



**GENERAL RECOMMENDATIONS BY KARAMAH  
NEW CEDAW CONCEPT PAPER:  
“ECONOMIC CONSEQUENCES OF MARRIAGE  
AND ITS DISSOLUTION”**

**Washington, DC  
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**INTRODUCTION:**

**This paper is a collection of detailed comments on the proposed CEDAW General Recommendation on the Economic Consequences of Marriage and its Dissolution (The Concept Note) currently being circulated by the CEDAW Committee at the United Nations. Karamah hopes that its comments will facilitate a thorough critique by Muslim delegations of the The Concept Note which is very significant insofar as it touches on and in some cases contravenes important Islamic jurisprudential principles.**

**Our comments are organized by provision. Numeric References below refer to matching paragraphs in The Concept Note. Italicized portions are sections from The Concept Note—all of them are included in this document. Bolded portions are Karamah’s revisions, suggested additions, footnotes, and recommendations.**

**COMMENTARY:**

- 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.*

**Undoubtedly, inequality in the family damages the lives of many women worldwide. Indeed a variety of discriminatory practices espoused in ideologies and cultures contribute to systemic inequality in the family. However, we must keep in mind that it is poverty and the lack of economic prosperity which has the “most damaging” effect upon women, as compared to any other factor. Thus, poverty correlates directly with the practices of forced marriage, limited educational opportunities for women, and limited property rights**

**within the context of marriage over all other factors. This fact has been demonstrated empirically and has been known by the social science and legal community for a very long time.**

**Certainly, religious, customary, and state laws often are an additional source of discrimination towards women; however this is certainly not *always* the case. Nor is such discrimination necessarily uniform based on a specific religion or culture. Rather, such discriminatory practices more often hold greater correlation with poverty levels within a specific region. Within an Islamic legal framework for example, it is well known that it is prohibited for a father, guardian, or any figure of authority to force a woman into marriage. Islamic law in fact, makes it a point to protect a woman's free will to choose her own spouse. In inheritance laws, likewise, the Qur'an expressly requires that female relatives receive a fixed share from the estate of the decedent relative. Moreover, a will is void if it attempts to circumvent the fixed share for females. Some legal systems, including the American legal system, permit a husband to disinherit his children and to limit the wife's share in his will or to disinherit a wife altogether in a prenuptial agreement.**

**We know, however, that many countries, some of them Muslim, still retain practices which are discriminatory towards women, inhibiting them from accessing their legal rights, higher education, or full autonomy within marriage. We need to work together to eliminate such practices which harm the well being of women. That being said, we must recognize that it is poverty that is the primary culprit of such practices. Therefore, it is not accurate nor is it effective to generalize that all religious, customary, and state laws are discriminatory towards women. For example, inheritance laws and certain marriage and custody laws around the Muslim world would constitute a positive empowerment of women. That does not mean that other provisions are discriminatory and must be changed. We must be strategic in our advocacy by building on the positive aspects of existing law in order to build the necessary momentum to affect the ultimate elimination of all forms of discrimination against women.**

*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.*

**No Comment.**

*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.”<sup>5</sup> The Millennium Development Goals, adopted in 2000, further confirm women’s right to equality in sharing the benefits of economic development.<sup>6</sup> 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.*

**Inheritance laws vary from country to country. The complexity of the inheritance laws make it difficult to generalize about the treatment of women because depending on the circumstances the same inheritance law could empower or inhibit. As such, a broad big picture approach is more effective to protect women as opposed to advocating for total overhaul of the existing system. In all cases, it is the duty of policy recommenders to examine such laws from a comprehensive, nuanced, and holistic perspective in order to truly understand the aims of such laws and the actual impact they have. Failing to do so can often result in working against the rights of women in many contexts. Inheritance law serves as an excellent case study for such a dilemma.**

**The ultimate objective of Islamic inheritance laws is to devolve wealth. It is well known that Islamic inheritance law holds specified shares for each individual legal heir, and it is only in two cases in which female family members appear to be assigned a smaller share. What must be kept in mind however is that Islamic law, unlike many Western legal systems, requires individuals to heir their property to relatives and spouses, both male and female, and prohibits disinheriting any relation. This prevents men from disinheriting female inheritors. Thus women in all cases receive a share of inheritance. In many Western legal systems, there is no stipulation requiring the inclusion of female family members as legal beneficiaries in a will. If an individual chooses, he can disinherit his daughters for example and they would thereby be prohibited from receiving any inheritance at all. In the spousal context, the husband could either negotiate a prenuptial agreement to disinherit his wife or limit her inheritance rights to her elective share under state law—ranging from 20-50% depending on the state. Thus, in comparison, while in a small number of cases women may receive a smaller share in the Islamic legal framework, they are protected from being disinherited and can never be excluded from receiving their share. Many other systems on the other hand, allow family members to be disinherited entirely, thus eliminating women’s economic inheritance rights entirely in many cases. This example is brought forth not to demonstrate the advantages or disadvantages of one system over another, but rather to demonstrate the fact that legal systems are more nuanced than they may appear to be at first glance and demand comprehensive, nuanced, and holistic study. Failure to do so can often result in inhibiting women’s empowerment as opposed to upholding it.**

- 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.*

**It is clearly true that family law is in dire need of reform worldwide especially in terms of the rights of women. In addition, policy recommenders, non-governmental organizations, and state actors must invest greater effort than ever before to alleviate the abuses and inequalities women face in the family framework. Useful comprehensive and holistic reform can only occur through a process which takes a variety of societal, cultural, and economic factors into account, and this process does take time. While many countries may need to improve in their approaches, we must bear in mind that indeed there are quite a number of countries who have worked toward family law reforms. Many of these countries may appear to be moving slowly, however sometimes slow incremental efforts might also be more useful and effective given the circumstances. Moroccan reforms in the Mudawwana for example, and Egypt's reforms regarding laws on the dissolution of marriage are changes which are positive for their respective citizenry. Such changes should be commended and encouraged. Egypt is now working on reform in the area of alimony for divorced women. Such areas do need improvement, however there are efforts taking place to move such reform forward, and from an Islamic legal perspective there is certainly a doctrinally legitimate space for these reforms.**

**We need to support these reforms by providing women with indigenous egalitarian interpretations to effect reform internally as opposed to externally. Internal reform is sustainable and legitimate within cultural norms. Otherwise, the women's movement will continue to suffer setbacks and the all or nothing approach will hurt women. Societies are constantly evolving in a very complex manner. Ignoring such a reality risks prescribing procedures for reform which are inevitably unrealistic and ineffective. It is very important that policy recommenders support efforts in educating women about the rights that they already have in order to make use of current opportunities available to them from the state so as to mitigate any potential abuses or inequalities they may face from other parties or state institutions. Thus, women, whether they are in the Middle East, Latin America, or the United States, deserve to know how to negotiate their marriage contracts within their current legal systems so as to maximize their rights. It is the job of policy recommenders to advocate for efforts which promote educating women about their legal rights. It is true that significant inequalities exist in state laws. It is also true that certain reforms have been**

addressed only formally in many instances with little substantive examination. It is important to recognize the existence of such challenges in order to ameliorate them.

At the same time, however, law and society are constantly evolving, thus it is necessary to focus on realistic ways that women can take advantage of currently existing opportunities within their own legal systems as well. There are many tools that women can use to maximize their positions. It is the job of policy recommenders to ensure that women have as much access to these tools as possible. For example, in the Islamic legal context assets acquired during the marriage are not marital. Therefore, they are not subject to division between the parties. The assets the wife acquires during the marriage remain her separate property and the husband would have no legal or equitable right to it. However, if property is the result of efforts by both spouses, the wife is entitled to a part of the property proportionate to her efforts. Therefore, a campaign to educate Muslim women to negotiate the right to title property in their joint names or to demand that certain property include their names could affect immediate tangible economic protections for women. There is classical authority that supports a partnership theory of acquisition of property during marriage. We should encourage research in this area. In other words, gradual and strategic reform is more realistic and effective than an all or nothing approach.

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.*

#### **No Comment**

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

This is true in many cases. It is important that we work together to enhance the lives of women and their opportunities for upward economic and social mobilization worldwide. This process, however, should not lead policy recommenders to adhere to an approach which neglects the fact that a comprehensive, nuanced, and holistic approach is required in studying the laws and cultures of different societies in order to reach outcomes which are

**truly improving the lives of women as opposed to placing them in even more disadvantaged situations.**

- 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.*

**This is certainly the case in a vast array of situations; however we must also be careful to restrict usage of generalizations where they might not fully apply. Are *all* women necessarily worse off economically in family relationships? Or do family frameworks, among a multitude of other factors, contribute to societal phenomena that can lead to inhibiting women's empowerment? It is important to understand the de facto realities of women's lives as complicated as they really are, in order to create solutions which will truly lead to women's empowerment.**

- 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.*

#### **No Comment**

- 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 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.*

**No Comment.**

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

**No Comment.**

*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.*

**Achieving equitable legal regimes under which the economic consequences of marriage and divorce are equally borne by men and women is an important endeavor. It is the job of policy recommenders to offer guidelines and advice on how to pursue the reforms necessary to achieve this. It is important to be aware that the goal of such recommendations is the betterment of society, particularly disadvantaged populations. Women in particular often suffer from societal or economic inequalities and any improvements that can be achieved through policy recommendations for women would be a clear priority.**

**In light of this goal, it is important to recognize that legal reform which is not informed by a particular society's own systems and practices can often work against the needs of the women in that society. We often find a tendency within the policy community of downplaying the tools that women can already access within their societies in order to**

advocate for reform. In the case of the Islamic legal framework, legitimate religious legal precedence and authority already exists for more equitable family laws and norms. One need not necessarily reject Islamic law as a legal system in entirety in order to achieve such a goal, but rather understand it better in order to know how to access and argue for reforms which push for women's rights yet retain legitimacy at the same time. In addition, educating women on how to utilize currently existing opportunities in order to mitigate inequalities propagated by state institutions is an additional element which needs to be kept in mind. Women must be taught how to make marriage contracts, a place where they can often negotiate for egalitarian marital rights, work for them. In addition, it is integral that the policy community recognize that internal reform has been and is occurring. Sometimes, what might appear to be slow or incremental change, is change that is holistic and takes the complicated and evolving nature of society into account. Finally, any policy recommendations offered must include the voice of a diverse array of women—most importantly women who will be most impacted by such reforms. Without their voices, any recommendations would be ill-informed of the actual realities in which female activists live, and thus may prove to be inhibitory rather than helpful.

## THE LEGAL FRAMEWORK

### 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.*
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.<sup>11</sup> 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 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.*

**It is quite true that a uniform civil code does not guarantee equal rights and opportunities for women, and the CEDAW committee itself should take note of this. Policy recommenders must keep in mind that if the goal of CEDAW's recommendations is indeed to better the situation of women, then they should be willing to do that which will actually, not rhetorically, improve their opportunities. Advocating *only* for a uniform civil code, in light of differing socio-cultural contexts, is not always the most effective or useful means of achieving greater rights and opportunities for women. Achieving women's empowerment involves understanding the laws and context of a given region based on input offered from the very women who are a part of these regions and are familiar with the de facto realities.**

**In addition, it is the presence and acceptance of multiple legal systems of both religious and civil law which allows Christian minority communities in Middle Eastern countries such as Jordan and Egypt to retain the right to practice family law according to their own customs as opposed to adhering to the religious laws of the dominant faith, or to a uniform civil code which may inhibit their ability to adhere to their specific faith practices. By allowing such minority communities to practice according to their own faith traditions, albeit within international human rights norms, such states are allowing for multiple legal systems to exist. It is clear to any policy recommender that to advocate for a required uniform civil code in such states—Egypt or Lebanon for example—would actually be discriminatory towards such minority communities-- such as the Coptic, Jewish, or Greek Orthodox communities in Egypt or Jordan-- as it would be impossible for a strict uniform code to take into account the variation in lifestyle and practices of all faith traditions present.**

**Proposed uniform civil family codes in Lebanon not even a decade ago met with extreme opposition from the Christian ecclesiastical community. Such would be the case in any country with significant religious minority communities. To demand that all citizens abide by a single code would cause extreme political instability as this would impact the autonomy of each minority religious community to freely exercise its right to practice. Would such political instability necessarily be useful and effective in advancing women's empowerment, or would such instability inevitably have a negative economic impact on disadvantaged populations—among them women?**

**At the same time, it is without doubt important to recognize that upholding the rights of minority religious communities and their right for free exercise is not just cause for preventing the advancement of women's rights. The Coptic community in Egypt for example, has experienced pressure to reform its family laws due to its unequal treatment of women.**

**In light of the need to protect free exercise of religion in religiously pluralistic regions, the need to advance family law reforms for the advancement of women, and the need to approach reform in a comprehensive, holistic, and nuanced manner that takes societal context into account, it is paramount for policy recommenders to push for reforms which advocate for state legal frameworks which allow individuals to elect under which system of family law they wish to be governed. Multiple religious family law codes should**

be permitted to co-exist and individuals should have the right to opt into using the one they prefer. By allowing individuals to elect the system under which they can be governed, individuals can choose which laws would be most appropriate for their specific context in an effort to promote egalitarian marital regimes which take into account differing socio-cultural and faith traditions. A path of reform along these lines would promote progress in a manner which is realistic, preserves economic stability, retains respect for societal pluralism, and promotes the advancement of women's empowerment and freedom of choice. Educating women about their options and about the legal tools they can use to protect themselves would be a necessary part of such reforms as well.

*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.*

Indeed the consequences of unregistered marriages can be devastating, as undocumented marriages can often result in women not receiving their rightful share of alimony, inheritance, and custody. The problem of unregistered marriages however is a global phenomenon and is present from Egypt to the United States. The practice of *zawaj 'urfi* in Egypt, or customary marriage without registration, is an issue which has been recognized within Egypt as problematic for a variety of reasons and has been prohibited by the state. Likewise, common law marriages in the United States, which are still recognized in 14 states, can be problematic for a variety of reasons as well. Action on a variety of levels is being taken to make women aware of the harmful consequences of participating in undocumented marriages, and many countries now require written proof and registration in order to consider marriages valid and legally binding.

*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.<sup>13</sup>*

Comments in response to Article 13 would apply here as well. As has been demonstrated, uniform codes are neither realistic nor are they the best path towards reform. Uniform codes which deny individuals the choice to opt for alternative family codes would also severely threaten the political and economic stability of pluralistic nations, and force minority Christian and Jewish communities for example, to abide by personal status codes administered by Muslim states.

## B. CONSTITUTIONAL ISSUES

*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.*

**It is important for state actors to recognize the importance of promoting egalitarian family laws and norms. Efforts which side step or prevent reform in this area are extremely harmful for women's rights. Demanding exemptions for personal status laws from constitutional provisions should never be a means for states to avoid working towards family law reform and women's empowerment. At the same time, efforts pushing reforms for family law must take into account the need for respecting free exercise of religion in light of the fact that religious pluralism is indeed a reality in the majority of nations worldwide.**

**The assumption that the implementation of a uniform civil code would be the best step forward for women's progress ignores the legal and empirical reality that many religious legal systems do in fact hold room for legitimate interpretations which accommodate and promote the rights of women in the most progressive sense. It is important to have a pragmatic approach in moving forward in order to minimize any possible damage that could be caused to the lives of women in the present, while at the same time pushing for reforms which would improve their opportunities in the future. It is important that we work within recognized legal systems, Islamic law being one of them, to develop egalitarian legal norms which promote the rights of women. Doing so allows us to work toward reasonable, functional solutions which are also legitimate. Doing so also allows us to work within currently existing systems which already hold the potential to adopt norms protecting women's rights as opposed to allowing such systems to be continuously dominated by interpreters who may not hold women's empowerment to be a priority.**

*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.<sup>15</sup> Others have not amended their constitutions but have adopted laws that attempt to ameliorate (but do not eliminate) discrimination against women in the family.<sup>16</sup> 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.<sup>17</sup> The Committee has expressed concern over any requirement of bridewealth 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 a marriage, and recommends that the requirement be abolished.<sup>18</sup> 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.<sup>19</sup>*

**In cases in which any individual is being exploited, be it a woman, man, or child, efforts should always be put forward in order to eliminate such exploitation. Likewise, transactions which involve the selling or buying of human beings at any level should be eliminated. A distinction must be made however between the sale or purchase of human beings, and the financial transactions, debt, settlements, or gifts which two individuals may rightfully choose to partake in as a part of a contract. The giving of engagement rings or jewelry in many cultures as a sign of intent to marry by a prospective spouse for example, does not indicate the sale or purchase of an individual. Rather such a gift is voluntarily given as an indication of commitment.**

**Likewise, in Islamic law the practice of prospective husbands offering *mahr* to prospective brides is a transaction of religious value analogous to the giving of jewelry or an engagement ring in the Western tradition. From a legal perspective, *mahr* is viewed as a marital gift, which may or may not be monetary. However, a monetary *mahr* has become customary, and may be paid in two parts: an initial prompt payment and a larger deferred payment. Deferred *mahr* is a senior debt that the husband owes specifically to the wife. It can be settled in installments or upon death or divorce. Brideprice or dowry practices are not a part of the *mahr* arrangement in Islamic law. The *mahr* arrangement, it should be noted, is strictly between the husband and wife and does not include the wife’s family as beneficiary.**

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.”<sup>20</sup> 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.

**It is important to promote spouses’ right to manage property. It is also important to note that many legal systems already have ways of dealing with property management between spouses. Furthermore, it is important that in cases where currently existing legal systems do have ways of upholding egalitarian norms, policy recommenders encourage women to use the tools available to them in order to exercise their rights. It should be noted for example, that Islamic law grants women full and complete right to manage their own property before and after marriage. Any property belonging to a woman remains her own even after marriage, and any property that she procures during her marriage is also**

**her own. Laws in Muslim countries which do not reflect this Islamic legal norm should certainly be re-examined.**

*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.*

**As mentioned in comments on Article 19, in Islamic law women retain full rights to manage their own property whether such property was procured before or after marriage. Upon divorce, such property remains hers and is not regarded as part of the marital property.**

## **E. ECONOMIC CONSEQUENCES OF DIVORCE**

*21. The core issue with respect to women's economic equality upon divorce is whether they share equally in property accumulated during the marriage.<sup>21</sup> 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.*

**Clearly, property accumulated in any partnership should be distributed along equitable terms. As discussed above however, the degree to which a single uniform standard would be useful, just, and practical means of determining equitable property distribution is questionable.**

**In the United States the majority of states still use an equitable distribution regime as opposed to a community property regime for property distribution in divorce. The equitable distribution regime includes fifteen factors which determine property allocations based on financial and nonfinancial investments made by the spouses. This type of arrangement allows, to the degree possible by a legal framework, to accommodate for varying de facto realities in marital regimes. An equitable distribution regime allows the legal system to allocate for non- financial contributions through the fifteen factors used to determine property allocations.**

**In New Jersey, for example, the Court must consider the N.J.S.A. 2A: s4-23.1 factors to determine the allocation of the assets between the parties as follows:**

1. **The duration of the marriage;**
2. **The age and physical and emotional health of the parties;**
3. **The income of property brought to the marriage by each party;**
4. **The standard of living established during the marriage;**
5. **Any written agreement made by the parties before or during the marriage concerning an arrangement or property distribution;**
6. **The economic circumstances of each party at the time the division of property becomes effective;**
7. **The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;**
8. **The contribution by each party to the education and training of the other;**
9. **The contribution of each party to acquisition, dissipation, preservation, depreciation, or appreciation in the amount of value of the marital property, as well as the contribution of a party as a homemaker;**
10. **The tax consequences of the proposed distribution to each party;**
11. **The present value of the property;**
12. **The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects;**
13. **The debts and liability of the parties;**
14. **The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children;**
15. **Any other factor which the court may deem relevant;**

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.<sup>22</sup> The Declaration on the Elimination of Discrimination against Women includes them in a single article,<sup>23</sup> 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.*

**An example of a legal system which already considers women to have full legal capacity to own and manage property would be the Islamic legal system. Islamic law has always granted women full legal capacity to manage their property before and after marriage. Unfortunately the de facto recognition of this concept in many Muslim-majority regions and regions in which Muslims are not the majority is lacking. State actors within such regions, as well as policy recommenders in general should bear in mind that Islamic law does in fact give women full legal capacity to manage property. Any laws which prevent women from retaining such rights would be against international human rights**

**and Islamic legal norms. Certainly action should be taken to ensure that women are able to freely access these rights.**

*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.*

**See comments for Article 22. Women retain full legal capacity in Islamic law before, during, and after marriage.**

*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.<sup>25</sup> 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.<sup>26</sup>*

**Indeed it is the case that marital property division is still an area requiring reform worldwide. We know that this is an issue in Europe, Asia, South America, Africa, and North America. In the United States for example, both social scientists and legal scholars point to the difficulties that women face in divorce proceedings in both community property and equitable distribution property states due to the fact that non-financial contributions are often less recognized in court than material assets. This is an issue that everyone must collectively work together on in order to create reforms which are realistic and just.**

**In the case of Islamic law, spouses who dedicate time to housework and child-rearing are entitled to financial compensation for all of their efforts. Islamic law very clearly recognizes non-financial contributions in the marital regime. Wives can, in fact demand financial compensation at the beginning or throughout the marriage and do not have to wait for divorce in order to obtain this compensation.**

**What is problematic is that such laws are largely unknown, or if known, are still largely under utilized or not implemented at all. Such legal norms must be brought to light and applied for the establishment of more equitable property division within the marital framework and upon divorce as well.**

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."*<sup>27</sup> *This is not to be measured in cash terms but as an equal contribution to the ultimate growth of the marital estate.*

**Islamic law recognizes the nonfinancial investment of spouses to the marital regime. In such a case, from an Islamic legal perspective, a wife would be entitled to receive full compensation for her financial and nonfinancial contributions. See comments on Article 26 above. The United States is still dealing with this challenge in many states. In some states, an educational degree is considered a marital asset that must be taken into account in dividing assets upon divorce. In other states, investments toward an educational degree would be considered a valid contribution taken into account for the purposes of equitable distribution and alimony.**

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 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.*

**This is an area of law that is still largely being developed worldwide--be this in the United States, Asia, Europe, Africa, or Latin America--and needs continuous reform and development. Policy recommenders must work toward offering recommendations that aim for just and equitable arrangements which recognize the contributions of both husbands and wives to the marital regime.**

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.<sup>28</sup> 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 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.<sup>29</sup>*

**This is an area of law that is still largely being developed worldwide--be this in the United States, Asia, Europe, Africa, or Latin America--and needs continuous reform and development. Policy recommenders must work toward offering recommendations which are just and equitable, and which keep in mind the fact that it is poverty and lack of education which has the greatest impact on the women's lives. Working toward alleviating poverty and increasing educational opportunities for women will undoubtedly play a significant role in helping women access legal tools available to them, and in creating reform on a global level which protects the rights of women.**

#### 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.<sup>30</sup> 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*

#### G. ISSUES SPECIFIC TO POLYGAMY

- 31. While the Committee has clearly indicated, in General Recommendation No. 21 and in many of its Concluding Observations,<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>*

**As has already been mentioned above, policy recommenders must recognize that inequalities towards women are almost always directly linked to poverty, social custom, or lack of education and related opportunities. By alleviating poverty and increasing education levels, we can effectively combat social customs that often force women into harmful relationships. Promoting women’s education, their right to freely consent to a marriage, and their access to economic opportunity is the best way to prevent polygamy.**