the requirement of dowry (payment of goods and/or cash by the bride's family to the husband's family) and recommends that it be abolished.¹⁹

D. Management of property during the marriage

19. The Committee has noted concern over inequality in spouses' rights to manage property in a number of States parties. Reviewing the report of Guinea, for example, it indicated concern about "prevailing discriminatory provisions in the Civil Code, such as . . . [*inter alia*] the notion that the man is head of the household."²⁰ Where a community property regime is the norm, nominally providing that half the marital property is theirs, women still may not have the right to manage the property.

20. In many legal systems women may retain the right to manage property that they own individually and may accumulate and manage additional separate property during the marriage. However, in some systems, property accumulated by virtue of women's economic activity is generally considered to belong to the marital household, and they do not have a recognized right to manage it. This practice renders them continuously dependent.

E. Economic consequences of divorce

¹⁸ CEDAW, Concluding Observations: Uganda, A/57/38 (2002), paras. 153-154.

¹⁹ CEDAW, Concluding Observations: India, CEDAW/C/IND/CO/3 (2007), para. 26 (alluding to the same concern expressed in prior reviews).

²⁰ CEDAW, Concluding Observations: Guinea, CEDAW/C/GIN/CO/6 (2007) para. 44; Concluding Observations: Cameroon, CEDAW/C/CMR/CO/3 (2009), para.46.

21. The core issue with respect to women's economic equality upon divorce is whether they share equally in property accumulated during the marriage.²¹ The specific issues vary considerably from state to state and include: whether women have legal capacity to own and manage property; the definition of marital property available for division between the spouses; recognition of non-financial contribution to marital property, including loss of economic opportunity and financial or non-financial investment in development of a husband's economic activity; and laws and customs relating to division of marital property. In addition, laws, customs, and practices relating to custody and financial support of minor children have an economic impact on women's post-divorce economic status.

22. The fundamental issue of women's legal capacity to own and manage property is articulated in CEDAW article 15 and is inseparable from equal rights in all aspects of marriage. General Recommendation No. 21 links these issues clearly.²² The Declaration on the Elimination of Discrimination against Women includes them in a single article,²³ which evolved into Convention articles 15 and 16. The Committee's Concluding Observations with respect to property rights are grounded in the premise that the Convention requires legal and *de facto* recognition of women's capacity to own and manage property.

23. In a number of States parties, individuals may marry according to ethnic or indigenous custom. Unless the State party has adopted legislation to modify it, ethnic or indigenous custom may not recognize women's capacity to own and manage property. Women in such marriages cannot claim an interest in most of the property accumulated during the marriage, regardless of their contribution. The

²¹ CEDAW, Concluding Observations: Lebanon, CEDAW/C/LBN/CO/2 (2008), paras. 44-45; Concluding Observations: India, CEDAW/C/IND/CO/3 (2007), paras. 54-55; Concluding Observations: Turkey, CEDAW/C/TUR/CC/4-5 (2005), paras. 25-26 (joint property ownership law should be retroactive).

²² GR 21, paras. 25, 26.

²³ *Declaration on the Elimination of Discrimination against Women*, A/RES/22/2263 (7 November 1967), article 6.

Committee has expressed concern over women's lack of property rights in customary marriage in these states.²⁴

24. The definition of marital property for purposes of division upon divorce is contested in many states. A comprehensive definition includes all property that is accumulated during the marriage, including real estate, household goods, savings and investments, interest in pensions or retirement accounts, businesses, and increase in value of non-marital property.²⁵ In states that comprehensively recognize women's legal capacity and the division of marital property upon divorce, the nature of each spouse's contribution to the marital estate may be an issue: property may be divided on the basis of title, which as a practical matter usually favors the husband; or based on the relative proportion of financial contribution, also usually favouring the husband. The Committee has recommended that these unequal results be remedied by recognizing non-financial contribution to marital property.²⁶

25. The Committee recently has also recommended that States parties recognize the contribution to marital property that consists of a wife's financial and household support of a husband's education, which is her investment in the development of his "human capital."²⁷ This is not to be measured in cash terms but as an equal contribution to the ultimate growth of the marital estate.

26. In States in which women's legal capacity is universally recognized, additional issues may arise as to defining and dividing marital property. Some civil and religious legal regimes provide that women

²⁴ CEDAW, Concluding Observations: Uganda, A/57/38 (2002), paras. 153-154; Concluding Observations: Samoa, A/60/38 (32d Sess.) (2005), paras. 60-61; Concluding Observations: Albania, A/58/38(Part I) (2003), paras. 68-69; Malawi, CEDAW/C/MWI/CO/5 (2005); Concluding Observations: Kenya, CEDAW/C/KEN/CO/6 (2007), paras. 41-42.

²⁵ Non-marital property is that owned individually by a spouse prior to the marriage or acquired as an individual inheritance or gift.

²⁶ CEDAW, Concluding Observations: Guyana, A/60/38 (2005), paras. 289-290.

²⁷ CEDAW, Concluding Observations: Slovenia, CEDAW/C/SVN/CO/4 (2008), paras. 33-34.

and men maintain separate property throughout the marriage, and in some states that do provide for marital or community property, spouses may elect marriage “out of community of property.” While such arrangements appear to be equal on their face, as a practical matter the wife may have less property than the husband upon entry into marriage and because of household duties, lack of education, systemic economic discrimination, and similar factors, is less likely to be in a position to add to her property during the marriage. In these systems, post-marital financial support may be limited by civil or religious law or custom. Women in these situations may well be left with no home, little or no property, and no continuing financial support. Similarly, laws providing for “equitable” division of property frequently do not define “equitable” and, with property division based on the discretion of judges or negotiation between spouses, result in wives receiving less than half the marital estate.

27. Where women’s legal capacity and marital property rights are still entirely or partly unrecognized, they are particularly vulnerable to eviction from the marital home. Women in customary marriages frequently live on property that belongs to the husband’s family or clan, without title residing in any individual.²⁸ Upon dissolution of the marriage, women traditionally were expected to return to the home of their parents (leaving their children with the father, to whose family they were considered to belong). This expectation has been disrupted by economic and cultural developments, including global acknowledgment of the pervasiveness of violence against women and the recognition that women should not be required to remain in violent marriages. However, some States parties, including those that have nominally recognized the realities of domestic violence, have failed to adopt marital property laws that provide for women to obtain a share of the accumulated marital property and to stay in their

²⁸ This applies to patrilineal custom and patrilocal marriage; matrilineal and matrilocal marriage customs result in a different situation.

homes. The Committee has noted with concern the failure of these States parties to protect women's rights upon dissolution of marriage and recommended that they adopt appropriate laws.²⁹

F. Inheritance

28. The Committee has consistently expressed concern over general inequality in inheritance rights, but it has not clearly addressed the issues specific to widows' inheritance as differentiated from inheritance by daughters.

29. Many of the Committee's Concluding Observations relating to the situation of widows refer to "widow inheritance," the custom of requiring a widow to marry her late husband's brother in order to remain on the family property and to be supported by the late husband's family or clan. The Committee recommends that such practices be eliminated as fundamentally discriminatory.³⁰ This implies also that a widow should have the right to inherit property accumulated during the marriage rather than being dependent on the husband's family or clan for support—and sometimes forced into a levirate marriage to sustain herself.

30. While rural families may live on land that belongs to a clan rather than to individuals, and no individual would be in a position to inherit this land, in some states the concept of clan ownership extends to exclude widow(s)' inheritance of *any* property. This can result in the late husband's family descending on the widow(s) and claiming all the property accumulated during the marriage, including such items as houses and businesses that are not on clan land, home furnishings, cars, and bank

²⁹ CEDAW, Concluding Observations: Kenya, CEDAW/C/KEN/CO/6 (2007), paras 17-18; Concluding Observations: Uganda, A/57/38, Exceptional session (2002), paras. 153-54.

³⁰ CEDAW, Concluding Observations: Ethiopia, A/59/38 (2004), paras. 251-252.

accounts. This is a fundamental violation of women's equal right to property upon the dissolution of marriage by death.

G. Issues specific to polygamy

31. While the Committee has clearly indicated, in General Recommendation No. 21 and in many of its Concluding Observations,³¹ that polygamy is a violation of the Convention and should be abolished, it also recognizes the necessity of protecting the well-being of the millions of women who are in polygamous marriages.

32. Some States parties have adopted laws that seek to discourage polygamy without formally abolishing it, by adding requirements that make it more difficult to sustain. The Committee has found these efforts wanting. For example, a law that requires a husband to obtain consent of prior wives in order to take a new wife, and provides for equal property division upon divorce from any wife, is insufficient.³² Similarly, with respect to a State party that has provided some property protection for widows in civil, religious, and customary marriages but has failed to address the inequalities inherent in its multiple marriage systems, the Committee has recommended that the State party "harmonize civil, religious, and customary law with article 16 of the Convention," including equal rights to property ownership and inheritance.³³

³¹ GR 21, para. 14; Concluding Observations: South Africa, A/53/38 (1998), para. 115; Concluding Observations: Cape Verde, CEDAW/C/CPV/CO/6 (2006), paras. 33-34; Concluding Observations: Ghana, CEDAW/C/GHA/CO/5 (2006), paras. 35-36; Concluding Observations: Kyrgyzstan, CEDAW/C/KGZ/CO/3 (2008), paras. 21-22; Concluding Observations: Tajikistan, CEDAW/C/TJK/CO/3 (2007), paras. 35-36.

³² CEDAW, Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6 [A/63/38] (2008), paras 146-147 (referring to Law of Marriage Act, 1971).

³³ CEDAW, Concluding Observations: Kenya, CEDAW/C/KEN/CO/6 (2007), paras. 41-44. (The Kenya Law of Succession Act, 1979, provides widows with a life estate in non-agricultural property, which ceases if they remarry).

CONCLUSION

33. Preparation of a more elaborate background paper is in process. The background paper will include additional examples and analysis and will make specific suggestions for a draft General Recommendation.
