



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

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## Committee on the Elimination of Discrimination against Women

### General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)

#### I. Background

1. As stated in the Universal Declaration of Human Rights, the family is the basic unit of society.<sup>a</sup> It is a social and legal construct and, in various countries, a religious construct. It also 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 than labour market structures and labour laws. Indeed, women often do not equally enjoy their family's economic wealth and gains, they usually bear the greater cost of the breakdown of the family than men and may be left destitute upon widowhood, especially if they have children and particularly where the State provides little or no economic safety net.

2. Inequality in the family underlies all other aspects of discrimination against women and is often justified in the name of ideology, tradition and culture. An examination of the reports of States parties reveals that in many States, the rights and responsibilities of married partners are governed by the principles of civil or common law, religious or customary laws and practices, or some combination of such laws and practices that discriminate against women and do not comply with the principles set out in the Convention.

3. Many of the States parties that maintain such legal arrangements have entered reservations to all or parts of articles 2 and 16. The Committee on the Elimination of Discrimination against Women has repeatedly noted with concern the extent of these reservations, which it considers invalid because they are 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, or ethnic or some combination thereof, conform to the Convention in general and to article 16 in particular.

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



4. The economic consequences for women of marriage, divorce, separation and death have been of growing concern to the Committee. Research conducted in some countries has found that while men usually experience smaller, if not minimal, income losses after divorce and/or separation, many women experience a substantial decline in household income and increased dependence on social welfare, where it is available. Throughout the world, female-headed households are the most likely to be poor. Their status is inevitably affected by global developments such as the market economy and its crises; women's increasing entry into the paid workforce and their concentration in low-paying jobs; persistent income inequality within and between States; growth in divorce rates and in de facto unions; the reform of social security systems or the launching of new ones; and, above all, the persistence of women's poverty. Despite women's contributions to the economic well-being of the family, their economic inferiority permeates all stages of family relationships, often owing to their responsibility for dependants.

5. Regardless of the vast range of economic arrangements within the family, women in both developing and developed countries generally share the experience of being worse off economically than men in family relationships and following the dissolution of those relationships. Social security systems, nominally designed to improve economic status, may also discriminate against women.

## II. Purpose and scope of the general recommendation

6. Article 16 of the Convention 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 adopted general recommendation No. 21, which elaborated upon many aspects of article 16 as well as its relationship to articles 9 and 15. General recommendation No. 21 notes that article 16 (1) (h) specifically refers to the economic dimensions of marriage and its dissolution. The present general recommendation builds upon the principles articulated in general recommendation No. 21, other relevant general recommendations, such as general recommendation No. 27, and the Committee's jurisprudence. It invokes the definition of discrimination contained in article 1 of the Convention and calls upon States parties to take legal and policy measures as required under article 2 of the Convention and general recommendation No. 28. It also integrates the social and legal developments that have taken place since the adoption of general recommendation No. 21, such as the adoption by some State parties of laws on registered partnerships and/or de facto unions, as well as the increase in the number of couples living in such relationships.

7. The entitlement of women to equality within the family is universally acknowledged, as evidenced by the related general comments of other human rights treaty bodies: Human Rights Committee general comment No. 28, on equality of rights between men and women (in particular paras. 23-27), and general comment No. 19, on protection of the family, the right to marriage and equality of the spouses; and Committee on Economic, Social and Cultural Rights general comment No. 16, on the equal right of men and women to the enjoyment of all economic, social and cultural rights (in particular para. 27), and general comment No. 20, on non-discrimination in economic, social and cultural rights. Important global political documents such as the Beijing Platform for Action<sup>b</sup> and the

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<sup>b</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.

Millennium Development Goals also refer to equality in the family as a fundamental principle.<sup>c</sup>

8. The Committee has consistently concluded that the elimination of discrimination against women requires States parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be achieved only when the States parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women's disadvantage or exclusion. In respect of the economic dimensions of family relations, a substantive equality approach must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women's economic capacity.

9. The present general recommendation will serve as a guide for States parties in achieving a de jure and de facto egalitarian regime under which the economic benefits and costs of family relations and the economic consequences of their 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.

### **III. Constitutional and legal framework**

10. The constitutions or legal frameworks of a number of States parties 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 to determine. In such cases, constitutional equal protection provisions and anti-discrimination provisions do not protect women from the discriminatory effects of marriage under customary practices and religious laws. 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 and legal frameworks are discriminatory, in violation of article 2 in conjunction with articles 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 with regard to family relations.

#### **Multiple family law systems**

12. Some States parties have multiple legal systems in which different personal status laws apply to individuals on the basis of identity factors such as ethnicity or religion. Some, but not all, of these States parties 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. The extent to which individuals are free to choose their religious or customary adherence and practice varies, as does their freedom to challenge the discrimination against women enshrined in the laws and customs of their State or community.

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<sup>c</sup> See resolution 55/2; see also the Millennium Project, Goal 3, available from <http://www.unmillenniumproject.org/goals/index.htm>.

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 against women. The lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination.

15. States parties should adopt written family codes or 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. In the absence of a unified family law, 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 should 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.

#### **IV. Various forms of family**

16. In general recommendation No. 21, paragraph 13, the Committee acknowledges that families take many forms and underscores the obligation of equality within the family under all systems, "both at law and in private".

17. Statements by other entities in the United Nations system confirm the understanding that "the concept of 'family' must be understood in a wide sense".<sup>d</sup> The Human Rights Committee, in para. 27 of its general comment No. 28, acknowledges the "various forms of family". In his report on observance of the International Year of the Family, the Secretary-General confirms that "families assume diverse forms and functions among and within countries".<sup>e</sup>

18. States parties are obligated to address the sex- and gender-based discriminatory aspects of all the various forms of family and family relationships. In respect of discrimination against women, they must address patriarchal traditions and attitudes and open family law and policy with the same scrutiny that is given to the "public" aspects of individual and community life.

19. Marriages may be formed through a variety of customs, ceremonies and rituals that may be sanctioned by the State. Civil marriage is sanctioned solely by the State and is registered. Religious marriage is solemnized through the performance of ritual(s) prescribed by religious law. Customary marriage is undertaken by the performance of ritual(s) prescribed by the customs of the parties' community.

20. Some States parties do not require registration of religious and customary marriages in order for them to be valid. Unregistered marriages may be substantiated by production of a marriage contract, witness accounts of the rituals or other means, as appropriate in the circumstances.

21. Some States parties that recognize polygamous marriages, under either religious or customary law, also provide for civil marriage, monogamous by definition. Where civil marriage is not provided for, women in communities that practice polygamy may have no choice but to enter into a marriage that is at least potentially, if not already, polygamous,

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<sup>d</sup> See general comment No. 4 of the Committee on Economic, Social and Cultural Rights, on the right to adequate housing (article 11 (1) of the International Covenant on Economic, Social and Cultural Rights), para. 6.

<sup>e</sup> A/50/370, para 14.

regardless of their wishes. The Committee concluded in general recommendation No. 21 that polygamy is contrary to the Convention and must be “discouraged and prohibited”.

22. In some States parties, the law also provides for registered partnerships and establishes rights and responsibilities between the parties. States may extend social and tax benefits to registered partnerships to varying degrees.

23. De facto unions are not registered and often do not give rise to any rights. Some States, however, recognize de facto unions and establish equal rights and responsibilities for them that can vary in scope and depth.

24. Certain forms of relationships (namely, same-sex relationships) are not legally, socially or culturally accepted in a considerable number of States parties. However, where they are recognized, whether as a de facto union, registered partnership or marriage, the State party should ensure protection of the economic rights of the women in those relationships.

### **Customary/religious unregistered marriages**

25. Registration of marriage protects the rights of spouses with regard to property issues upon dissolution of the marriage by death or divorce. The Convention obligates States parties to establish and fully implement a system of marriage registration. However, many States parties lack either a legal requirement of marriage registration or implementation of existing registration requirements, and in such instances individuals should not be penalized for failure to register, including where lack of education and infrastructure makes registration difficult.

26. States parties should establish a legal requirement of marriage registration and conduct effective awareness-raising activities to that effect. They must provide for implementation through education about the requirements and provide infrastructure to make registration accessible to all persons within their jurisdiction. States parties should provide for establishing proof of marriage by means other than registration where circumstances warrant. The State must protect the rights of women in such marriages, regardless of their registration status.

### **Polygamous marriages**

27. The Committee reaffirms paragraph 14 of its general recommendation No. 21, which states that “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 its concluding observations, the Committee has pointed to the grave ramifications of polygamy for the human rights and economic well-being of women and their children, and has consistently called for its abolition.

28. States parties should take all legislative and policy measures needed to abolish polygamous marriages. Nevertheless, as stated by the Committee in its general recommendation No. 27, “polygamy is still practised in many States Parties, and many women are in polygamous unions”. Accordingly, with regard to women in existing polygamous marriages, States parties should take the necessary measures to ensure the protection of the economic rights of women.

### **Registered partnerships**

29. States parties that provide for registered partnerships must ensure equal rights, responsibilities and treatment between the partners in economic matters addressed by the legislation on those partnerships. The recommendations contained below apply *mutatis mutandis* in States parties that recognize registered partnerships in their legal order.

### **De facto unions**

30. Women enter *de facto* unions for a variety of reasons. Some States provide a legal framework for recognizing *de facto* unions at some point, such as upon the death of a partner or the dissolution of the relationship. Where such legal frameworks do not exist, women may be exposed to economic risks when a cohabiting relationship ends, including when they have contributed to maintaining a household and to building other assets.

31. The Committee determined in its general recommendation No. 21 that the elimination of discrimination against women in *de facto* unions is included in State party obligations under article 16 (1). In States parties where such unions exist, and with regard to relationships in which neither partner is married to another person or is in a registered partnership with another person, the Committee recommends that the State party consider the situation of women in these unions, and of the children resulting from them, and take the necessary measures to ensure the protection of their economic rights. In countries where *de facto* unions are recognized by law, the recommendations contained below apply *mutatis mutandis*.

## **V. Economic aspects of family formation**

32. States parties should provide to individuals entering into marriage information on the economic consequences of the marital relationship and of its potential dissolution by divorce or death. Where the States parties provide for registered partnerships, the same information should be provided to them.

### **Payment or preferment as a requirement of marriage**

33. In general recommendation No. 21, paragraph 16, the Committee notes that some State parties “allow marriage to be arranged for payment or preferment”, which is a violation of a woman’s right to freely choose her spouse. “Payment or preferment” refers to transactions in which cash, goods or livestock are given to the bride or her family by the groom or his family, or when a similar payment is made by the bride or her family to the groom or his family. This practice should not be in any way required in order for a marriage to be valid, and such agreements should not be recognized by the State party as enforceable.

### **Contracts: prenuptial and postnuptial agreements**

34. In some systems, marriages or other recognized forms of union may be undertaken only by written contract. Some systems allow the option of contractual agreements concerning property to be undertaken prior to or during the marriage. States must ascertain that women are not left with less protection than they would have under the standard or default marriage provisions, owing to grave inequality in bargaining power.

35. When States parties provide for the possibility of making private contractual arrangements with respect to the distribution of marital and other property following the dissolution of marriage, they should take measures to guarantee non-discrimination, respect

public order, prevent the abuse of unequal bargaining power 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 other formal requirements and providing for retroactive invalidation or for financial or other remedies if the contract is found to be abusive.

## **VI. Economic aspects during the relationship**

36. A number of States parties retain discriminatory systems of property management during the marriage. Some retain laws stating that the man is the head of the household, thus giving him the role of sole economic agent as well.

37. Where a community property regime is the norm, nominally providing that half of 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 as belonging to the marital household, and women may not have a recognized right to manage it. This may be the case even with regard to women's own wages.

38. States parties should provide for equal access by both spouses to the marital property and equal legal capacity to manage it. They should ensure that the right of women to own, acquire, manage, administer and enjoy separate or non-marital property is equal to that of men.

## **VII. Economic and financial consequences upon dissolution of relationships**

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

39. Some legal systems make a direct link between grounds for divorce and the financial consequences of divorce. Fault-based divorce regimes may condition financial rights on the lack 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.

40. States parties should:

- Revise provisions linking grounds for divorce and financial consequences in order to eliminate opportunities for husbands to abuse these provisions and thereby to avoid any financial obligations towards their wives.
- Revise provisions relating to fault-based divorce in order to provide compensation for the contributions made by the wife to the family's economic well-being during the marriage.
- Eliminate differences in the standards of fault for wives and for husbands, such as requiring proof of greater infidelity by a husband than by a wife as a basis for divorce.

41. Some legal regimes require the wife or her family to return to the husband or his family any economic benefits in the form of payment or preferment, or other such payments

that were an element of marriage formation, and do not impose equal economic requirements on a divorcing husband. States parties should eliminate any procedural requirement for payments to obtain a divorce that does not apply equally to husbands and wives.

42. States parties should provide for separating the principles and procedure dissolving the marriage relationship from those relating to the economic aspects of the dissolution. Free legal aid should be provided to women who do not have the means to pay for court costs and attorney fees, so as to ensure that no woman is forced to forgo her economic rights to obtain a divorce.

### **Dissolution of marriage by separation and divorce**

43. Most laws, customs and practices relating to the financial consequences of marriage dissolution can be broadly classified into two categories: distribution of property and maintenance after divorce or separation. Property distribution and post-dissolution maintenance regimes often favour husbands regardless of whether laws appear neutral, owing to gendered assumptions relating to the classification of marital property subject to division, insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property and gendered family roles. In addition, laws, customs and practices relating to the post-dissolution use of the family home and chattels clearly have an impact on women's post-dissolution economic status.

44. Women may be barred from claiming property rights for lack of recognized capacity to own or manage property, or the property regime may not recognize property accumulated during the marriage as subject to division between the parties. Interrupted education and employment histories and childcare responsibilities frequently prevent women from establishing a path to paid employment (opportunity cost) sufficient to support their post-dissolution family. These social and economic factors also prevent women living under a regime of separate property from increasing their individual property during marriage.

45. The guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties. The division of roles and functions during the spouses' life together should not result in detrimental economic consequences for either party.

46. States parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. States parties should recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage.

47. States parties should provide for equal formal and de facto legal capacity to own and manage property. To achieve both formal and substantive equality with respect to property rights upon the dissolution of marriage, States parties are strongly encouraged to provide for:

- Recognition of use rights in property related to livelihood or compensation in order to provide for replacement of property-related livelihood.
- Adequate housing to replace the use of the family home.
- Equality within the property regimes available to couples (community property, separate property, hybrid), the right to choose property regime, and an understanding of the consequences of each regime.
- Inclusion of the present-value computation of deferred compensation, pension or other post-dissolution payments resulting from contributions made during the



marriage, such as life insurance policies, as part of the marital property subject to division.

- Valuation of non-financial contributions to marital property subject to division, including household and family care, lost economic opportunity and tangible or intangible contributions to either spouse's career development and other economic activity and to the development of his or her human capital.
- Consideration of post-dissolution spousal payments as a method of providing for equality of financial outcome.

48. States parties should undertake research and policy studies on women's economic status within the family and upon the dissolution of family relationships and publish the results in accessible forms.

### **Property rights after death**

49. Many States parties, by law or custom, deny widows equality with widowers in respect of inheritance, leaving them vulnerable economically upon the death of a spouse. Some legal systems formally provide widows with other means of economic security, such as through support payments from male relatives or from the estate of the deceased. However, in practice, these obligations may not be enforced.

50. Under customary forms of landholding, which may limit individual purchase or transfer and may only be subject to right of use, 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 of the deceased in order to remain on the land. The existence of offspring, or lack of offspring, may be a major factor in such marriage requirements. In some States parties, widows are subject to "property dispossession" or "property grabbing", in which relatives of a deceased husband, claiming customary rights, dispossess the widow and her children from property accumulated during the marriage, including property that is not held according to custom. They remove the widow from the family home and claim all the chattels, then ignore their concomitant customary responsibility to support the widow and children. In some States parties, widows are marginalized or banished to a different community.

51. Survivorship rights to social security payments (pensions and disability payments) and in contributory pension systems play a large role in States parties in which couples pay significant sums into those systems during the relationship. States parties are obligated to provide for equality between men and women in terms of spousal and survivorship benefits from social security and pension systems.

52. The laws or practices of some States parties restrict the use of a will to override discriminatory laws and customs and increase women's share of inheritance. States parties are obligated to adopt laws relating to the making of wills that provide equal rights to women and men as testators, heirs and beneficiaries.

53. States parties are obligated to adopt laws of intestate succession that comply with the principles of the Convention. Such laws should ensure:

- Equal treatment of surviving females and males.
- That customary succession to use rights or title to land cannot be conditioned on forced marriage to a deceased spouse's brother (levirate marriage) or any other person, or on the existence or absence of minor children of the marriage.
- That disinheritance of the surviving spouse is prohibited.
- That "property dispossession/grabbing" is criminalized, and that offenders are duly prosecuted.

## VIII. Reservations

54. In its 1998 statement on reservations to the Convention,<sup>f</sup> the Committee expressed concern about the number and the nature of reservations. In paragraph 6, it specifically noted that:

Articles 2 and 16 are considered by the Committee to be core provisions of the Convention. Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles.

In respect of article 16, the Committee specifically stated in paragraph 17 that:

Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.

55. With respect to reservations relating to religious laws and practices, the Committee recognizes that since 1998 a number of States parties have modified their laws to provide for equality in at least some aspects of family relations. It continues to recommend that States parties take “into consideration the experiences of countries with similar religious backgrounds and legal systems that have successfully accommodated domestic legislation to commitments emanating from international legally binding instruments, with a view to” withdrawing reservations.<sup>g</sup>

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<sup>f</sup> A/53/38/Rev.1, part two.

<sup>g</sup> CEDAW/C/ARE/CO/1 (2010), on concluding observations, United Arab Emirates, para. 46.