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**Committee on the Elimination of Discrimination  
against Women**  
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## **Draft General Recommendation on article 16**

### **Economic consequences of marriage, family relations and their dissolution**

#### **Introduction**

1. As stated in the Universal Declaration of Human Rights, the family is the basic unit of society.<sup>1</sup> It is a social and legal construct, and to many, it is also a religious construct. But beyond that, it is an economic construct. Family-market research has established that family structures, gendered labour division within the family and family laws affect women's economic well-being no less, and probably even more, than labour market structures and labour 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 wealth and gains, and they usually bear a much higher cost than men upon breakdown of the family.

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. 21, 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

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<sup>1</sup> Resolution 217 A (III), article 16 (3).

to inheritance and to ownership of land and other property ...”<sup>2</sup> 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”.<sup>3</sup> The Millennium Development Goals, adopted in 2000, further confirm women’s right to equality in sharing the benefits of economic development.<sup>4</sup>

4. Inequality in the family, which is the most damaging of all forces in women’s lives, underlying all other aspects of discrimination and disadvantage faced by women, is often justified in the name of ideologies and cultures. An examination of States parties’ reports reveals that in many States, the rights and responsibilities of married partners are governed by common law principles, religious or customary laws and practices, or some combination of these laws and practices, and do not comply with the principles contained in the Convention.

5. These laws, including customary laws and practices, often discriminate against women and are incompatible with the Convention. Indeed, many of the States parties that maintain such legal arrangements [regimes] have entered reservations to article 16 or part of it. The Committee on the Elimination of Discrimination against Women has on several occasions noted with concern the extent of these reservations and expressed its opinion as to their invalidity, as being incompatible with the object and purpose of the Convention. It has consistently called upon these States parties to withdraw their reservations and ensure that their legal systems, whether civil, religious, customary, ethnic, or some combination of systems, conform to the Convention in general and to article 16 in particular.

6. Article 16 of the Convention provides for the elimination of discrimination against women at all three stages of marriage and family relations: on the formation of the relationship, during the relationship and upon its dissolution by divorce, separation or death. The economic inferiority and vulnerability of women permeate all three stages of family relationship, but they are manifested most gravely at the very end of this continuum, when the relationship ends.

7. The economic consequences of divorce, separation and dissolution by death have been of growing concern to social scientists and policymakers. Research in industrialized countries has found that while men usually experience minimal income losses after divorce and/or separation, 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 high-income countries, share the experience of being worse off economically than men in family relationships and following dissolution of those relationships.

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<sup>2</sup> *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annex II, para. 61 (critical area of concern: women and poverty).

<sup>3</sup> *Ibid.*, para. 232 (d) (critical area of concern: human rights of women).

<sup>4</sup> See resolution 55/2; see also The Millennium Project, goal 3, <http://www.unmillenniumproject.org/goals/index.htm>.

8. The economic aspects of article 16 have become increasingly important in view of global developments in recent years, including the impact of the global market economy and its crises, the entry of growing numbers of women into the paid workforce and their concentration in low paid jobs, 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.

9. Given the fundamental nature of marriage and de facto relationships and its intrinsic relationship to women's economic equality and to the well-being of children following dissolution of marriage and family relations, the Committee, by this General Recommendation, seeks to deepen its engagement with States parties on these issues. This General Recommendation will serve as a guide for States parties in achieving an egalitarian legal regime under which the economic benefits and costs of marriage and de facto relationships, and the economic consequences of dissolution are borne equally by men and women. It will establish the norm for evaluating implementation by States parties of the Convention with respect to economic equality in the family.

### **Constitutional issues**

10. It is a matter of concern that a number of States parties' constitutions still provide that personal status laws (relating to marriage, divorce, distribution of marital property, inheritance, guardianship, adoption and other such matters) are exempt from constitutional provisions prohibiting discrimination or reserve matters of personal status to the ethnic and religious communities within the State party. 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. Some States parties have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes, whether they are regulated by civil code, religious law, ethnic custom, or any combination of laws and practices. All these constitutional arrangements are discriminatory, in violation of articles 2, 5, 15 and 16 of the Convention.

11. States parties should guarantee equality between women and men in their constitutions and should eliminate any constitutional exemptions that would serve to protect or preserve discriminatory laws and practices as to family relations.

### **Multiple family law systems**

12. Some States parties have multiple legal systems, in which different personal status laws apply to individuals based on identity factors, such as ethnicity or religion. Some, but not all, such States also have a civil legal code that may apply in prescribed circumstances or by choice of the parties. In some States, however, individuals may have no choice as to the application of identity-based personal status laws.

13. Where there is no State religion, States generally allow the definition and application of religious and ethnic law and custom to be controlled by authorities

within the respective communities. Where a State religion exists, the definition and application of religious law may be controlled by State authority or by authorities supported by the State. Such authorities are generally, although not universally, male. The extent to which individuals are free to choose the form of their religious or customary observance varies, as does their freedom to challenge discrimination against women enshrined in their State's or community's laws and customs.

14. The Committee has consistently expressed concern that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory. Lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination.

15. States parties should adopt written personal status laws that provide for equality between spouses or partners irrespective of their religious or ethnic identity or community, in accordance with the Convention and the Committee's General Recommendations. The system of personal status laws should provide for individual choice as to the application of religious law, ethnic custom, or civil law at any stage of the relationship. Personal laws should embody the fundamental principle of equality between women and men, and be fully harmonized with the provisions of the Convention so as to eliminate all discrimination against women in all matters relating to marriage and family relations.

## **Various forms of family**

16. General Recommendation No. 21, paragraph 13, states that

the form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

17. Subsequent statements by other entities in the United Nations system confirm this understanding that "the concept of 'family' must be understood in a wide sense".<sup>5</sup> The Human Rights Committee, in its General Comment No. 28, acknowledges the "various forms of family":

In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these contexts (see General Comment No. 19, para. 2). Single-parent families frequently consist of a single woman caring for one or more children, and States parties should describe what measures of support are in place to enable her to discharge her parental functions on the basis of equality with a man in a similar position.<sup>6</sup>

18. In paragraph 14 of his report on the observance of the International Year of the Family (A/50/370), the Secretary-General confirms that "families assume diverse

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<sup>5</sup> General Comment No. 4 on article 11 (1) of the International Covenant on Economic, Social and Cultural Rights. See E/1992/23, annex III, para. 6.

<sup>6</sup> CCPR/C/21/Rev.1/Add.10, General Comment No. 28, para. 27.

forms and functions among and within countries”. Moreover, the United Nations Programme on the Family, exploring changes in family formation and functions in view of national and global economic and social developments, noted the diversity and the fluidity of definitions.

19. The normative core of the definition is the elimination of discrimination against women within the family, regardless of its size and membership. States parties are obligated to address the discriminatory aspects of all the various forms of family and family relationships. They must address patriarchal traditions and attitudes and open family law and policy to the same scrutiny that is given the “public” aspects of individual and community life.

20. States parties must eliminate discriminatory laws and practices that result in economic inequality between men and women in the various family configurations, including de facto relationships.

### **De facto relationships**

21. The Committee on the Elimination of Discrimination against Women determined, in its General Recommendation No. 21, that the elimination of discrimination against women in de facto relationships is included in State party obligations under article 16 (1). More recently, it stated clearly that States parties must “have consensual unions recognized as a source of rights”.<sup>7</sup>

22. Women enter de facto relationships for a variety of reasons, frequently related to poverty and lack of bargaining power. Some States provide by law for entering a partnership that confers the same rights on partners as marriage does on spouses. States may, alternatively, provide a legal framework for recognizing de facto relationships at a later point, such as upon death of a partner or dissolution of the relationship, when the existence of the relationship bears on the property rights of a surviving or a separating partner. Lack of such mechanisms results in extreme hardship for women who have contributed to maintaining a household and building other assets. In many States parties and in many areas of the law, women in de facto relationships enjoy no special rights so that when a cohabiting relationship ends, ownership of any assets will be decided by property law, with the courts having no discretion to reallocate assets, as occurs upon divorce. In 2007 the Committee recommended that States parties “ensure the same protection of women’s rights in marriage and in situations of cohabitation”.<sup>8</sup>

23. States parties should recognize de facto relationships based upon factors such as length of the relationship, mutual tangible and intangible contribution to the welfare of the family unit, whether the couple has children together and shared living arrangements. States should accord parties in recognized de facto relationships the same rights and responsibilities, including with regard, inter alia, to taxation, social welfare and pensions, as those in formal marriages.

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<sup>7</sup> See A/59/38, part two, para. 287.

<sup>8</sup> See CEDAW/C/EST/CO/4, para. 31.

## **Unregistered marriages**

24. Many States parties lack either a legal requirement of marriage registration or implementation of existing registration requirements. Registration of marriage protects the rights of spouses with regard to property issues upon dissolution by death or divorce. The Convention obligates States parties to establish a system of marriage registration and to provide for full implementation of registration requirements. However, individuals should not be penalized for failure to register where lack of education and infrastructure make registration difficult. States parties should provide for establishing proof of marriage by means other than registration where circumstances warrant.

25. States parties should establish a legal requirement of marriage registration. They must provide for implementation through education about the requirements and provide infrastructure to make registration accessible to all persons within its jurisdiction.

## **Polygamous marriages**

26. As stated by the Committee in paragraph 14 of its General Recommendation No. 21, “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”. Since the adoption of this General Recommendation, the Committee has consistently noted with concern the persistence of polygamous marriages in many States parties. In concluding observations the Committee has pointed to the grave ramifications of polygamy for women’s human rights and economic well-being and that of their children, and has consistently called for its abolition. States parties should take all legislative and policy measures needed to eliminate polygamous marriages.

27. With regard to women in existing polygamous unions, States parties should provide that they have equal right to manage property accumulated by the household and equal share in assets upon divorce and/or separation. Furthermore, States parties must ensure that a woman in a polygamous marriage also has the right to the family home or, if the home is shared, to other property that allows her to establish her own home upon divorce and/or separation from a polygamous marriage. States parties must ensure that upon death of a polygamous husband, his estate is shared among the wives and their respective children on a basis of equality.

## **Entry into marriage: the economic aspects of marriage formation**

28. The Committee has consistently noted with concern the economic aspects of marriage formation that discriminate against women. Paragraph 16 of General Recommendation No. 21 alludes to the arrangement of marriage “by payment or preferment” as a violation of women’s right to freely choose a spouse. The Committee has expressed concern about any requirement of bride wealth or bride price (a payment of cattle, goods, or other assets by a prospective husband’s family

to the family of the prospective wife) to complete marriage formalities and recommends that the requirement be abolished.<sup>9</sup> Similarly, the Committee is concerned about 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.<sup>10</sup>

29. Dowry, bride wealth, or other financial exchange should not be in any way required for marriage to be valid. Such agreements should not be recognized by the State party as enforceable.

### **Contracts: pre- and post-nuptial agreements**

30. In some systems marriage may be undertaken only by written contract. Where marriage is not required to be concluded by contract, some systems allow for contractual agreements concerning property to be undertaken prior to or during the marriage. Contracts undertaken in these contexts may be subject to grave inequality in bargaining power. Such inequality may result in agreements that leave women with less protection than they would have under the standard or default marriage provisions.

31. States parties should provide for the possibility of making private contractual arrangements with respect to the distribution of marital and other property following the dissolution of marriage or de facto relationships. They should ensure that the bargaining power of the spouses is equal and protect each spouse from abuse of power in making such contracts. These protective measures may include requiring that such agreements be written or subject to some other formal requirements and providing for retroactive invalidation or for financial or other remedies if the contract is found to be abusive.

### **Management and control during the relationship**

32. The Committee has noted concern about inequality in spouses' rights to manage property in a number of States parties. Some States parties maintain the premise, stated in formal law, that the man is head of the household, thus making him the sole economic agent of the household.<sup>11</sup>

33. 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. 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, property accumulated by virtue of women's economic activity may be considered to belong to the marital household and they do not have a recognized right to manage it. In some systems, this may be the case even with regard to women's own wages.

34. States parties should provide to both spouses equal access to the marital property and equal capacity to manage it. They should ensure that women's right to

<sup>9</sup> See A/57/38, part three, paras. 153-154.

<sup>10</sup> See CEDAW/C/IND/CO/3, para. 26 (alluding to the same concern expressed in prior reviews).

<sup>11</sup> See CEDAW/C/GIN/CO/6, para. 44, and CEDAW/C/CMR/CO/3, para. 46.

own, acquire, manage, administer and enjoy separate property is equal to that of men.

## **Financial consequences upon dissolution of relationships**

### **Grounds for divorce and financial consequences**

35. Some legal systems make a direct link between grounds for divorce and financial consequences of divorce. Fault-based divorce regimes may condition financial rights on existence or level of fault. They may be abused by husbands to eliminate any financial obligation towards their wives. In many legal systems, no financial support is awarded to wives against whom a fault-based divorce has been pronounced. Fault-based divorce regimes may include different standards of fault for wives and husbands, such as requiring proof of greater infidelity by a husband than by a wife as a basis for divorce. Fault-based economic frameworks frequently work to the detriment of the wife, who is usually the financially dependent spouse.

36. Other divorce regimes may condition divorce on compensating the husband or returning bride wealth, dowry, or other such payments to the husband's family, placing a serious economic obstacle in the way of divorce in even the most abusive situations. Apart from formal divorce provisions, women may be driven into giving up financial rights to expedite the divorce process, in particular where attorney fees and other aspects of divorce procedure are costly.

37. States parties should provide for separating the procedure dissolving the marriage relationship from the principles and procedures relating to the economic aspects of the dissolution. States should ensure, as a matter of public order, that no woman be forced to forego her economic rights to obtain a divorce.

## **Dissolution by separation and divorce**

38. Most laws, customs and practices relating to financial consequences of marriage dissolution or dissolution of a de facto relationship can be broadly classified into two categories: distribution of property and maintenance after divorce. Property distribution and post-divorce maintenance regimes may generally favour one spouse, regardless of whether laws appear neutral, because of gendered assumptions relating to the definition of marital property, valuation of different forms of contributions (whether direct or indirect), capacity to manage property, and family roles. In addition, laws, customs and practices relating to custody and financial support of minor children and to post-dissolution use of the family home and chattels clearly have an impact on women's post-divorce economic status.

39. The core issue with respect to women's economic equality upon divorce or dissolution of a de facto relationship is whether they share equally in property accumulated during the relationship.

40. In some States women may be barred from claiming property rights for lack of recognized capacity to own or manage property; or they may be barred from claiming a share in the property accumulated during the marriage because the property regime or system does not recognize such accumulation as marital property subject to division between the parties. In many States the economic arrangements made during marriage do not help women after separation, when they lose the



benefit of the main income earner but retain responsibility for a large proportion of child-related expenses. Furthermore, their interrupted job histories and childcare responsibilities do not equip them for regular paid employment. In some States, the employment of a separate marital property regime has resulted in women's inequality, leaving them in a much weaker position as compared to men.

41. The specific issues vary considerably from State to State and include:

- Whether women have legal capacity to own and manage property, and whether that capacity is recognized in fact
- The definition of marital property available for division between the spouses, which should include any form of deferred compensation, pension, or other income or income entitlement earned during the marriage that will be paid later in life
- The ownership of or use rights to the family home and other real property, in particular where families live and work on property held by an extended family or a community or ethnic group
- The ownership impact of land redistribution or resettlement schemes, which sometimes exclude women from sharing or holding title
- The nature of the formal property regimes such as community property, separate property, or hybrid regimes (where spouses may accumulate separately titled property during marriage, but the value accumulated during the marriage is subject to equal distribution), whether choice of regime is possible and whether women understand the nature of the property regimes and the ramifications of their choice
- Recognition of non-financial contribution to marital property, including maintaining the household and caring for children and other family members, loss of economic opportunity and financial or non-financial investment in development of a husband's economic activity, earning capacity and human capital.

42. The guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be equally borne by both parties. The division of roles and functions during the spouses' life together should not result in detrimental economic consequences for either party. To achieve this end any regime of property division may be adopted, as long as it provides for equal financial and economic outcome.

43. States parties are obligated to provide, upon divorce and/or separation, for equality between parties in the division of property accumulated during the marriage or de facto relationship, regardless of which party obtained it and regardless of financial contribution to its accumulation. States must also provide for proper valuation and equal division of other economic attributes of the relationship. States parties must recognize the value of indirect contributions with regard to the acquisition of matrimonial property, and their equalization with direct contributions for the purpose of the division of matrimonial property should be a core element of any marital property system. Furthermore, States parties should adopt a concept of marital property that should include any form of deferred compensation, pension, or other income or income entitlement earned during the marriage that will be paid

later in life, as well as some form of consideration of increased earning potential or professional qualifications acquired during the marriage.

## **Dissolution through death**

44. Laws and customs relating to inheritance can discriminate against women both as daughters (compared to the treatment of sons) and as wives who become widows (compared to the treatment of husbands that become widowers). Many States parties differentiate between women and men on both levels, so that women's share of a deceased parent's or spouse's property, or of property accumulated during a marriage, is significantly smaller than that of men in the same circumstances. Some legal systems justify this by providing daughters and wives with other means of economic security, such as through support payments from male siblings or from the deceased's estate. However, in reality these obligations are seldom enforced and women are left destitute.

45. Some States parties' laws or practices restrict the use of a will to override discriminatory laws and customs and increase women's share of inheritance. Some States parties still maintain customary forms of landholding, which may limit individual purchase or transfer and may only be subject to right of use. In many cases such land, while in reality used by both spouses for the benefit of the family, may belong to the community and upon the death of the husband, the wife or wives may be told to leave the land or may be required to marry a brother in order to remain on the land. Yet another deeply discriminatory phenomenon is "property dispossession" or "property grabbing", in which relatives of a deceased husband, claiming customary rights, dispossess a widow and her children from property accumulated during the marriage that is not held by the community, removing her from the family home and claiming all the chattels. They then ignore their concomitant customary responsibility to support the widow and children.

46. The connection between discriminatory marital property regimes and widows' economic insecurity cannot be overstressed. Denial of women's equal share of all property accumulated during marriage leaves her totally vulnerable economically upon death of her spouse.

47. States parties must adopt laws of intestate succession that comply with the principles of the Convention. Such laws must treat surviving females and males equally and must recognize the surviving spouse as primary heir. Succession, whether to use rights or to title, cannot be conditioned on forced marriage to a deceased spouse's sibling or any other person, or on the existence of minor children of the marriage.

48. Laws relating to the making of wills must provide equal rights to women and men. Total disinheritance of a spouse should be prohibited. Where land is held communally and is the basis of livelihood, States must provide that the surviving spouse be allowed to remain on the land during his or her lifetime without being subject to levirate or sororate marriage. "Property dispossession/grabbing" should be criminalized and offenders should be duly prosecuted.