

**HIV/AIDS AND THE ROLE OF GENDER INEQUALITY AND VIOLENCE
IN SOUTH AFRICAN LAW**

by

MPHOENG MAUREEN MSWELA

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requirements for the degree of

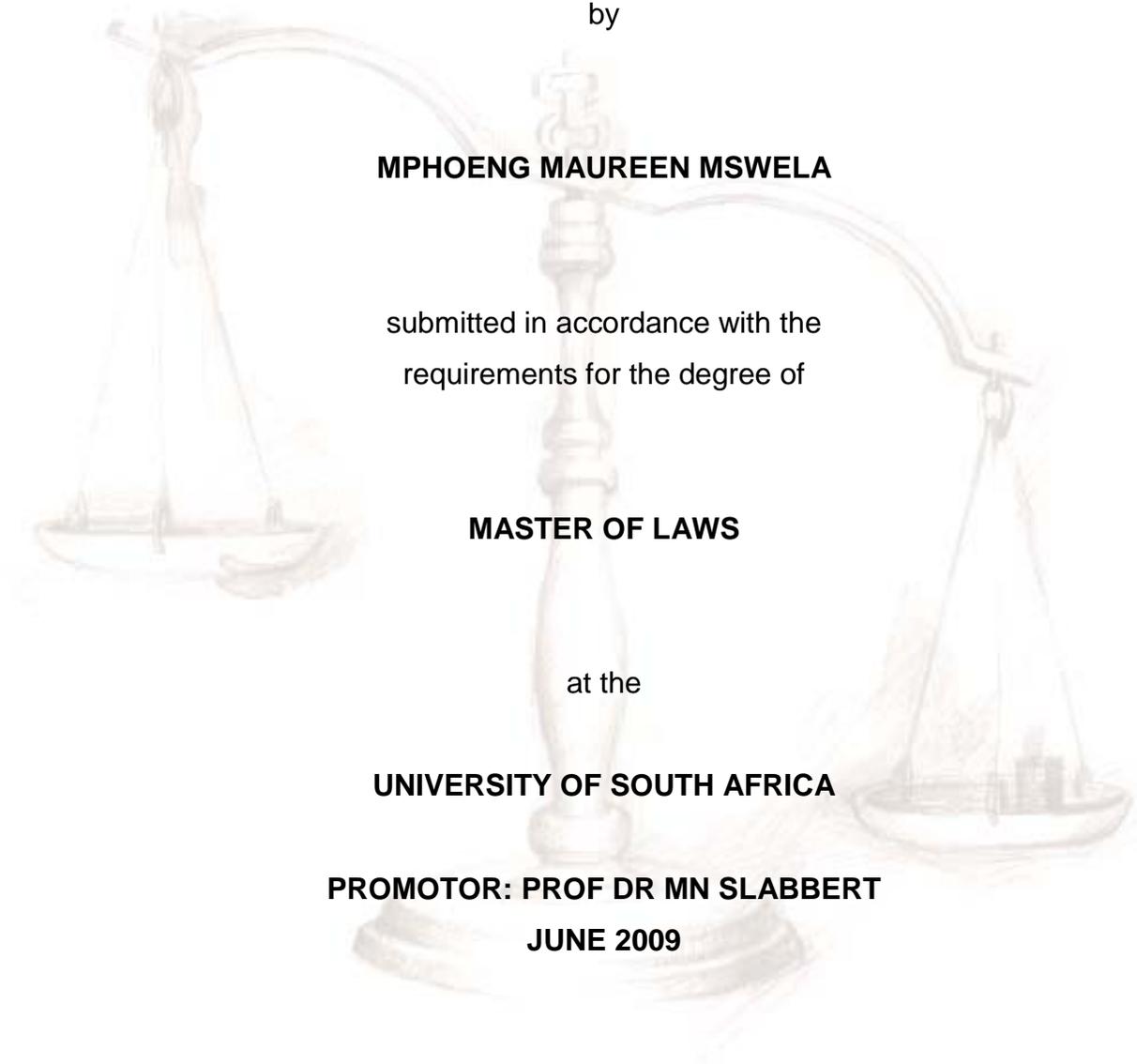
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STATEMENT

Student number: 4463-036-0

I, Mphoeng Maureen Mswela, declare that: *HIV/AIDS and the role of gender inequality and violence in South African Law* is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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It is not easy being me
There is something very hard about being so free
I am speaking of my sexuality

They call it "the life"
I call it trife
full of stress and strife

I can't get married
I mean that they just buried
Even though my options are varied

Because of my "status" I can't reproduce
To this world, a child I shall never introduce
Should I become a recluse?

Don't feel sorry for me
Just promise to be all you can be
Gay, straight or "maybe"

I still have hope
I just have to cope
Look at the broader scope

Tis ain't easy being me
Something ain't right with being this free
Apparently

The Mountain Rise Cemetary in KwaZulu Natal where many people who died from AIDS are buried

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Mphoeng Maureen Mswela
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SUMMARY

South Africa has not escaped the rising prevalence and severe impact of HIV/AIDS in relation women. From an economic and social vantage point, the HIV/AIDS epidemic hits women the hardest, with underprivileged black women the most susceptible to the virus. The theoretical framework of this research focuses on the intersection between HIV/AIDS, gender inequality and gender violence, and more specifically, on certain cultural practices and customs that contribute towards and exacerbate women's subordination and inequality, which in turn, increase women's exposure to become infected with HIV. Relevant to this focus is inevitably an investigation of perceived threats to specific fundamental human rights as a result of some entrenched practices that continue to reinforce women's subordinate position in society, aggravated by the high incidence of gender violence.

Key terms: HIV/AIDS; gender violence; intimate relationships; culture, equality; dignity; female genital mutilation; polygamy; patriarchy; virginity testing; dry sex.

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“Law is not everything, but [it] is not nothing either. Perhaps the most important lesson is that the mountain can be moved... [and] women’s experiences can be written into the law, even though clearly tensions [will] remain.” (C MacKinnon *Feminism unmodified: Discourses on life and law* (1987, Harvard: Harvard University Press at 117)).

CHAPTER 1

INTRODUCTION

1.1 CONTEXTUAL BACKGROUND AND SIGNIFICANCE OF THE TOPIC

The HIV/AIDS pandemic has taken a predominantly grave toll on sub-Saharan-Africa where AIDS is now the prime cause of death¹ despite a range of prevention strategies. The pandemic has turned out to be an uncontrollable humanitarian and human security issue signifying one of the most startling challenges to human security and survival in many parts of the world.² It has taken a particularly heavy toll on sub-Saharan Africa, where the virus not only has devastating effects on the individuals and families touched by HIV/AIDS, it is beginning to have much wider social, economical and political ramifications.³ Everyday in South Africa, an estimated 1700 people are newly infected with HIV.⁴

Important for this study is the fact that the burden of HIV/AIDS does not fall evenly or equally.⁵ The overwhelming of those currently living with HIV/AIDS are

¹ Elbe S “International Security: HIV/AIDS and the changing landscape of war in Africa” (2002) 27 *Fall* 159-177 at 159. For a clinical explanation of what HIV and AIDS are, see paragraph 1.8.3 below. For statistics regarding the prevalence of HIV in certain sub-Saharan countries, including South Africa, see Nienaber A G “The protection of participants in clinical research in Africa” (2008) 8 *South African Journal on Human Rights* 138-162 at 140-141.

² Elbe 159.

³ Elbe 159.

⁴ Karim A *HIV/AIDS in South Africa* (2005, Cambridge: Cambridge University Press) at 2. Gilbert L & Walker L “Treading the path of least resistance: HIV/AIDS and social inequalities - A South African case study” (2002) 54 (7) *Science Direct* 1-17 at 2.

young African women in developing countries.⁶ The epidemic continues to have a disproportionate impact on women with 46.3% of premature deaths in South Africa being attributed to HIV/AIDS in 2000.⁷ A 2004 cross-sectional study of women presenting for antenatal care in Soweto indicates that women with violent or controlling male partners are at an increased risk of HIV infection.⁸ The results of the 17th national HIV and syphilis antenatal sero-prevalence survey⁹ indicate an HIV prevalence rate of 28.0% among pregnant women in the age group fifteen to forty-nine years who attend antenatal clinics. Figures indicate that almost one in every three pregnant women in South Africa is HIV positive. When these figures are extrapolated to the general population, it is estimated that the total number of HIV-positive South Africans is 5.41 million, and that the national HIV prevalence rate among the almost 46 million South Africans is around 12%.

Gender-based violence and gender inequality are repeatedly cited as key determinants of women's risk to HIV, yet empirical research on the probable connections remains insufficient.¹⁰ Dunkle¹¹ submits that research on the connection between social conservative constructions of masculinity; intimate partner violence; male dominance in relationships; behaviour that increases the risk of HIV-infection, as well as effective interventions is urgently needed in the South African context. Despite the fact that most women affected by HIV/AIDS live in sub-Saharan Africa, it is sad to note that almost all existing research on

⁶ Gilbert & Walker 2.

⁷ Hassim A *et al* (ed) *Health and democracy* (2007, Cape Town: Siberink) at 353.

⁸ Dunkle D L "Gender based violence, relationship power, and risk of HIV infection in women attending antenatal clinics in South Africa" (2004) vol 363 (issue 9419) *The Lancet* at 1415.

⁹ Bonthuys E & Albertyn C (ed) *Gender, law and justice* (2007, Lansdowne: Juta) at 296. Bonthuys & Albertyn refer to statistics from the Department of Health. See Department of Health *National HIV and syphilis antenatal sero-prevalence survey in South Africa 2005* (2006). Edwin Cameron points out that reliable statistics on the prevalence of the pandemic in South Africa are not easy to find. See Cameron E "Legal and human rights responses to the HIV/AIDS epidemic" (2006) 17 *Stellenbosch Law Review* 47-90 at 47 at footnote 1. See also the Department of Health at <http://www.doh.gov.za/docs/antenatal-f.html> for the results of the 17th national HIV and syphilis survey (visited 20 November 2008).

¹⁰ Dunkle 1416.

¹¹ Dunkle 1416

violence and the vulnerability of women to HIV/AIDS comes from the United States of America.¹²

This study, as will be explained in more detail below, will attempt to show that gender-based violence and social inequality are key factors in the spreading of HIV/AIDS. The study will focus attention on social and cultural factors which increase women's vulnerability and exposure to HIV/AIDS.

1.2 HIV/AIDS DURING APARTHEID

From a political perspective, the reaction of South Africa to the pandemic has been characterised by a form of refutation in the premier levels of political power.¹³ It is helpful to look at this matter within two governmental phases: the pre May 1994 period when the National Party (NP) was in power and the post May 1994 period when the African National Congress (ANC) government took over.¹⁴

It would be inappropriate to place all the ills of the high prevalence of HIV/AIDS among women at the door of apartheid but it is worthwhile to state that apartheid played a major part in the displacement of family units, thereby disrupting the stability of the family.¹⁵ The forced removals from land which had been occupied for ages through the so-called rural-urban drift and migrant labour, disrupted integrated families.¹⁶ Men who moved into the cities were housed in single-sex hostels which could not accommodate their spouses.¹⁷

¹² Dunkle 1416.

¹³ Karim 35.

¹⁴ Cameron at 48-56. Also see Frankowski S *Legal responses to AIDS in comparative perspective* (1998, The Hague: Kluwer Law International) at 125. Also see Cameron at 48-56.

¹⁵ Frankowski 126-127.

¹⁶ Miller W B *Health, Culture and community: Case study of public reactions to health programs* (1955, New York: Russell Sage Foundation) at 18. See also Frankowski 126-127.

¹⁷ Frankowski 127.

These migrant workers turned to prostitutes for sexual solace.¹⁸ Some women escaped rural poverty to the city where they opted for prostitution.¹⁹ They exchanged sex for money which placed them at a high risk of contracting HIV.²⁰ What apartheid did, however, highlights the economic failure and breakdown of the black community thereby making HIV a receptive host on the underprivileged, “dysfunctional” black community.²¹

The National Party’s initial response to HIV during the years of apartheid was informed by racial discrimination and homophobia. There was no comprehensive and policy on HIV/AIDS.²² HIV/AIDS was alleged to be a predicament of homosexuals, as well as the black population, in particular the black immigrant workers.²³ There was a belief that the AIDS peril could be “legislated away” if the infected could be recognised and “put away”.²⁴ In this regard two tough public measures were passed.²⁵ Firstly, the Minister of Health added the epidemic under the schedule “communicable diseases” and this regulation was passed pursuant to the (now repealed) Health Act.²⁶ The effect of

¹⁸ Karim *HIV/AIDS in South Africa* at 54,161 and 310. In this regard, see also Frankowski 127.

¹⁹ Frankowski 127.

²⁰ Karim at 54. See also Frankowski 127.

²¹ Frankowski 127.

²² Frankowski 127.

²³ Frankowski 127. See also Gordon E & Golanty E *Health and Wellness* (2006: Jones & Bartlett) at 248. These authors emphasise that in the past people mistakenly believed that HIV/AIDS was a disease affiliated with homosexual men only. They argue that the reason why people must have been mistaken is because the first AIDS related cases of AIDS were among male homosexuals and a number of male homosexuals had died of the disease. Other misconceptions that existed relating to the HIV/AIDS epidemic is that in America, some African American pastors believed that HIV/AIDS was a disease which came about as a curse from God to homosexuals. With respect to this see Collins C F & Pinn V W *African-American women’s health and social issues* (2006, Boston: Greenwood Publishing Group) at 95.

²⁴ World Health Organisations & Mann J M *Legislative responses to AIDS* (1989, Leiden: Martinus Nijhoff) 136-143. Also see Frankowski 127.

²⁵ Frankowski 127.

²⁶ Communicable Diseases and the Notification of Notifiable Medical Conditions 1987, GN R2438, in Government Gazette 11014 of 30 October 1987, promulgated in terms of sections 32, 33 and 34 of the Health Act 63 of 1977. Annexure 1 of the above regulations lists twenty diseases as Communicable diseases. AIDS is listed as the first communicable diseases on this list. Communicable diseases are generally highly contagious diseases such as Ebola, typhoid and diphtheria (usually water or air borne) that justify measures such as isolation and quarantine. To include AIDS - a disease that is transmissible but not

the regulation was to bestow public health officials and authorities far-reaching powers over people suffering from the diseases and carriers of the disease.²⁷ The provision authorised officials to place persons suffering from AIDS or alleged to be suffering from AIDS under quarantine,²⁸ to medically examine persons who are HIV-positive,²⁹ as well as those who are alleged to have HIV,³⁰ and to order that a person suffering from HIV not be permitted to prepare or hold food or water which is to be drunk or eaten by other persons.³¹

In 1972 the Home Affairs Minister issued regulations rendering persons suffering from HIV/AIDS “prohibited persons” in the Republic.³² These harsh

contagious - in this list was rightly criticised. The regulations provide that carriers of communicable diseases may not prepare food for other persons. Since HIV cannot be transmitted by way of food, this provision can justly be described as being inapplicable in the context of AIDS.

²⁷ Frankowski 127.

²⁸ Regulation 2(1)(d) of the Regulations to the Communicable Diseases and the Notification of Notifiable Medical Conditions in Government Gazette 11014 of 30 October 1987 reads as follows: “A local authority may, when it comes to its notice that a communicable disease is present or has occurred in its district and if it is reasonably satisfied that the spread of such a disease constitutes or will constitute a real danger to health, by written order and subject to conditions contained in such order [...] (d) place under quarantine in order to prevent the spread of such disease or in order to control or restrict such disease [...] (i) any person or persons actually suffering or suspected to be suffering from such disease, in cases where such person or persons are not removed to a hospital or place of isolation.”

²⁹ Such a medical examination could include a HIV-test.

³⁰ Regulation 14(1) of the Regulations to the Communicable Diseases and the Notification of Notifiable Medical Conditions in Government Gazette 11014 of 30 October 1987 reads as follows: “Any person a medical officer of health suspects on reasonable grounds to be a carrier of a communicable disease and who as such constitutes a danger to the public health shall, if so instructed by the medical officer of health, subject himself to a medical examination at a time and place determined by the medical officer of health in order to establish whether such person is in fact a carrier as suspected.”

³¹ Regulation 14(3)(a) of the Regulations to the Communicable Diseases and the Notification of Notifiable Medical Conditions in Government Gazette 11014 of 30 October 1987 reads as follows: “A medical officer of health may, when he is satisfied on medical scientific grounds that the danger exist of a carrier of a communicable disease to other people , order in writing that such carrier-

(a) Go or be removed to a hospital, other place of isolation or area referred to in the order so as to remain there under medical supervision for a period determined in such order [...]”

³² Section 13(1)(h) of the Admission of Persons to the Republic Regulation Act 59 of 1972 reads as follows: “Any person referred to in this subsection who enters or has entered the Republic or who, though lawfully resident in one province, enters or has entered another province in which he is not lawfully resident, shall be a prohibited person in respect of the Republic or such other province (as the case may be), namely [...] any person who is afflicted with leprosy or with any such infectious, contagious, loathsome or other disease

measures were repealed when the Aliens Control Act 96 of 1991 came into force. These regulations, when in force, were fiercely criticised on the ground that they drastically infringed on individual freedoms.³³ It should be emphasised that this happened at a time when the Bill of Rights did not yet exist. Important is the fact that the effect of these regulations exacerbated discrimination against AIDS sufferers, thereby alienating them from efforts to control the epidemic.³⁴ For these reasons the government's HIV/AIDS advisors and the medical profession generally disapproved of these regulations and called for their repeal.³⁵ South African lawyers who studied these regulations warned the government on the harsh impact that these coercive methods posed for the human rights of persons suffering from HIV/AIDS.³⁶ HIV/AIDS patients suffered not only "physical debilitation and death" but also stern intolerance by the community, as well as rejection, discrimination and stigmatisation.³⁷ Fortunately, as a result of increased opposition towards these measures, these regulations were removed by the National Party.³⁸ Sadly, the fact that the previous government was a late convert to realising that non-coercive means would produce positive efforts in the control of the virus left the country without a clear strategy for controlling HIV for a long time.³⁹

(other than tuberculosis) as is defined by regulation; and any person who is afflicted with tuberculosis unless he is in possession of a permit to enter the Republic, issued upon such conditions as may be prescribed". As mentioned above, GN R2439 in Government Gazette 11014 of 10 October 1987 includes HIV/AIDS amongst other communicable diseases.

³³ Frankowski 129.

³⁴ Frankowski 129. For interest sake a few years after Columbus came back from his meeting with the New World there was an epidemic in Edinburgh, Scotland which speedily spread through Europe. Surprised with the spread of this epidemic the King of Scotland and his council declared that this contagious disease be named Grangor. The sufferers of this disease were alienated from the rest of the community and were left to die out of the town at an island named Frith. This is a typical example of stigmatisation against diseases sufferers. See Kirby M "AIDS and the law" (1993) 9 *South African Journal on Human Rights* 1-21 at 1.

³⁵ Frankowski 129.

³⁶ Cameron E & Swasson "Public health and human rights - The AIDS crisis in South Africa" (1992) 8 *South African Journal on Human Rights* 232-233.

³⁷ Cameron at 51.

³⁸ Frankowski 129.

³⁹ Frankowski 129.

In the 1980's, the apartheid government assembled a National AIDS program and an AIDS Training and Information Centre (ATC).⁴⁰ The ATC became involved in anti-HIV/AIDS strategies which indicated a move towards a non-coercive strategy.⁴¹ Unfortunately it had a limited impact as it had no credibility among the African part of the population and that its activities were constrained due to limited funds.⁴² That the black community was not represented in these efforts is clear from the fact that the Health Minister produced posters on HIV/AIDS in English and Afrikaans only.⁴³ Some of the images used to convey the AIDS message were designs of large condomised penises on posters and billboards. These further alienated the black community whose culture frowns upon such sexual imagery in public.⁴⁴

After realising the ineffectiveness of the ATC, the government established the AIDS Unit which is said to have been more receptive towards the needs of the community.⁴⁵ Much is owed to the role played by the National AIDS Convention of South Africa (NACOSA) which is an association of all state, private, non-governmental sections and community based organisations.⁴⁶ The convention was launched in 1992 with its key areas being education and prevention; counselling; care; welfare; research; human rights and legal reform.⁴⁷ In 1994 the National Party government allotted two hundred and fifty six million and seventy seven thousand rand on their budget for AIDS,⁴⁸ unlike the previous apartheid government who had in the previous two years only spent twenty-one million rand.⁴⁹ NACOSA's plans were, however, never extensively

⁴⁰ Karim at 34-35 See also Frankowski 130.

⁴¹ Frankowski 130. See also Karim at 35.

⁴² Karim at 35. See also Frankowski 130.

⁴³ Frankowski 130.

⁴⁴ Frankowski 130. See also Karim at 35.

⁴⁵ Frankowski 130.

⁴⁶ Cameron E "Legal and human rights responses to the HIV/ AIDS epidemic" (2006) 17 *Stellenbosch Law Review* 47-90 at 55. Also see Frankowski 130.

⁴⁷ Cameron at 55-56. See also Frankowski at 131.

⁴⁸ Setel P *et al Histories of sexually transmitted diseases and HIV/AIDS in sub-Saharan Africa* (1999, Westport: Greenwood) at 236.

⁴⁹ Setel at 236.

implemented.⁵⁰ NACOSA played an important role in addressing some of the serious issues of HIV/AIDS and human rights, which culminated in some of the recommendations of the South African Law Reform Commission between 1997 and 2001.⁵¹

1.3 HIV/AIDS IN THE ERA OF THE NEW CONSTITUTIONAL DEMOCRACY

The first anti-apartheid government headed by Nelson Mandela was agitated by major political and social change, reconciliation and state building which took preference over the need to accord AIDS the crucial priority.⁵² During the first years of the new democratic order, the virus was not given the strenuous responsiveness it ought to have been given. The period between 1993 and 2000 thus saw a rapid increase in HIV/AIDS in South Africa.⁵³

One of the statutes designed to address the HIV/AIDS problem is the new National Health Act (hereafter the National Health Act),⁵⁴ which replaced the controversial Health Act 63 of 1977. The National Health Act now provides for a more uniform and egalitarian national health care system. As far as the issue of notifiable and communicable diseases are concerned, section 90(1) provides that the Minister, after consultation with the National Health Council, may make regulations regarding communicable diseases and notifiable medical conditions. Draft regulations to deal with communicable diseases were published for public

⁵⁰ Cameron at 55-56. Cameron does not explicitly state the various reasons why NACOSA's plans were never implemented. Ngwena, however, points out that the government was not able to fully fund NACOSA, and ended up focusing on short term plans aimed education, the prevention of the epidemic and a focus on the guidelines aimed at the care for persons infected. Ngwena also highlights the misuse of funds allotted to HIV/AIDS projects by the government under the NACOSA plan. See Ngwena C "Legal responses to AIDS in South Africa" at 131-133, in: Frankowski S *Legal responses to AIDS in comparative perspective* (1998, Netherlands: Kluwer Law International).

⁵¹ Cameron at 55-56.

⁵² Karim 35.

⁵³ See <http://www.avert.org/aidssouthafrica.htm> (visited 21 May 2008).

⁵⁴ 61 of 2003.

comment by the Department of Health early in 2008. These *Regulations regarding Communicable Disease*⁵⁵ provide inter alia for the notification of certain communicable diseases listed in Annexure 1, as well as the prevention and control of communicable diseases by health authorities. Measures include mandatory medical examination, isolation and quarantine of patients suffering from diseases listed in Annexure 1. Contrary to the 1987 regulations discussed above, neither HIV nor AIDS is listed in Annexure 1. HIV and AIDS are clearly no longer considered “communicable diseases” which need to be reported to health authorities.⁵⁶

Tragically, the high rate of HIV/AIDS amongst women could have been lesser if the nation had also focused on the epidemic during those years. Now that almost everyone is aware of the epidemic which affects women more severely, the time has come that practices which increase women’s exposure and vulnerability to the disease be identified and critically addressed. It is important in this regard to briefly turn to the positive political and social changes attained during 1993 and 2000 in an attempt to address the problems that affect women’s exposure to HIV/AIDS.

1.4 THE PATTERN OF HIV/AIDS IN SOUTH AFRICA

The HIV/AIDS epidemic in South Africa is mainly regarded a heterosexual type of epidemic.⁵⁷ An additional distinctive feature of the pattern of the epidemic is the

⁵⁵ No R27 in *Government Gazette* of 25 January 2008.

⁵⁶ Tuberculosis (including MDR-TB and XDR-TB) remains a notifiable disease, with MDR-TB and XDR-TB having to be reported on an urgent basis. The draft regulations further provide that health care providers can apply for a high court order to have a person with MDR-TB or XDR-TB medically examined and isolated for a maximum period of six months, which period may be extended by a new court order. Certain conditions have to be met before mandatory action can be taken. They include that other measures which may prevent the spread of the disease must have been tried and that it must be the most justifiable course of action in relation to the risk of the disease being transmitted and to the stress the compulsory measure is likely to entail for the patient.

⁵⁷ Gilbert & Walker at 14. Also see Karim at 35. Also see Epprecht M *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008, Ohio: Ohio

young age of onset infection of women.⁵⁸ Young black women are particularly disproportionately affected by the disease.⁵⁹ There is a strong link between factors such as low income, high unemployment, violence and poor education with HIV infection.⁶⁰ In all of these correlations women emerge as those who are the worst affected.⁶¹ There are of course a number of pre-disposing factors, besides violence and others mentioned above, that put women at increased risk of becoming infected with HIV. These include a range of biological, psychological, economical and cultural factors, which clearly show how complex the problem of women's increased exposure to HIV is. It goes without saying that attention needs to be directed to the factors which are causing women to be more vulnerable to the disease.

1.4.1 FACTORS AFFECTING THE PATTERN OF HIV/AIDS IN SOUTH AFRICA

Gilbert and Walker⁶² have identified a number of factors that affect the pattern of HIV/AIDS in South Africa. Some of these factors will be addressed in more detail in the chapters that follow.

1.4.2 GENERAL FACTORS

Some of the general factors that influence the pattern of HIV/AIDS in South Africa are the general low status of women in society and within relationships; women's traditionally subordinate role in the family and limited personal resources in indigenous communities; general misinformation regarding and

University) at 111, for an extensive discussion on HIV/AIDS as a heterosexual type of epidemic.

⁵⁸ Gilbert & Walker 14.

⁵⁹ Gilbert & Walker 2.

⁶⁰ Beck E J *et al The HIV Pandemic: Local and Global Implications* (2008, Oxford: Oxford University Press) at 50. Also see Gilbert & Walker 14.

⁶¹ Gilbert & Walker 14.

⁶² Gilbert & Walker 14.

ignorance regarding HIV/AIDS; disrupted family and communal life due in part to apartheid, migrant labour patterns and high levels of poverty; and finally, a settled transport infrastructure and high mobility of persons, allowing for the rapid movement of the virus into new communities.

1.4.3 CUSTOMS AND PRACTICES

Specific customary practices and habits facilitate the spreading of the virus in Sout Africa. These are, for example, resistance to the use of condoms as a result of specific sexual and cultural norms and values; social norms which allow or promote high numbers of sexual partners especially among men; the phenomenon of an extended family household structure; preference for a male child (son); the practices of polygamy; bride price; wife inheritance (levirate), and also the practice of silence and superstition.

While the correlation between human rights and HIV/AIDS is so complex, it is apparent that the social and legal status of women in many societies points to the connectedness of HIV/AIDS and human rights.⁶³ Some traditions, customs, practices and religions entrench the subordinate rank and exploitation of women in marriages and relationships, thereby increasing their vulnerability to HIV/AIDS infection.⁶⁴ The protection of human rights is therefore of utmost importance in protecting women's interests, avoiding becoming infected and also in eradicating all forms of discrimination and intolerance practiced against those living with HIV, their relatives and acquaintances.⁶⁵

1.5 RESEARCH PROBLEM AND PROBLEM STATEMENT

⁶³ Gostin L O & Lazzarini Z *Human rights and public health in the AIDS pandemic* (1997, Oxford: Oxford University Press) at vii-viii.

⁶⁴ Gostin & Lazzarini vii-viii.

⁶⁵ Gostin & Lazzarini vii-viii.

Understanding gender violence in South Africa requires a generalised historical knowledge of women's legal position in the South African society. Sexual relationships were historically characterised by strong imbalances.⁶⁶ Women were traditionally regarded as powerless⁶⁷ and wives were treated as minors in the sense that they had no proprietary capacity, nor could they contract and sue in court.⁶⁸ In this regard, women were seen as "perpetual minors".⁶⁹ As recently as 1993, women had the equal status as guardians of their own children.⁷⁰

A characteristic feature of the era preceding the enactment of the Constitution was that black women's disadvantaged legal position was exacerbated by their race and gender. The coming into force of the Bill of Rights in South Africa had a significant impact on the legal position of women. Since this development all women have become entitled to receive proper appreciation as equal citizens.⁷¹ Since the enactment of the Constitution, the law has played a significant role in addressing such prejudice, as the achievement of equality is one of the main objectives of the Constitution.⁷² Calls for progression and the endorsement of women's status are being made and applied on a daily basis as evidenced by the work of a number of organisations, most notably Women for Peace, the African National Congress Women's League Department, the Human Rights Institute of South Africa and the Centre for Gender Studies.⁷³

There are several ways in which HIV/AIDS, violence and gender inequality may overlap in the context of women's lives. Firstly, male violence may impede a

⁶⁶ Bennett T W *Customary Law in South Africa* (2004, Lansdowne: Juta) at 249, 252 and 254.

⁶⁷ Castle J & Kiggundu E "Are rural women powerless when it comes to HIV & AIDS risk? Implications for adult education programmes in South Africa" (2007) 1 *Perspectives in Education* 45-58 at 46.

⁶⁸ Bennett at 252.

⁶⁹ Woolman S *et al Constitutional Law of South Africa* 2nd ed (2007, Cape Town: Juta) at 37-17.

⁷⁰ Woolman at 37-17.

⁷¹ Meintjes S "The women's struggle for equality during South Africa's transition to democracy" (1996) 30 *Transformation* 47-64 at 47.

⁷² Constitution of the Republic of South Africa, 1996, section 1 (hereafter referred to as the Constitution).

⁷³ See <http://www.distel.ca/womlist/countries/southafrica.html> (visited 06 August 2008).

woman's ability to protect herself from HIV. Sexual violence increases a woman's risk through non-consensual sex, or by limiting her efforts or ability to convince her partner to wear a condom. Studies suggest that in some cultures, suggesting condom use is potentially more dangerous than even raising the issue of birth control, as condoms are widely associated with promiscuity, prostitution and disease in these cultures.⁷⁴ A woman requesting her partner to use a condom may trigger a violent response. Hence, any HIV-prevention strategy that aims to get woman to "negotiate" condom use is doomed to fail, as it rests on the assumption of equity between the sexes that simply does not exist in both consensual and coercive relationships.⁷⁵

In addition to the direct health harm posed by cultural practices that encourage concurrent sexual networks within a marriage (eg between multiple wives, the husband and other extra-marital sexual contacts of all the spouses permitted in terms of polygyny), the latter significantly amplifying the HIV transmission rate,⁷⁶ other seemingly less harmful practices, for example those of 'dry sex', female genital mutilation, the levirate, also increase women's vulnerability to HIV, as the study will show. Against the background of patriarchy, harmful stereotyping (which equates a woman's worth with her reproductive capacity), women's subordinate role in certain communities, and the compounding factor of gender violence, it becomes clear how vulnerable women indeed are. Harmful and discriminatory cultural practices intersect with gender violence to increase women's exposure to HIV/AIDS. Women's vulnerable position often compels them to continue with unsafe or harmful practices, simply because the social,

⁷⁴ See Worth D "Sexual decision-making and AIDS: Why condom promotion among vulnerable women is likely to fail" (1989) 20(6) *Studies in Family Planning* 297-307. See also Naylor NM "'Cry the beloved continent': Exploring the impact of HIV/AIDS and violence on women's reproductive and sexual rights in Southern Africa" in: Cook R J & Ngwena C (eds) *Health and human rights* (2007, Aldershot: Ashgate) 21-45 at 30.

⁷⁵ Naylor at 61.

⁷⁶ Kelly L M "Polygyny and HIV/AIDS: A health and human rights approach" in: Cook RC & Ngwena C *Health and human rights* 147-180 at 148.

economic and cultural costs of avoiding these risks may be too high.⁷⁷ Women lacking economic resources may often resort to prostitution or informal sexual relationships with several men in exchange for material goods or financial support.

However, despite all the changes since the last fifteen years, women in South Africa are generally still disadvantaged as a result of inter alia cultural and religious practices which dictate among others that a woman should hold an inferior position in society.⁷⁸ Some women, especially in rural areas, put up with the impact of most of the discriminatory cultural practices, especially within the context of the family or intimate relationships. In the present era of HIV/AIDS, the power imbalance between sexes in the cultural context carries a novel sense of urgency. Women have become especially susceptible to the disease as a result of their limited power in sexual encounters.⁷⁹

The research question is therefore to examine the intersection between gender inequality and gender violence against the backdrop of HIV/AIDS, and more specifically, to critically assess those cultural practices and customs that contribute towards and exacerbate women's subordination and inequality, which in the process increase women's exposure to become infected with HIV. In order to illustrate this, the study will also closely examine the fundamental human rights relevant to this purpose.

The impact of the Constitution on this topic is threefold. First, as the supreme law in South Africa, any legislation that is irreconcilable with the Constitution will be invalid;⁸⁰ second, the Bill of Rights applies to all law and binds the executive,

⁷⁷ Gruskin S "Negotiating the relationship of HIV/AIDS to reproductive health and reproductive rights" (1995) 44 *American University Law Review* 1191-1206 at 1194-5.

⁷⁸ Castle & Kiggundu at 47.

⁷⁹ Bonthuys & Albertyn at 375.

⁸⁰ Section 2 of the Constitution which reads as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

legislative, judiciary and all organs of state;⁸¹ and third, the Bill of Rights instructs the state to use the power that the Constitution provides for in ways that do not violate the fundamental rights.

1.6 LIMITATIONS

The topic of this dissertation invariably spans a wide range of legal issues relating to HIV/AIDS across a few legal disciplines, ranging from private law issues and customary law to public and procedural law matters. It would be impossible to traverse each of these issues in detail. The focus of this study is hence limited to the interplay between gender inequality, gender violence and HIV/AIDS in the present South African context. The focus will be on women specifically, as women have traditionally suffered the most in relation to gender inequality and violence. Relevant to this focus is inevitably an investigation of perceived threats to specific fundamental human rights as a result of some entrenched practices that continue to reinforce women's subordinate position in society, aggravated by the high incidence of gender violence. The objectives of this research are hence inter alia to explore how some of these African customs and practices contribute to the women's increased risk of becoming infected with HIV/AIDS, and also to deepen the understanding of the legal position and vulnerability of women with respect to their rights to equality, dignity, freedom of choice and freedom to be free from any form of violence. The nature of the

⁸¹ Section 39 of the Constitution states:
“(1) When interpreting the Bill of Rights, a court, tribunal or forum -
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

issues selected for discussion inevitably points to matters related to the private (and personal) sphere. As the study will show, the family is seen as the unit of male dominance, the location of male violence and hence the main site of women's oppression. States have traditionally viewed women's concerns as "private" instead of "public" matters, hence the historical reluctance to intervene in matters such as domestic violence, etc. It is therefore submitted that in order to counter mainstream legal theory and jurisprudence that are mainly "masculinist", this study will attempt to address the topic by emphasising the gendered context in which women infected and affected by HIV live and how this impacts on their vulnerability. The so-called "private" or "personal" domain which contextualises this research topic will need to be made public and political.

1.7 GENDER INEQUALITY AND VIOLENCE THROUGH THE LENS OF THE CONSTITUTION

The following rights are relevant in the context of women's inequality and against the backdrop of HIV/AIDS and violence. Some of these rights will be explored in more detail in subsequent chapters of this study. In order to contextualise the topic, it is necessary to provide a brief overview of the essence of some of the relevant rights.

1.7.1 GENDER EQUALITY

The right to equality is entrenched in section 9 of Constitution.⁸² The South African Constitution accords high significance to the right to equality and

⁸² Section 9(1)- (5) of the Constitution reads as follows:
 "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
 (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

condemns any laws and practices which support the subordination of disadvantaged groups and undermine their worth.⁸³

Equality protects the equal worth of the holder of the right.⁸⁴ It is argued that people have equal worth for the reason that all of them have human dignity and because they are bearers of equality.⁸⁵ The right to equality sometimes require that particular persons be treated differently in a manner which may be justifiable.⁸⁶

The social and reproductive equality of women will gain huge ground when all women are free to decide whether or not to have sex.⁸⁷ While it is culturally correct to maintain some traditional values and customs that many African societies identify with, there are some customs that are retrogressive and have a definite impact on the fundamental rights of those women bound by these.⁸⁸ One such example is the customary principle of “cleansing”⁸⁹ which forces a widow to have sex with a husband’s relative in order to exorcise the deceased spirit after his death and save the village. This practice persists, despite the ravaging impact of HIV and despite feminists speaking out against this custom.⁹⁰ Another example that may increase a woman’s susceptibility to contract HIV is

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

⁸³ Woolman 37-12.

⁸⁴ Rautenbach IM & Malherbe EFJ *Constitutional Law* (4th ed) (2004, Durban: Lexis Nexis Butterworths) at 329-330.

⁸⁵ Rautenbach 329-330.

⁸⁶ Rautenbach 329-330.

⁸⁷ Woolman at 37-13.

⁸⁸ See <http://www.sardc.net/editorial/sadctoday/v3-1-06-1999/v3-1-06-1999-11.htm> (visited 14 April 2008).

⁸⁹ Curry J (ed) *The reference shelf: Women’s rights* (2005, New York: H W Wilson) at 175.

⁹⁰ Curry 175.

the practice known as “dry sex” in South Africa.⁹¹ This practice supposedly increases sexual gratification for men during intercourse.⁹² The practice of dry sex also refers to the use of herbs to dry out the vagina.⁹³ In South Africa, the practice is most prevalent in Kwazulu Natal, which incidentally has the highest rate of HIV.⁹⁴

A cultural belief first seen in the Eastern Cape in 1947 when an epidemic of sexually transmitted diseases broke out after soldiers returned from World War II, has reared its ugly head.⁹⁵ This practice entails the raping of virgin women and children in the belief that it would cure a sexually transmitted disease.⁹⁶ Today the same myth is presently evidenced in the belief that raping or having sexual intercourse with a virgin would cure HIV/AIDS.⁹⁷ Some believe that this myth is most effective when one rapes one’s own virgin girl child.

These are only examples of some customs and beliefs that not only undermine women’s equality, human dignity, but also increase women’s exposure to HIV/AIDS. These harmful practices – which in some instances constitute gender violence – must be examined in the context of fundamental rights such as inter alia the right to freedom and security of the person and the right to equality which means “full and equal enjoyment of all rights and freedoms”.⁹⁸

In many rural households, the father as the head of the family has to leave the family home for the urban area where most of the financially viable activities

⁹¹ Slabbert M “Till death do us part” (2006) 47 (1) *Codicillus* 1-3 at 5.

⁹² Slabbert at 5.

⁹³ Arrehag L *et al* *The impact of HIV/AIDS on livelihoods, poverty and the economy of Malawi* (Sida, Stockholm: 2006) 1-112 at 43.

⁹⁴ Baleta A “Concern voiced over “dry sex” practices in South Africa” *Lancet* vol 352 (issue 9136) at 1292-1292 at 1292.

⁹⁵ See <http://www.iol.co.za> (visited 9 April 2008).

⁹⁶ See <http://www.iol.co.za> (visited 9 April 2008).

⁹⁷ George E *et al* *Scared at school: sexual violence against girls in South African schools* (2001: Human Rights Watch) at 25. See also Morisky D E *Overcoming AIDS: lessons learned from Uganda* (2006, Norfolk: Information Age) at 279.

⁹⁸ Section 9(2) of the Constitution.

take place. Drimie⁹⁹ argues that rural communities carry the cost of their migrants contracting HIV/AIDS through the loss of income remitted by a worker who has fallen ill and through the cost of supporting such an ill worker who has come back home. The reality of this situation is that the rural wife has to carry the responsibility and burden to care for the husband by the disinvestment of her own assets. The disinvestment of the wife's assets refers to situations where the money is not enough to care for the ill and the rural wife is forced to sell the small property in which she has invested over many years. Such property could either include livestock such as one of more goats, sheep, chicken or rabbits. Items typically sold usually comprise of livestock, radios and bicycles, the latter often the only form of savings that most underprivileged household possesses.¹⁰⁰ Often in these situations, the children are withdrawn from attending school. In most instances, it is the girl child who is withdrawn from attending school. This in itself is a clear indication of how HIV/AIDS is facilitating differentiation along gender lines.

The customary law practice of primogeniture plays an important role when discussing the role of HIV/AIDS in gender-based violence and the right to equality. This practice, at the centre of the case of *Mthembu v Letsela*,¹⁰¹ which will be discussed in detail in a subsequent chapter, enables men (but not women) to be appointed as universal heirs of the deceased. The inheritance of the family property by the heirs comes with a responsibility to administer the property for the benefit of the widow and the deceased family members.¹⁰² Bonthuys and Albertyn criticise the manner in which some handle the inherited property. Often the heir does not discharge his responsibility as heir and sadly

⁹⁹ Drimie S "The impact of HIV/AIDS on rural households and land issues in Southern and Eastern Africa" A background paper prepared for the food and Agriculture Organisation, Sub-regional office for Southern and Eastern Africa (2002) 1-31 at 9.

¹⁰⁰ Arrehag 61.

¹⁰¹ *Mthembu v Letsela* 1997 2 (SA) 936 at 945. The principle of primogeniture is applicable to the customary rule of intestate succession. This principle enables the male heir to bear responsibility for the maintenance of the destitute female relatives. It is for this very reason that the court in *Mthembu v Letsela* held that this principle is unconstitutional.

¹⁰² *Mthembu v Letsela* at 945.

enough at times the widow together with her children are evicted from their home on the basis that her marriage was not valid.¹⁰³ It is submitted that having been left in such a situation encompassed by serious hardships and poverty, the widow becomes more exposed to the risk of contracting HIV/AIDS. Primogeniture, which in essence deprives women of the husband's estate at the death of the husband, plays a significant role in contributing to the vulnerability of women to HIV/AIDS. The widow is left without anything to maintain herself; a factor which places her at a high risk of HIV-infection, as her socio-economic position may leave her no choice but to become involved in unprotected sexual relationships for money with men who are already HIV positive, or who again may refuse to wear a condom. In the case of *Bhe v Magistrate Khayelitsha*¹⁰⁴ (discussed in detail later in the study) the principle of primogeniture was challenged on the basis that it discriminates unfairly on the grounds of gender, age and birth. The Constitutional court held that

[w]here a rule of indigenous law deviates from the spirit, purport and object of the Bill of Rights, courts have an obligation to develop it so as to remove such.¹⁰⁵

Drimie¹⁰⁶ argues that all factors which predispose people to HIV are poverty driven and that poverty relates to the spread of HIV in ways that are entrenched

¹⁰³ Bonthuys & Albertyn 189-190.

¹⁰⁴ *Bhe v Magistrate Khayelitsha* 2004 (1) BCLR 27 (CC) at 48. The Constitutional court had to decide on the constitutionality of the principle of primogeniture which underlies the indigenous law of succession. An African woman claimed ownership of a plot on behalf of herself and her two daughters after the death of her customary husband. The father of the husband claimed that he was the customary heir and also disputed the validity of her marriage. He also claimed custody over the children. The majority judgment declared this principle regulating intestate succession in indigenous law unconstitutional. Such a principle violates rights of equality and dignity. On the same grounds the majority judgment struck down the traditional rule of male primogeniture. The minority judgment found that that the rule of male primogeniture should be developed in line with the Constitution.

¹⁰⁵ *Bhe v Magistrate Khayelitsha* at 66.

¹⁰⁶ Drimie at 7. Refer also to Nienaber A G "The protection of participants in clinical research in Africa" at 142-143. Nienaber lists some of the factors that contribute to the already heavy burden of the disease. Among these factors are: low levels of education, high poverty, civil wars and a disintegrating infrastructure.

to structural poverty arising from gender imbalance, land ownership inequality, rural urban immigration and breakdown of traditional sexual mores.

1.7.2 FREEDOM AND SECURITY OF THE PERSON

Section 12 of the Constitution provides for the right to freedom and security of the person.¹⁰⁷ This right protects the physical and psychological integrity of human beings.¹⁰⁸ Various expressions are used to describe the protected conduct and interests under section 12, such as, for example, the right “to make decisions concerning reproduction”, “security in and control over their bodies”, and “to be free from all forms of violence from either public or private sources”.¹⁰⁹ These expressions are designed to protect aspects of bodily and psychological integrity.¹¹⁰

Currie and De Waal¹¹¹ submit that the inclusion of this right is an acknowledgment that the power to make choices about reproduction is a vital feature of control over one’s body. The fundamental nature of the right is to be left alone in matters concerning one’s body.¹¹² In other words, the right generates a sphere of individual inviolability.¹¹³

¹⁰⁷ Section 12 of the Constitution reads as follows:

- (1) “Everyone has the right to freedom and security of the person, which includes the right –
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right
 - (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.”

¹⁰⁸ Woolman 37-15.

¹⁰⁹ Rautenbach & Malherbe 334-335.

¹¹⁰ Rautenbach & Malherbe 335.

¹¹¹ Currie I & De Waal J *The Bill of rights handbook* (2005, Lansdowne: Juta) at 308.

¹¹² Currie & De Waal 308.

¹¹³ Currie & De Waal 308.

“Security in” and “control over” ones body are not synonymous in the sense that the former refers to the protection of bodily integrity against interruption by the state and others.¹¹⁴ The latter refers to the so called bodily autonomy or self determination against interference.¹¹⁵ Bonthuys and Albertyn¹¹⁶ argue that HIV/AIDS is one pertinent issue that relates to women’s rights to freedom and security of the person, as will become clear from this study.

It is further argued that section 12(2)(b) must be read with section 12(1)(c) which includes the right to be free from violence.¹¹⁷ It is apparent that bodily security is jeopardised by violence. In a subsequent chapter, this study will inter alia show how the customary law principle of patriarchy undermines a woman’s right to freedom and security of the person. Bhasin¹¹⁸ uses a vast range of examples to illustrate what patriarchy is and how it manifests itself. The following two examples illustrate how patriarchy may find expression in the private lives of some women:

I have to submit my body to my husband whenever he wants it. I have no say. I fear sex. Don’t enjoy it.¹¹⁹

This power pattern reinforces the notion that women are powerless beings who are expected to accede to the sexual demands of men. Any request by a woman to practice safe sex or to negotiate sexual matters with her husband or partner is often perceived as a challenge to his authority. Another hypothetical example is the following:

I wanted my husband to use family planning methods but he refused. He also did not give me permission to get operated myself.

¹¹⁴ Currie & De Waal 308.

¹¹⁵ Currie & De Waal 308.

¹¹⁶ Bonthuys & Albertyn 296.

¹¹⁷ Bonthuys & Albertyn 309.

¹¹⁸ Bhasin K *What is patriarchy?* (1994, New Delhi: Vision Wordtronic) at 3-5.

¹¹⁹ Bhasin at 4.

This example illustrates how the male partner's or husband's authority over the woman's reproductive rights may prevent her from negotiating the use of condoms or other family planning methods. It is disturbing to find that whenever women speak out about the use of condoms and the violation of their rights, they are told that they are becoming "western" or promiscuous. The request for the use of a condom or contraceptives alone often triggers a violent response from male partners.¹²⁰

The examples clearly show that in customary marriages characterised by patriarchy, the husband has absolute and undefined marital power over the wife. Castle and Kiggundu¹²¹ correctly observe that the issue of marital power has an impact on those marginalised by society, specifically black women living in rural areas. They further emphasise that sex is about power, it is also about who initiates it, who makes decisions about it and who wears a condom.¹²² Women's inferior status in patriarchal societies (such as those in Louis Trichardt and Thohoyandou) and these women's economic dependence on men greatly increase their vulnerability to sexual transmitted diseases.¹²³ This so-called "gender contract" is hence a major obstacle in the way for women to protect themselves from HIV/AIDS.¹²⁴ This position will be explored in more detail later, as well as the manner in which some customary practices curtail the right to freedom and security.

1.7.3 HUMAN DIGNITY

¹²⁰ See discussion under paragraph 2 above.

¹²¹ Castle & Kiggundu at 45.

¹²² Castle & Kiggundu 46-49.

¹²³ Castle & Kiggundu 46-49.

¹²⁴ Castle & Kiggundu 46-48. These authors do not define "gender contract" but this term clearly refers to the entrenched position of women's subordination in the labour market and their principle responsibility in respect of reproduction and care. The concept implies an invisible contract among women as a group and patriarchal structures. See also Roy K C *et al Economic development and women in the world community* (1996, USA: Greenwood Publishing Group) at 141.

The value of human dignity is protected and endorsed by the recognition of the right to dignity in the Bill of Rights.¹²⁵ Human dignity is considered to be what gives a person his or her intrinsic worth.¹²⁶ Dignity is the basis of a person's innate rights to freedom and to physical integrity, from which a number of other rights stem.¹²⁷ The Constitutional court in *S v Makwanyane*¹²⁸ observed that the reverence for dignity for all humans is of utmost importance in South Africa. The court further noted that apartheid was a denial of common humanity in the sense that black people were refused respect and dignity, but that

The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.¹²⁹

Human dignity accordingly also provides the basis for the right to equality – inasmuch as all human beings possess human dignity in equal measure, everyone must be treated as equally worthy of respect.¹³⁰ Respect for human dignity entails recognising that all persons are able to make individual choices.¹³¹ The right to human dignity is linked to the right to personal freedom and physical integrity.¹³²

Van Heerden J, in *Dawood v Minister of Home Affairs*,¹³³ held that the right to human dignity must be interpreted to afford protection to the institutions of marriage and family life. The control of women's reproductive rights by their husbands or partners will be examined in more detail in the study below. It will

¹²⁵ Section 10 of the Constitution reads as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

¹²⁶ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at 777.

¹²⁷ Currie & De Waal 273.

¹²⁸ *S v Makwanyane and Another* at 778.

¹²⁹ *S v Makwanyane* 778.

¹³⁰ Currie & De Waal 273.

¹³¹ Currie & De Waal 274.

¹³² Currie I & De Waal 273.

¹³³ *Dawood v Minister of Home Affairs* at 859-862.

be argued that such control constitutes an unjustifiable violation of a woman's constitutional right to dignity.¹³⁴

1.7.4 PRIVACY

The Constitution protects the right to privacy in section 14.¹³⁵ Privacy is an individual state of life with the nature of seclusion from the public and publicity.¹³⁶ This entails an absence of acquaintance in an individual's personal affairs.¹³⁷ Thus privacy can only be infringed by unlawful acquaintance by outsiders with the individual's personal life.¹³⁸ Ackerman J in the *Bernstein* case¹³⁹ states that privacy is a truly a personal realm save for where a person moves into joint relations and activities such as business and social interaction. In such cases the scope of personal liberty shrinks for that reason.

The scope of a person's constitutional right to privacy extends to aspects such as a legitimate expectation of privacy, the right to be left alone, the right to development of the individual personality, informational privacy and searches

¹³⁴ The right to dignity is also acknowledged as an independent personality right within the common law concept of *dignitas*. This independent personality right within the concept of *dignitas* entails a person's subjective feelings of dignity or self-respect. Violation of a person's dignity in common law constitutes insulting that person. There exist a number of ways in which this may take place. However, for conduct in terms of the common law to be classified as a violation of dignity, the behaviour must both infringe the subjective feelings of dignity (thus factual infringement of a legal object), as well as be *contra bonos mores*. See Neethling et al *Law of delict* (5th ed) (2006), Durban: Lexis Nexis Butterworths) at 321.

¹³⁵ Section 14 of the Constitution reads as follows:
 "Everyone has the right to privacy, which includes the right not to have -
 (a) their person or home searched;
 (b) their property searched;
 (c) their possessions seized; or
 (d) the privacy of their communications infringed."

¹³⁶ Neethling 323.

¹³⁷ Neethling 323.

¹³⁸ Neethling 323.

¹³⁹ *Bernstein v Bester* NO 1996 (2) SA 751 (CC) at 788.

and seizures.¹⁴⁰ The right to be left alone encompasses decisions relating to an individual's body, home and family life. The rationale behind this right is that other people should have nothing to do with an individual's intimate affairs.¹⁴¹ It is submitted that the right to privacy recognises that every individual is entitled to a sphere of personal autonomy in which the law may not interfere.¹⁴² The sphere of autonomy does not only refer to control over physical aspects such as the human body or the home or private property, but also to certain kinds of decisions such as whether or not to have a sexual relationship with someone.¹⁴³

The right to privacy also finds protection in the law of delict.¹⁴⁴ This cause of action has been recognised since the classical Roman period and it protects a number of personality rights under the Latin terms *corpus*, *fama* and *dignitas* which can loosely be translated as a person's physical and mental integrity, good name and dignity.¹⁴⁵

The Constitution did not abolish the common law recognition of dignity. The courts will hold on to the existing common law actions which are in accordance with the values of the Constitution.¹⁴⁶ In the Constitutional case of *NM and Others v Smith and Others*,¹⁴⁷ the appellants complained that the High Court had failed to protect their rights to privacy, dignity and psychological integrity. The Constitutional court looked at whether the common law right of privacy should be developed so as to impose liability on those who negligently publish confidential information.¹⁴⁸

¹⁴⁰ De Waal at 317-328.

¹⁴¹ Currie I & De Waal J *The Bill of rights handbook* (2001, Lansdowne: Juta) 1-825 at 271.

¹⁴² De Waal 271.

¹⁴³ De Waal 271.

¹⁴⁴ *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC) at 787.

¹⁴⁵ *NM and Others v Smith and Others* at 787.

¹⁴⁶ Woolman 38-2.

¹⁴⁷ *NM and Others v Smith and Others* at 759.

¹⁴⁸ *NM and Others v Smith and Others* at 764-765, and 772-775. The breach of a person's privacy at common law constitutes an *iniuria* and the action for the invasion of privacy is

1.7.5 EDUCATION

Women's rights activists argue that by being getting married at a young age, young women are doomed to become the "property" of men who are physically and psychologically dominant within the marriage.¹⁴⁹ Young girls are commonly thought to be more "valuable" because they are sexually inexperienced or virgins and they are more complacent and malleable in personality and likely to obey orders.¹⁵⁰ It is submitted that because the bodies of these young girls are physiologically underdeveloped, they are more easily injured through sexual intercourse and are thus extremely vulnerable to diseases such as HIV.¹⁵¹ This is due to the young girl's unripe cervix and the low vaginal mucus production.¹⁵²

There appears a widespread belief in Africa that young girls are less likely than adult women to be infected with HIV/AIDS and they are thus considered to be safer sexual partners.¹⁵³ Beliefs like these add to the phenomenon of men selecting brides significantly younger than ten and eleven years old. A following chapter in this study will examine the various reasons why men prefer to marry young girls. Early marriage exposes young women to many risk's, which may include high blood pressure, anaemia, haemorrhage and a significantly greater risk of contracting sexually transmitted diseases, including HIV. Sadly, being labelled a virgin may also increase the young girl's vulnerability to sexual assault or rape.

based on the *actio iniuriarum*. An unlawful intrusion of someone's privacy is judged in the light of the general test of the *boni mores*.

¹⁴⁹ Packer C *Using human rights to change tradition* (2002, Antwerp: Intersentia) at 25.

¹⁵⁰ Packer 25.

¹⁵¹ Packer 27.

¹⁵² Packer 27.

¹⁵³ Leclerc-Madlala S "Protecting girlhood? Virginity revivals in the era of AIDS" (2003) 56 *Agenda* 16 at 17-18.

To exacerbate this situation the young bride is expected to take on her new duties as wife following the marriage immediately.¹⁵⁴ Her schooling thus comes to an abrupt end. In such circumstances schooling is considered unnecessary for fulfilling her new duties as homemaker. The widespread practice of early marriage means that young girls have to stop their education at a young age, despite their wishes to continue with an education. This study will argue that such a practice obstructs the girl child's right to education. Education is imperative for the incorporation of important facts; the advance of independent consideration; and the formulation of opinion. The infringement of the right to education is closely related to other violations of rights, as will be shown.

The South African educational system makes HIV and AIDS a priority. This implies that if young girls drop out of school as a result of early marriage, they will miss out on the crucial HIV/AIDS education that could literally save their lives. Gunderson¹⁵⁵ argues that explicit AIDS education should be pursued with vigour, even if some find it unpleasant and an invasion of their privacy. Educating people on how to avoid contracting any infectious disease is a typical public health strategy.¹⁵⁶ With AIDS it seems appropriate to teach people about the disease, since transmission may involve particular activities which individuals can choose to avoid. From the point of view of uninfected persons who are concerned to avoiding contracting HIV/AIDS, the message of AIDS education is essential. Making information obtainable about who is at risk, the activities through which HIV is transmitted, and how these activities can be made safer will both benefit those individuals willing to avoid exposure as well as support the precautionary public health goal.

The above outline of some of the rights that are affected by specific practices that characterise the private lives of women will be examined in more detail in

¹⁵⁴ Packer 77.

¹⁵⁵ Gunderson M *et al* *AIDS: Testing and privacy* (1989, Utah: University of Utah Press Salt Lake City) 1-241 at 97.

¹⁵⁶ Gunderson 98.

the chapters that follow. One such right not referred to above, is the right to have access to health care services, which is entrenched in section 29(1)(a) of the Bill of Rights. This right will, however, be specifically addressed in relation to some of the rights briefly referred to in this chapter.

1.8 CONCEPTS

The brief description below of some of the main concepts which appear throughout the study will assist in contextualising the issues that will be explored in more detail below.

1.8.1 GENDER VIOLENCE

Gender violence is a very broad concept, that may take many different forms, such as, for example, the rape of a virgin woman or child in the belief that it would cure HIV/AIDS; the rape of a woman in a train; the sexual oppression of a girl student by staff members; or a wife being treated with hostility with the justification that a bride price was paid for her. The contexts in which the violence may occur, may differ, for example in respect of the impairment caused; the relationship between victim and assailant; as well as ways of legally dealing with the situation. However, what all these results have in common is the observable fact of gender.

The Declaration on the Elimination of Violence against Women (DEVW)¹⁵⁷ exclusively and explicitly addresses the issue of violence against women. It affirms that the phenomenon violates, impairs or nullifies women's human rights and their exercise of fundamental freedoms. The definition is amplified in article 2 of the Declaration which identifies three areas in which violence among women commonly takes place:

¹⁵⁷ The United Nations Declaration on the Elimination of Violence against Women (DEVW), proclaimed by the UN General Assembly in its resolution 48/104 of 20 December 1993.

- Physical, sexual and psychological violence that occurs in the family, including battering; sexual abuse of female children in the household; dowry-related violence; marital rape; female genital mutilation and other traditional practices harmful to women; non-spousal violence; and violence related to exploitation;
- Physical, sexual and psychological violence that occurs within the general community, including rape; sexual abuse; sexual harassment and intimidation at work, in educational institutions and elsewhere; trafficking in women; and forced prostitution;
- Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.¹⁵⁸

Gender based violence has also been defined by the United Nations in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in similar terms.¹⁵⁹

Implicit in the above definition and important for the present study is the realisation that gender violence affecting women could be of a physical, sexual or psychological nature; and that gender violence includes violence occurring in the family, as well as dowry related violence and violence emanating from traditional practices.

¹⁵⁸ DEVW of 20 December 1993, article 2.

¹⁵⁹ Convention on The Elimination of all Forms of Discrimination against Women of 18 December 1979 defines gender based violence as “any act [...] that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in private or public life [...]. [V]iolence against women shall be understood to encompass, but not be limited to, physical, sexual and psychological violence occurring in the family, the community, including battery, sexual abuse of female children, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, violence related to exploitation, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women, forced prostitution, and violence against women perpetrated and condoned by the state.”

1.8.2 THE PRACTICE OF DRY SEX

The practice of dry sex is defined as the sexual practice of reducing vaginal secretions by using traditional medicine, by wiping out the vagina, prior to and during sexual intercourse for the purpose of making the woman's vagina dry and tight.¹⁶⁰ Dry sex preparation also entails the inserting of toothpaste, antiseptics or soap into the vagina for purposes of drying it out. Sub-Saharan women attain this dryness in various ways. Herbs from the Mugugudhu tree are wrapped in a nylon stocking and inserted into the vagina for ten to fifteen minutes in a procedure that is regarded as very painful. *Mutendo wegudo* (dry soil where a baboon has urinated) is a traditional Zimbabwean recipe to dry out the vagina. Shredded newspapers, cotton, salt and detergents are also used.¹⁶¹

Women engage in such a practice for many reasons. The practice is said to generate extra sensation for the man during intercourse but may be very painful for the woman. Wives often express the need to practice dry sex in order to keep their husbands and prevent them from finding sexual satisfaction elsewhere.¹⁶²

The practice is common in sub-Saharan Africa. Dry sex poses serious problems as it increases the chances of transmitting sexually transmitted diseases (STDs) including AIDS, due to vaginal tearing.¹⁶³ The practice is generally incompatible with the use of condoms which require lubrication to avoid breakage.¹⁶⁴ It may also result in vaginal inflammation and/or traumatic lesions which in turn may increase the transmission of STDs and HIV in other ways.¹⁶⁵ The practice facilitates transmission of HIV/AIDS in three ways: the lack of lubricant results in

¹⁶⁰ Civic D & Wilson D "Dry sex in Zimbabwe and implications for condom use" 1996 42 (1) *Social Science and Medicine Journal* 91-98 at 93.

¹⁶¹ See http://www.rho.org/html/hthps_overview.htm#drysex (visited 13 August 2008).

¹⁶² See http://www.rho.org/html/hthps_overview.htm#drysex (visited 13 August 2008).

¹⁶³ Gruenbaum E *The female circumcision controversy: An anthropological perspective* (2001, Pennsylvania: University of Pennsylvania Press) at 154.

¹⁶⁴ Josefina J *et al The complete HIV/AIDS teaching kit* (2007, New York: Springer) at 313.

¹⁶⁵ Josefina at 313.

lacerations in the delicate membrane tissue, making it easier for the lethal virus to enter; in addition, the natural antiseptic lactobacilli that vaginal moisture contains are not available to combat sexually transmitted diseases and finally, condoms break far more easily due to the increased friction.¹⁶⁶

1.8.3 HUMAN IMMUNODEFICIENCY VIRUS (HIV) AND THE ACQUIRED IMMUNO DEFICIENCY SYNDROME (AIDS)

Medical opinion in the case of *Hoffmann v South African Airways*¹⁶⁷ describes HIV/AIDS as a progressive disease of the immune system. The disease is caused by the human immunodeficiency virus, or HIV.¹⁶⁸ HIV is a human retrovirus that affects vital white blood cells called CD4+ lymphocytes.¹⁶⁹ The disease is characterised by decreasing immunocompetence over time.¹⁷⁰

HIV/AIDS is an infectious disease which involves intimate contact for transmission.¹⁷¹ The predominant means of transmission is by far via sexual contact.¹⁷² The virus is also passed from one person to another through transmissions from medical-work related injuries or from needle stick or sharp instruments.¹⁷³ Transmission also occurs through needle sharing by intravenous drug users; infected pregnant woman can pass the disease during pregnancy, delivery or breastfeeding. The virus can also be transmitted through the

¹⁶⁶ Hyena H “‘Dry sex’ worsens AIDS numbers in southern Africa” (1999), accessed at <http://www.salon.com/health/sex/urge/world/1999/12/10/drysex/index.html> (visited 20 January 2009). See also Walker L *et al Waiting to happen: HIV/AIDS in South Africa: The bigger picture* (2004, Cape Town: Juta) at 48, and Page J *et al Working with HIV/AIDS* (2006, Cape Town: Juta) at 32.

¹⁶⁷ *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) at 1216.

¹⁶⁸ *Supra.*

¹⁶⁹ *Supra.* A CD4+ count is a blood test to determine how well the immune system is working in people who have been diagnosed with human immunodeficiency virus (HIV). CD4+ cells are a type of white blood cell. White blood cells are important in fighting infections. CD4+ cells are also called T-lymphocytes, T-cells, or T-helper cells. See <http://www.webmd.com/hiv-aids/cd4-count> (visited 23 August 2008).

¹⁷⁰ *Hoffmann v South African Airways* at 1217.

¹⁷¹ *Supra.*

¹⁷² *Supra.*

¹⁷³ *Supra.*

transfusion of blood products.¹⁷⁴ The progression of an untreated HIV infection is characterised by four stages, as is set out in the *Hoffmann case*.¹⁷⁵

1.9 FRAMEWORK OF THE DISSERTATION

The study consists of five chapters, structured as follows:

In this chapter (chapter one), a general introduction to the study is presented. Inclusive to this is the contextual background to the research problem, the problem statement and limitations, as well as an overview of relevant constitutional rights implied by the topic.

Chapter two will investigate how indigenous African culture has influenced the family structure, sexual relations, and particularly the social position of women in South Africa before and after the Constitution was enacted. In addition, chapter two will examine specific customary law principles and practices with the

¹⁷⁴ *Supra*.

¹⁷⁵ *Supra* at 1216. See also Nienaber who discusses the clinical aspects of the progression of the HIV. Nienaber A G *Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa* (unpublished LLD thesis, UP, 2007) at 27-31. The four stages of the progression of HIV infection are the acute stage; the asymptomatic immunocompetent stage; the asymptomatic immunosuppressed stage and the acquired immune deficiency syndrome stage respectively. The acute stage is the stage directly after infection. During this stage the infected has flu-like symptoms for weeks. It is during this stage that the immune system is depressed. This acute stage is temporary and once the individual recovers clinically the immune systems becomes normal. The acute stage also encompasses the so-called window period where an infected person may test negative yet in actual fact he is already infected by the virus. During the asymptomatic immunocompetent stage the infected person's body functions normally. The infection at this stage is clinically silent. The immune system at this stage is not yet affected. The third stage is marked by the drop in the CD4+ count to below 500 cells per micro litre of blood. HIV destroys the CD4+ such that when the number of cells reaches a certain level the body's immune system becomes weak. When the CD4+ becomes less than 300 cells per micro litre of blood the infected person becomes vulnerable to secondary infections and thus needs to take prophylactic antibiotics and antimicrobials. Despite the fact that the individual's immune system is significantly depressed the individual may be unaware of the progression of the disease in his body. The final stage is the end stage of the gradual deterioration of the immune system. The patient at this stage has full-blown or clinical AIDS. The individual becomes prone to opportunistic infections. These opportunistic infections may prove fatal as a result of the resilient body which can not fight against them.

objective of determining whether such customary principles are constitutionally objectionable.

Chapter three provides a detailed analysis of the relevant constitutional rights applicable to this study. This chapter is divided into two parts. Part one will examine what the assertion of the right to equality entails with particular reference to gender equality. The Constitutional court's approach in the *Harksen* case to determine whether unfair discrimination exists will be discussed in detail. Part two of chapter three will turn to the rights of dignity, freedom and security of the person, the right to access to health care services, as well as the right to education.

Chapter four will discuss the general limitation clause contained in section 36 of the Constitution. This chapter will examine one of the customary practices that is referred to in this study, namely female genital mutilation, more closely, by testing this practice against the equality clause and the limitation clause with the purpose of enquiring whether such customary practice violates the right to equality. The ultimate aim of this chapter is to illustrate how some of these customs and practices not only undermines women's equality and freedom and security of the person, but also how these practices interact with gender violence by amplifying the risk of some women to contract HIV. Chapter four will also include a brief overview of some of the international human rights relevant to this study.

Chapter five provides a summary of the study and recommendations.

“The memory of their screams calling for mercy, gasping for breath, pleading that those parts of their bodies that it pleads [sic] God to give them be spared... ‘Why Mum? Why did you let them do this to me?’ Those words continue to haunt me. My blood runs cold whenever the memory comes back. It’s now four years and my children still suffer [its] effect.” (Peters J S & Wolper A *Women’s rights, human rights: International feminist perspectives* 1995: New York: Routledge) at 224.

CHAPTER 2

CULTURAL PRACTICES THAT MAKE WOMEN VULNERABLE TO HIV/AIDS

2.1 INTRODUCTION

The word culture can integrate numerous elements such as a historical record, food, gestures, clothing, eye contact, common traits, language, race, hunting practices, farming and cultivation, work of art and music, to mention but a few.¹ If all these elements that integrate the word culture are combined, culture may be defined as that what people believe, what they do and what they feel.² Within this definition it is also likely to include insight based on human psychology, sociology or anthropology.³ An extensive interpretation of culture hence embraces an array of original activity linked with the arts and sciences, in cooperation with sporting activity and the typical and precise characteristics and the ways of thoughts and systematising the lives of every individual and every community.⁴

Bennett's⁵ analysis of culture refers to people's entire store of information and artefacts, particularly the languages, structure of belief, and set of laws, that give collective groups their distinctive character. Traditional practices have significance and execute a purpose

¹ Peterson B *Cultural intelligence: A guide to working with people from other cultures* (2004, Boston: Intercultural Press) at 17 and 20.

² Peterson 17.

³ Peterson 17.

⁴ Grant E “Human Rights, Cultural Diversity and Customary Law in South Africa” (2006) 50(1) *Journal of African Law* 2–23 at 5.

⁵ Bennett T W *Human rights and African customary law under the South African Constitution* (1995, Cape Town: Juta) 23.

for those who practice them.⁶ Although traditional practices may have a positive impact on reproductive health, they may, however, also be harmful.⁷ Western medicine is becoming increasingly familiar with the advantages of some traditional health practices.⁸ Positive traditional health practices are referred to as “indigenous knowledge”.⁹

Addressing harmful traditional practices is a complex exercise. Advice and caution against harmful health customs can lead to life-long detestations between the advisor and the group practising the harmful custom.¹⁰ Worldwide health professionals, human rights activists and non-governmental organisations struggle with the issue on how to deal with harmful traditional practices. In this regard, human rights activists have decided that the best strategy in approaching changing culture is to withdraw from direct condemnation which can be counterproductive when they are looked upon as imperialist and impertinent.¹¹ They should instead be engaged with and communicate with representatives of the societies in which the risky practices subsist.¹² It is fundamental that they have to show respect of the cultures concerned and centre their efforts for transformation on the inner agents of change.¹³

A harmful traditional practice may be so deeply rooted such that such practice can only be changed when the people who practice it understand the danger, risk and indignity of

⁶ Grant 22.

⁷ Brems E *Human Rights: Universality and diversity* (2001, The Hague: Martinus Nijhoff Publishers) at 512.

⁸ Conrad P & Gallagher E B *Health and health care in developing countries: Sociological perspectives* (1993, Philadelphia: Temple University Press) at 126-127.

⁹ Von Lewinski S *et al Indigenous heritage and intellectual property: Genetic resources, traditional knowledge, and folklore* (2003, The Hague: Kluwer Law International) 129-131. Examples of “indigenous knowledge” are for example, long periods of breast feeding practiced in many parts of Africa and postpartum practices founded on divine structure, including rest, hygiene, love and good nutrition. See Romm A J *Natural health after birth: The complete guide to postpartum wellness* (2002, Rochester: Inner Traditions / Bear & Company) at 51-60.

¹⁰ LeBaron M & Pillay V *Conflict across cultures: A unique experience of bridging differences* (2006, Boston: Intercultural Press) at 15-18.

¹¹ Brems at 512-513.

¹² Brems 513.

¹³ Brems 513.

such harmful practice.¹⁴ Notwithstanding this, a number of countries have managed to uproot some deeply entrenched and harmful health practices in spite of many obstacles. A good example is the Chinese practice of foot binding which was for some time practiced in many parts of China.¹⁵ This practice was abolished within one generation.¹⁶

Closer to home, the Constitutional court held the customary law principle of primogeniture to be unconstitutional.¹⁷ Section 23 of the Black Administration Act was described as a discriminatory provision and irreconcilable with the Constitution for the reason that it blatantly hindered females (above male relatives) from becoming heirs.¹⁸

Curran and Bonthuys¹⁹ argue that there are many cultural practices that enhance women's vulnerability to HIV which have not yet effectively been studied. For this reason, a comprehensive understanding of some of these cultural practices is necessary in deciding on approaches to address the prevalence of HIV/AIDS in South Africa and Africa generally.²⁰ However, in order to contextualise these practices in the framework of a Western, liberal model, the right to culture must be examined more closely first.

¹⁴ Heyns H & Viljoen F *The impact of the United Nations human rights treaties on the domestic level* (2002, The Hague: Martinus Nijhoff) at 537.

¹⁵ Marshall K & Keough L *Mind, heart, and soul in the fight against poverty* (2004, Washington DC: World Bank Publications) 160.

¹⁶ Marshall & Keough 160.

¹⁷ *Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC).

¹⁸ Deveaux M *Gender and justice in multicultural liberal states* (2006, Oxford: Oxford University Press) at 199-201. In this regard also see Bregmans Attorney's Estate Articles at <http://www.roylaw.co.za/index.cfm?fuseaction=home.article&pageID=8922777&ArticleID=8843366> (visited 12 September 2008) for the full article.

¹⁹ Curran E & Bonthuys E "Customary law and domestic violence in rural South African communities" (2005) 21 *South African Journal on Human Rights* 607-635 at 608-609.

²⁰ Curran & Bonthuys at 608-609.

2.2 THE RIGHT TO CULTURE

2.2.1 THEORETICAL OBSERVATIONS

The right to culture is one of the fundamental human rights that is generally acknowledged and protected. International and regional instruments protect a number of key rights relating to culture. Indeed, the constitutions of most countries in the world, including South Africa, have explicitly provided for the protection of this right.²¹ Van der Vyver²² emphasises that the provisions in the South African Constitution protecting cultural rights realise the global norm contained in article 27 of the International Covenant on Cultural and Peoples Rights (hereafter referred to as the ICCPR).

Section 30 of the Constitution provides individuals with the right to culture while section 31 encapsulates the right of persons belonging to a cultural, religious or linguistic community to enjoy their culture, practice their religion and use their language, thus making the right an individual as well as a community entitlement.²³

The right to culture articulated in section 30 is expressed in a clause of choice.²⁴ Individuals are free to participate in the culture of their choice and they also have a right, as members of a particular cultural community, to take part the activities of this

²¹ Sections 30 and 31 of the Constitution read as follows:

30(1) "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

31(1) "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community;

(a) to enjoy their culture, practice their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

31(2) "The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

²² Article 27 of the International Covenant on Cultural and Peoples Rights of 3 January 1986. See also Van der Vyver J D "Cultural identity as a constitutional right in South Africa" (2003) 14(1) *Stellenbosch Law Review* 51-67, at 52.

²³ Bennett TW *Customary Law in South Africa* (2007, Lansdowne: Juta) at 87.

²⁴ Irving H *Gender and the Constitution: Equity and agency in comparative constitutional design* (2008, Cambridge: Cambridge Press) at 238.

community.²⁵ The related duty which falls on the group is to allow access to any person joining.²⁶ The issue of “choice” appears to be extremely challenging when applied to the legal and social affairs of a specific cultural community.²⁷ Importantly, choice however does not apply to children who are individually vulnerable and defenceless.²⁸ It is during this childhood and defenceless period that these cultural connections are mostly formed.²⁹ As women in patriarchal societies have traditionally been accorded the same status children, they too are vulnerable in respect of certain harmful cultural practices.

The aim of protecting and upholding cultural exercise is given additional force by section 185 of the Constitution which authorises the establishment of a commission for the support and protection of the rights to culture, religion and language.³⁰

International human rights law also has a duty to uphold and protect cultural activities and artefacts, chiefly those of worldwide value.³¹ Culture is praised as positive in the vast majority of human rights instruments.³² Nevertheless, some regulations such as the protocol to the African Charter on the Rights of Women in Africa³³ recognise that some cultural and social practices might have a harmful impact on a person’s health and well-being.³⁴

²⁵ Bennett *Customary law* at 87.

²⁶ Bennett *Customary law* 87.

²⁷ Irving at 238.

²⁸ Irving 238.

²⁹ Irving 238.

³⁰ Grant at 6. Grant further stipulates that the object of the commission is the support of reverence for the cultural, religious and linguistic rights and the support and advancement of freedom from strife, compassion, acceptance and nationwide accord amongst such communities. The assignment of the commission is authorised and dependent on national legislation. The legislation to put the commission into operation was passed in 2002 which legislation is known as the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act.

³¹ See http://www.hrea.org/index.php?base_id=157(visited 14 September 2008).

³² See http://www.hrea.org/index.php?base_id=157(visited 14 September 2008).

³³ Organisation of African Unity Protocol to the African Charter on Human and Peoples Rights on the Rights of Women, 2nd Ordinary Session of the Assembly of the Union 11 July 2003. Article 2(2) of the Protocol stipulates that the Protocol enjoins the state parties to “modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

³⁴ See http://www.hrea.org/index.php?base_id=157(visited 14 September 2008).

Article 27 of the Universal Declaration on Human Rights (hereafter referred to as the UDHR)³⁵ expressly provides for the protection of the right to culture. Article 27 states that everybody has the right to freely partake in the cultural life of the society, to take pleasure in the arts and to contribute to its scientific development and its benefits.³⁶ In this regard, the right to culture includes the right to enjoy and develop cultural life and identity.³⁷ Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also protects the right “to take part in cultural life”.³⁸

Occasionally individual and group rights may diverge.³⁹ There are nevertheless two limitations understood in virtually all fundamental rights, which are the broader interest of the state and the primary rights of others.⁴⁰ The right to culture is restricted at the point at which it infringes on another human right. Sections 30 and 31 of the Constitution include an explicit reference to other rights by means of a so-called internal limitation clause.⁴¹ This inner limitation section, which provides that the right to culture cannot be implemented in a way incompatible with any provision of the Bill of Rights, was anticipated to thwart communities from practising nasty and harmful practices and to curb the oppressive characteristics of some cultural traditions.⁴² The equality clause

³⁵ The Universal Declaration on Human Rights of 10 December 1948.

³⁶ Article 27 of the UDHR reads as follows: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

³⁷ See <http://www.un.org/rights/dpi1627e.htm> (visited 14 September 2008).

³⁸ Article 15 (1) of the International Covenant on Economic, Social and Cultural Rights of 3 January 1976 states that: “The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications.”

³⁹ Bennett at 87.

⁴⁰ Bennett at 89.

⁴¹ Bennett 89. See footnote 21 above for the contents of sections 30 and 31.

⁴² Bennett 89. For a further discussion on section 30 and 31 of the Constitution, see Henrard K *Minority protection in post-apartheid South Africa: Human rights, minority rights, and self-determination* (2002, Westport: Greenwood Publishing Group) at 115 and Hitchcock R K & Vinding D *Indigenous peoples' rights in Southern Africa* (2004, Copenhagen: International Work Group for Indigenous Affairs) at 102. In this regard, also see Bainham who remarks that culture cannot be said to “trump the right to equality under the South African Constitution.” He comes to the conclusion that in no way was culture ever anticipated that it would take precedence over the equality. See Bainham A & International Society on Family Law *the International Survey of Family Law: 1996* (1998, Leiden: Martinus Nijhoff Publishers) at 272.

contained in section 9 of the Constitution poses the greatest challenge to the right to culture generally and hence to the African legal tradition.⁴³

The broad extent of the right to culture brings it inevitably in conflict with some laws and other fundamental human rights.⁴⁴ Universalist versus cultural relativist questions arise in this context. The question of global standards versus local values becomes relevant. This topic is predominantly controversial in several African countries where arguments based on resistance to westernisation, as well as the desire to protect cultural standards, are time and again raised in opposition to universalism.⁴⁵ In South Africa, the universalist versus cultural relativist argument has, been rendered marginal by the Constitution which is founded on a universalist human rights structure.⁴⁶

The ostensible agreement on the subject of the application of international human rights norms in South Africa masks a rather more complex reality.⁴⁷ South Africa is a culturally varied country. It is, in addition, a country in which the culture of the majority of the population has, over time, been subjected to a minority of the western culture, first under colonialism and subsequently under apartheid.⁴⁸ The complications innate in the application of universal human rights norms in culturally diverse societies, such as South Africa, are documented in the Vienna Declaration, which, even while confirming the eventual goal of universal protection, makes apparent that

[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴⁹

⁴³ Bennett 90.

⁴⁴ Bennett 95.

⁴⁵ Grant 2.

⁴⁶ Grant 2.

⁴⁷ Grant 2

⁴⁸ Grant 3.

⁴⁹ Vienna Declaration and Programme of Action United Nations General Assembly, UN Doc. A/CONF.157/23, 12 July, 1993, para. 5. See also Grant at 3.

The constitutional obligation of courts with regard to customary law is section 211(3) of the Constitution which provides that the courts “must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. Customary law is therefore subject to the Bill of Rights and the constitutional human rights contained therein.⁵⁰ It is necessary at this point to make it clear that some of the customary practices that this study examines, derive from living customary law and not from “official” (and often distorted) customary law as it is contained in legislation and legal precedents.⁵¹

2.2.2 THE RIGHT TO CULTURE AS INTERPRETED BY THE COURTS

In the case of *Christian Education South Africa v Minister of Education*⁵² (discussed in more detail later), the rights to freedom of religion and culture were in conflict with a law barring corporeal punishment in learning institutions. The religious beliefs of the parents of the children involved in this case condoned the use of corporal punishment.⁵³ These parents had consented to the use of corporeal punishment on their children at their respective schools.⁵⁴ The central question in this case was whether Parliament had violated the religious rights of the parents of children in independent schools by enacting the South African Schools Act⁵⁵ which prohibits the use of corporal punishment in schools.⁵⁶ The court held that the prohibition was reasonable and justifiable under the limitation clause primarily because children’s rights to dignity, freedom and security of

⁵⁰ This has been affirmed by the courts, see for example, *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) at paragraph [51]. See also Wieland L “The role of the courts in the conflict between African customary law and human rights” (2005) 21 *South African Journal on Human Rights* 241-277 under paragraph II.

⁵¹ Wieland at 246, footnote 24, explains that the official customary law contained in legislation has over time been influenced and distorted by colonialism and apartheid.

⁵² *Christian Education South Africa V Minister of Education* 2000 (10) BCLR 1051(CC) at 1052 paragraph [A]-[G].

⁵³ *Christian Education South Africa V Minister of Education* at 1053 paragraph [1]-[2] [B].

⁵⁴ *Christian Education South Africa V Minister of Education* at 1053 paragraph [1]-[2] [B].

⁵⁵ Section 10 reads as follows: “(1) No person may administer corporeal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.”

⁵⁶ *Christian Education South Africa v Minister of Education* at 1053 paragraph [1]-[2] [B]-[C]

the person outweigh their parent's rights to culture and religion.⁵⁷ Judge Sachs referred to the *S v Williams's*⁵⁸ case which found that the administration of corporal punishment was unconstitutional as it infringes the values on which the Constitution is based.⁵⁹

Although an appellant's right to smoke cannabis as an element of his religion and culture was allegedly infringed by a bar on the use and possession of drugs in terms of the Drugs and Trafficking Act,⁶⁰ the majority of the Constitutional court in the case of *Prince v The President of the Law Society Of the Cape of Good Hope & Others*⁶¹ held that the encroachment was reasonably permissible for the reason that there was no less restrictive ways to prevent drug abuse.⁶²

⁵⁷ *Christian Education South Africa v Minister of Education* at 1052 paragraph [I]-[J] and 1065-1076.

⁵⁸ *S v Williams and Others* 1995 (7) BCLR 861 (CC) paragraphs [48] and [49].

⁵⁹ *Christian Education South Africa V Minister of Education* at 1073 paragraph [44] [B]-[C]

⁶⁰ Section 4(b) reads as follows: "No person shall use or have in his possession – (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless - (i) he is a patient who has acquired or bought any such substance - (aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made there under; or (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner, and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner; (ii) he has acquired or bought any such substance for medicinal purposes – (aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made there under; (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or (cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian, with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner; (iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made there under; [Sub-paragraph (iii) amended by section 4 of Act 18 of 1996.] (iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made there under, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; [...] (vi) he has otherwise come into possession of any such substance in a lawful manner."

⁶¹ *Prince v President of the Law Society of the Cape of Good Hope and Others* at 220 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC)

⁶² *Prince v President of the Law Society of the Cape of Good Hope and Others* at 234 paragraph [A].

The case of *Mabena v Letsoalo*⁶³ presents a fine example of how culture can be developed in line with the Constitution. In this case the mother of the bride (rather than the father) negotiated and consented to the marriage between her daughter and the late son in law. The deceased's parents, Mr and Mrs Mabhena, contested on the validity of the marriage between their late son and the respondent.⁶⁴ The judge in the *Letsaolo* case recognised the official customary law rule that women are continual minors who do not have the capacity to act as guardians for their children and that they fell under the guardianship of their male relatives.⁶⁵ This official customary law rule extends to cases of marriage negotiations where it is apparent that the authorities on customary law recognise the father of the bride or an extra male guardian to officially contract for and be given *lobola*.⁶⁶ The traditional customary law thus did not allow the bride's mother to be the guardian of her daughter, since she was also under the charge of her husband, her biological father or either of their successors.⁶⁷ Despite acknowledging authors who support the aforementioned position on women, Judge Du Plessis, however, remarked in his judgement that it must be accepted that there are cases in practice where mothers should be able to be involved in negotiations regarding *lobola* and assent to the marriages of their daughters.⁶⁸ In this regard one would agree that the judge did not perceive customary law as a closed system but rather as a fluid narrative which changed in light of changing gender relationships. Du Plessis J noted in his judgment that

[it] is evident that customary law is, as many systems of law should be, in a state of continuous development.⁶⁹

Fishbayn⁷⁰ argues that the judge in the *Letsaolo* case was able to disaggregate the formal beliefs of customary law from the authentic standards and practices of modern

⁶³ *Mabena v Letsoalo* 1998 (2) SA 1068.

⁶⁴ *Mabena v Letsoalo* at 1071 [D]-[G].

⁶⁵ *Mabena v Letsoalo* 1998 (2) SA at 1073.

⁶⁶ *Mabena v Letsoalo* at 1073 [F]-[I].

⁶⁷ *Mabena v Letsoalo* at 1073 [H]-[I].

⁶⁸ *Mabena v Letsoalo* 1068 [D]-[E] and 1074 [F].

⁶⁹ *Mabena v Letsoalo* 1074 [H].

participants in customary law. Himonga and Bosch⁷¹ correctly observe that the judge was faithful to his responsibility to give recognition to the rule of living customary law in accordance with the spirit, purport and objects of the Bill of Rights.

The judge's postmodern interpretation of culture achieves a synthesis between the community's commitment to equality as well as retaining the supportive purpose served by the institution of customary marriage.⁷² The reasoning in this judgement is instructive, not only for the development of equality in the South African jurisprudence, but also for any national or international tribunal coming to grips with conflicts over culture and equality.⁷³

Specific features of South African customary law and religion which are directly and indirectly linked to the present pattern of HIV/AIDS amongst women will next be examined.

2.3 PATRIARCHY

A decade down the path of democratic organisation, economic inequalities still dominate as one of the toughest challenges frustrating South Africa's commitment to human rights.⁷⁴ Although poverty and economic inequality persist to mirror racial discrepancy, they also embed gender inequalities.⁷⁵ Poverty in South Africa is gender-centred thereby challenging the equal status of women in law and creating obstacles in the realisation of the human rights of women.⁷⁶

⁷⁰ Fishbayn L "Litigating the right to culture: Family Law in the new South Africa" (1999) 13(2) *International Journal of Law, Policy and the Family* 147-173 at 165

⁷¹ Himonga C & Bosch C "The application of African customary law under the Constitution of South Africa: Problem solved or just beginning?" (2000) 117 *South African Law Journal* 306-341 at 336.

⁷² Fishbayn 168.

⁷³ Fishbayn 168.

⁷⁴ Bentley K "Women's human rights & the feminisation of poverty in South Africa" (2004) 31(100) *Review of African political economy* 247-261 at 247.

⁷⁵ Bentley 247.

⁷⁶ Bentley 247. The gendered notion of poverty in South Africa is also raised by Ghosh R N *Human resources and gender issues in poverty eradication* (2001, New Delhi: Atlantic Publishers & Distributors) at 223-227.

The feminisation of poverty is important for the reason that women experience poverty in a dissimilar way compared to men.⁷⁷ The resulting crisis is hence not only statistical (e.g. presenting the magnitude of women who are affected by poverty), but also relative in the sense that poverty has far reaching effects on women.⁷⁸ It has a propensity to be sterner on women and it further poses more problems for women who put up with the load of caring for children in these circumstances.⁷⁹

Patriarchy, existing in all races and societies in South Africa, subsist in conjunction with a system of human rights and equality before the law.⁸⁰ One of the new attributes of patriarchy is the assumption that gender inequality is a characteristic of culture and tradition and, as a result, to dispute it is to interfere with the framework of society in a manner that infringes the right of groups to self-determination.⁸¹ Inferences such as these reinforce the unequal treatment of women within the household, family and the normal financial system.⁸²

As noted earlier, the Constitution and other domestic laws as well as international human rights instruments protect women from all forms of discrimination. Important in this regard are the laws that address discrimination on the grounds of gender. The challenge then is to devise these laws to be part of every person's life, not just women.⁸³ Bentley⁸⁴ argues that the provisions, both domestic and international, that afford protection against discrimination on grounds of gender are undermined, and often paralysed, by profoundly rooted cultural norms of patriarchy.

⁷⁷ Bentley 247.

⁷⁸ Bentley 247.

⁷⁹ Bentley 247. See also, Walker C *Women and resistance in South Africa* (1982, Salt City: Onyx Press) at 163.

⁸⁰ Bentley 247-248.

⁸¹ Bentley 247-248.

⁸² See Gordon A *Transforming capitalism and patriarchy: gender and development in Africa* (1996, Boulder Colorado: Lynne Rienner Publishers) at 106. See also Bentley 248.

⁸³ Bentley 248.

⁸⁴ Bentley 248

The notion of patriarchy was initially used by social scientists to express a structure of management where men held political power in their competence as leaders of the family circle.⁸⁵ Important for this study is the connotation that patriarchy involves the powers of a husband over his spouse, children and any other dependants.⁸⁶ This kind of patriarchy is restricted to the domestic and family context.⁸⁷ In modern times, patriarchy and paternalism are used interchangeably.⁸⁸ The feminist critique on male power also rests on patriarchy as a starting point.⁸⁹

Catherine MacKinnon reminds us of the time when, during the drafting of the Universal Declaration on Human Rights, the definition of a “human being” and a “person” was debated,⁹⁰ and aptly asks whether a time will ever come “when women [will be] human”.⁹¹ Women are still not treated in a manner which universal standards require all humans to be treated. MacKinnon’s question is as follows:

If women were human, would we have little to no voice in public deliberations and in government? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we are close? Would we be sexually molested in our families?⁹²

This extract typifies some characteristics of patriarchy such as the belief that women are not given a chance to speak out and be heard. This is evidenced in cultural communities where men control and take leadership positions in community groups⁹³ as well as in their respective families. Women are perceived as a gentle group, not capable

⁸⁵ Bonthuys & Albertyn at 18.

⁸⁶ Bennett 55.

⁸⁷ Bennett 55.

⁸⁸ Bennett 55.

⁸⁹ Bennett 55.

⁹⁰ <http://www.nostatusquo.com/ACLU/mackinnon/mackin1.html> (visited 7 February 2008).

⁹¹ <http://www.nostatusquo.com/ACLU/mackinnon/mackin1.html> (visited 7 February 2008).

⁹² <http://www.nostatusquo.com/ACLU/mackinnon/mackin1.html> (visited 7 February 2008).

⁹³ Bourque S C & Warren K B *Women of the Andes: Patriarchy and social change in two Peruvian towns* (1981: Michigan: University of Michigan) at 46-47.

of expressing themselves.⁹⁴ These marginalised women often fear to tell their stories, the “stories of the marginalised”, as Van Niekerk describes.⁹⁵

For radical feminists, patriarchy “justifies” the control of males over females.⁹⁶ Patriarchal power, interestingly, is not limited to females but is expanded to control over younger men.⁹⁷ History clearly illustrates that patriarchy has been in existence since the earliest times all over the world.⁹⁸ In the context of this study, patriarchy should be understood as a societal relationship between men, instituted with the intention to formulate interdependence between men and women with the consequence that men dominate women.⁹⁹ This system gives preference to the existence of men and value men’s work as more honourable than that of women.¹⁰⁰

Patriarchy in present times is evidenced in a variety of ways, such as by precluding women from accessing managerial positions which may keep them at the bottom end of the labour market or in the family home, where they (often unable to compete financially with men) have to stay, serving men for personal, sexual and childrearing purposes.¹⁰¹

Section 211(1) of the Constitution recognises the institution, status and role of traditional leaders.¹⁰² The foundation of leadership under the African portion of South Africans is

⁹⁴ Van Esterik P *Materializing Thailand* (2000, Oxford: Berg Publishers) at 236.

⁹⁵ Van Niekerk G “Indigenous Law and narrative: Rethinking methodology” (1999) 32 *Comparative and International Law Journal of Southern Africa* 208-227 at 210.

⁹⁶ Dale R (ed) *Education and the state: Politics, patriarchy and practice* (1981, New York: Taylor & Francis) at 197. See also Bonthuys and Albertyn at 19 in this regard.

⁹⁷ Bonthuys & Albertyn at 19.

⁹⁸ Dale 197.

⁹⁹ Dale 197.

¹⁰⁰ Lewis R A & Sussman M B *Men’s changing roles in the family* (1986, Philadelphia: Haworth Press) at 17.

¹⁰¹ Dale 197. Despite the constitutional guarantee of equal treatment in the labour force by virtue of section 23(1) of the Constitution, and the protection afforded by the Employment Equity Act 55 of 1998 (section 6) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (sections 6 and 8), discrimination against women still persist.

¹⁰² Section 211 of the Constitution reads as follows: (1) “The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The

entrenched in a collective system of patriarchy.¹⁰³ This entails that the position of traditional leadership is restricted to male affiliates of the family.¹⁰⁴ It is also restricted to the male and eldest son of the primary wife.¹⁰⁵ This system of succession with regard to leadership is perceived as inconsistent with the constitutional obligation of equality on grounds of gender. It appears that it is only among the Lovedu population of the Northern Province where a woman may possibly become head of her community.¹⁰⁶ Men are capable to hold the position of ward heads.¹⁰⁷

The question whether the tradition of male succession to traditional leadership to the exclusion of females amounts to unfair discrimination, is an open one.¹⁰⁸ One may argue that the acknowledgment of the institution of traditional leadership may well entail tolerance of the unfair practices allied to this practice.¹⁰⁹

One of the several consequences of patriarchy is the control of women's sexuality, as will be discussed in a subsequent chapter.¹¹⁰ MacKinnon¹¹¹ points out that sexual abuse has become so deeply rooted and is also a consequence of the "systematic form of sex discrimination". This persistence of male power over women has consequently led women to becoming more vulnerable to HIV/AIDS, the latter in turn also inextricably correlated to poverty. Poverty in itself does not cause HIV/AIDS.¹¹² Poverty, however, can be seen as an incubator of HIV/AIDS.¹¹³ Since gender and poverty are inextricably combined, it is deeply disturbing to note that 70% of the world's poorest people are women. These poor women are very vulnerable as they often have to submit to unsafe

courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

¹⁰³ Bekker *et al Introduction to customary legal pluralism in South Africa* (2002, Durban: Butterworths) at 131.

¹⁰⁴ Deegan H *South Africa reborn: Building a new democracy* (1999, New York: Routledge) at 85. See also Bekker at 131.

¹⁰⁵ Bekker at 131.

¹⁰⁶ Bekker at 131.

¹⁰⁷ Bekker at 131.

¹⁰⁸ Bekker at 131.

¹⁰⁹ Bekker at 131.

¹¹⁰ Dale at 197.

¹¹¹ MacKinnon C *Women's lives, men's laws* (2007, Harvard: Harvard University Press) at 1.

¹¹² Bentley at 257.

¹¹³ Bentley at 257.

sex with their husbands or other male partners, or risk possible violence in their domestic settings if they insist on the use of contraceptives or condoms, in an attempt to secure a source of living, which in turn increase their exposure to HIV.¹¹⁴

This distressing situation of women is supported by findings of the UNAIDS *Gender Analysis: Fiscal 2004-2010 Strategic Plan*, which examines the links among poverty, violence and AIDS. This analysis explains and relates these factors to the subordinate and inferior social position of women and girls, which makes it hard or unattainable for these women to negotiate safe sex.¹¹⁵

Most often, in both in both casual and steady relationships, the use of condoms is determined by the man. Societies which are characterised by male control display more intimate partner violence. In these societies, male dominance is cited as a primary cause of intimate partner violence.¹¹⁶ It is thus clear from this discussion and that of the introductory chapter that the issues relating to women's exposure to HIV/AIDS cannot be separated from a number of interrelating factors, such as gender inequality, violence, harmful customary practices and poverty.

It is hence submitted that the socio-economic context described above, compounded by the cultural norms that support women's subordination, which in turn increases women's vulnerability to HIV/AIDS, has to be critically assessed and addressed. While a number of laws in South Africa are designed to protect women, their predicament lies in the enforcement of such laws in the face of deeply rooted cultural beliefs, which will next be considered.¹¹⁷

¹¹⁴ Bentley at 257.

¹¹⁵ Bentley at 257. See also the UNAIDS *gender analysis: Fiscal 2004-2010 strategic plan* 2003 at 42.

¹¹⁶ Jewkes R "Intimate partner violence: causes and prevention" 2002) 359 *The Lancet* (1423-1429 at 423.

¹¹⁷ Bentley at 258.

2.4 POLYGAMY, LEVIRATE, EARLY MARRIAGE AND VIRGINITY TESTING

2.4.1 POLYGAMY

Polygamy is a traditional African custom which is exercised in three-quarters of the world's recognised societies.¹¹⁸ In sub-Saharan Africa, Togo is stated as the country with the highest percentage of polygamy.¹¹⁹ Fifty-two percent of married women in Togo are involved in polygamous relationships.¹²⁰ In contemporary Africa the incidence of polygamy is believed to be 20 to 30 polygamists for every 100 married men.¹²¹

It is trite that children play a significant role in African culture and that a family's status and reputation is measured by the children born to that family.¹²² The original purpose of polygamy in traditional Africa was to make sure that all women in the rural community had a spouse for the purpose of procreating.¹²³ Polygamy also contributed to the continued existence of the community, particularly the black community, through a high fertility rate.¹²⁴ It also enabled a husband to marry a second wife if the first wife was infertile or was not able to give him a son.¹²⁵ In this regard a man can be guaranteed of an heir and the permanence of the lineage without resorting to a divorce.¹²⁶

¹¹⁸ Moller V & Welch G R "Polygamy, economic security and well-being of retired Zulu migrant workers" (1990) 5 (3) *Journal of Cross-Cultural Gerontology* 205-216 at 205.

¹¹⁹ Cook CT "Polygamy: Did the Africans get it right?" (2007) 38 *Journal of Black Studies* 232-250 at 236-237.

¹²⁰ Cook at 236.

¹²¹ Moller & Welch at 205.

¹²² Nkosi G "Indigenous African marriage and same sex partnerships: Conflicts and controversies" (2007) 2 *International Journal of African Renaissance Studies: Multi-, inter- and transdisciplinarity* 200-216 at 206.

¹²³ Cook at 238.

¹²⁴ Cook at 238. In this regard also see Moller V & Welch G J *Polygamy and well-being among Zulu migrants* (1985, Durban: Centre for Applied Social Sciences) at 14.

¹²⁵ Cook at 238.

¹²⁶ Moller & Welch *Polygamy and well-being among Zulu migrants* at 14.

It is also argued that polygamy is practiced for the purpose of sexual necessity.¹²⁷ A popular assumption is that males are by nature endowed with a disposition for assortment in sexual partners, the latter supposedly not a characteristic feature among women.¹²⁸ The argument that men practice polygamy for the reason that they have a high sex drive is open to criticism on the ground that it is extremely weak and untenable. Not only is there no biological evidence supporting this theory, it also ignores the reality that in most traditions and customs the husband may have many sexual relationships out of wedlock.¹²⁹

A lengthy post-partum sex taboo is cited as one of the reason which facilitates the practice of polygamy.¹³⁰ This argument - similar to the sex drive thesis - is theoretically and empirically more sound.¹³¹ A post-partum sex taboo refers to the bar against sexual intercourse for a prescribed period following an event, such as the birth of a child. During this period, the husband is strictly prohibited from having sexual intercourse with his wife. Polygamy is hence said to be a societal reaction to lengthy post-partum sex taboos, thus providing the husband with the opportunity to have access to other sex partners.¹³²

Polygamy also enables females to marry where females outnumber marriageable males.¹³³ This process is also known as a “marriage squeeze” market.¹³⁴ A “marriage squeeze” in the context of this study refers to the demographic imbalance where there are plenty of women and a shortage of men to marry the potential brides.¹³⁵ Examples

¹²⁷ Moller & Welch *Polygamy and well-being among Zulu migrants* at 5.

¹²⁸ Moller & Welch *Polygamy and well-being among Zulu migrants* at 5.

¹²⁹ Moller & Welch *Polygamy and well-being among Zulu migrants* at 5.

¹³⁰ Zeitzen M K *Polygamy: A cross-cultural analysis* (2008, Oxford: Berg Publishers) at 61.

¹³¹ Moller & Welch *Polygamy and well-being among Zulu migrants* at 6.

¹³² Wesley J *et al Culture and human development: The selected papers of John Whitingn* (1994, Cambridge: Cambridge University Press) at 226-229.

¹³³ Moller & Welch *Polygamy and well-being among Zulu migrants* at 6.

¹³⁴ Cook at 239.

¹³⁵ Cook at 239.

of societies more likely to have an imbalanced sex ratio in favour of females are societies with a high male loss in warfare.¹³⁶

Moller¹³⁷ argues that polygamy can be perceived as a privilege and not a principle for the reason that its extent depends on the riches and rank of the husband. Status and prestige are cited as some of the reasons that drive women to opt for polygamous marriages as they believe that these husbands are well-off to provide for them sufficiently.¹³⁸ Chiefs and leaders were believed to practice polygamy for the purpose of acquiring a higher rank.¹³⁹

Polygamy should be considered together with the practice of bride price and service.¹⁴⁰ It is trite that in the African tradition the man must pay a certain amount of money and cattle which is commonly known as bride price or bride wealth (also known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, and *emabhaka*).¹⁴¹ Legislation in South Africa states that a court may not find that the practice of *lobolo* is in conflict with public policy.¹⁴² Bonthuys and Curran¹⁴³ point out that like other customary institutions, the payment of *lobolo* has changed radically since the time when “official” rules regarding it were recorded. It is nowadays paid in cash rather than cattle; it is no longer retained by the wife’s family, but rather spent to meet economic needs. As a result of a steady “inflation” in the amounts paid for *lobolo*, it has become more difficult for some to marry, resulting in an increase in cohabitation. It is, in addition, rather the grooms themselves and not the families, who pay the *lobolo*. These practices potentially increase women’s vulnerability to domestic violence, as some of these men abuse their

¹³⁶ Moller & Welch *Polygamy and well-being among Zulu migrants* at 7.

¹³⁷ Moller & Welch “Polygamy, economic security and well-being of retired Zulu migrant workers” 205.

¹³⁸ Moller & Welch *Polygamy and well-being among Zulu migrants* at 15.

¹³⁹ Moller & Welch at “Polygamy, economic security and well-being of retired Zulu migrant workers” 205.

¹⁴⁰ Cook 238.

¹⁴¹ Cook 238. See also section 1 of the Recognition of Customary Marriages Act 120 of 1998.

¹⁴² In *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T) the court confirmed that *lobolo* was not against the rules of public policy or the rules of natural justice. See also section 11(1) of the Black Administration Act 38 of 1927; section 54(A) of the Magistrates’ Court Act 32 of 1944 and section 1 of the Law of Evidence Amendment Act 45 of 1988.

¹⁴³ Curran E & Bonthuys E “Customary law and domestic violence in rural South African communities” at 616.

wives by claiming that they had 'paid' for them.¹⁴⁴ As the *lobolo* is paid to the fathers of the wives and this money is often quickly spent, the families of the wives are usually reluctant to welcome them back when they suffer domestic abuse, as they are unable to return the *lobolo*. In this way, women's own families may collude with violent husbands to trap them in abusive marriages, as was the case in *S v Mvamvu*¹⁴⁵ where a woman who had been married in customary law left her husband because of his violence. As the *lobolo* in this case was not returned when she left, he claimed that the marriage still existed, abducted her and raped her twice, despite the existence of a domestic violence interdict against him.

A polygamist should hence be wealthy enough to marry the first and subsequent wives.¹⁴⁶ In both traditional and contemporary Africa, polygamy is also seen as a sign of wealth since a man's success or wealth is measured by the number of wives he has.¹⁴⁷ Women in Africa, particularly rural woman, contribute to the agricultural economy, which adds to the husband's wealth in the sense that women and children in the specific polygamous family are a form of cheap labour.¹⁴⁸ Some of the funds attained from the labour that women and children provide allow the husband to take additional wives.¹⁴⁹

From the above it is apparent that polygamy was in some way advantageous to women. Polygamy, however, is most often fraught with intricacies within the family circle, not only amid co-wives, but between the wives and the husband too.¹⁵⁰ Over-protectiveness and jealousy amongst co-wives is one such feature, resulting most likely from fear that the husband does not share his feel for affection and possessions evenly among them.¹⁵¹

¹⁴⁴ Curran & Bonthuys 617.

¹⁴⁵ Unreported Supreme Court of Appeal judgment, case no 350/2003, delivered 29 September 2004.

¹⁴⁶ Cook 238.

¹⁴⁷ Cook 238.

¹⁴⁸ Cook 238.

¹⁴⁹ Cook 238.

¹⁵⁰ Al-krenawi A "A family therapy with a multiparental/multispousal family" (1998) 37 (1) *Family Process* 65-81 at 68.

¹⁵¹ Al-krenawi at 68.

Modern day polygamy faces conflicts such as the issue of tradition versus modernity, religion versus culture, form versus content, young versus old as well as the West versus non-West.¹⁵² This study submits that in South Africa the major concern resulting from polygamous marriages is the problem of HIV/AIDS.¹⁵³ It would be wrong to conclude that polygamy is a primarily harmful practice which leads directly to the spreading of HIV/AIDS. The manner, however, in which persons in polygamous marriages conduct themselves, however, may facilitate the spreading of HIV.

In a polygamous family circle the potential victims of HIV/AIDS are more numerous compared to the marriage couple in a monogamous union. The extent of the potential spreading of HIV/AIDS in a polygamous marriage is much more pronounced compared to a monogamous union.

Infidelity within a polygamous marriage is a clear divergence of what is traditionally required by the official customary values of polygamous marriages.¹⁵⁴ The emergence of so called “affluent polygamy” may be illustrative.¹⁵⁵ This type of polygamy is practised not as a set of the original African tradition but in a rebellious way by shirking the original values of polygamy. Nwoye¹⁵⁶ submits that this type of polygamy is becoming

¹⁵² Zeitzen M K *Polygamy: A cross-cultural Analysis* (2008, Oxford: Berg Publishers) at 145. In the context of this study, modernity versus tradition denotes the conflicts that arise when social and cultural beliefs have been rationalised as a result of recent developments. Cultural constraints, for example, are a bar to the practice of some traditional practices, eg the ritual of sacrificing of an animal for cleansing purposes is practically impossible within the confines of shared duplex homes or a block of flats. On the other hand, economic challenges as a result of the modern way of living have made it difficult for a man to be involved in a polygamous marriage. Religion versus culture involves the dominating conflicts between divine teachings and culture. In some instances, religion and culture may align harmoniously. An example of this could be the ritual of cleansing which is found in both the Bible and in terms of some cultural beliefs. Form versus context refers to the disparagement of the original structure of polygamy and the new rebellious way of diverting from the original practice of polygamy (discussed in more detail in the main text below). Young versus old looks at how the upcoming generation ridicule, disapprove and modify certain cultural practices. They see such practices as intolerable. The explanation on tradition versus modernity applies also to the West versus non-West description above.

¹⁵³ Zeitzen 176. This same issue is also raised by Viljoen F & Stefiszyn K (eds) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007, Pretoria: PULP) at 252.

¹⁵⁴ Nwoye A “The practice of interventive polygamy in two regions of Africa: Background, theory and techniques” (2007) 31(4) *Dialectical Anthropology* 383–421 at 383-384.

¹⁵⁵ Nwoye at 383-384.

¹⁵⁶ Nwoye at 383-384

more popular by the day in most African cities in Southern Africa. Infidelity is thus a characteristic feature of affluent polygamy. The failure to maintain sexual relationships within the traditional polygamous marriage could be an example of rebelling against the original values of the principles of polygamy. It is clear that this type of polygamy places the women involved in these relationships at a high risk of contracting HIV/AIDS.

The manner in which HIV may be spread by members in these polygamous unions is manifold. The husband in a polygamous marriage may be the source of the virus.¹⁵⁷ This usually happens when the family or the men migrate to urban areas in search for employment.¹⁵⁸ During their stay in the city the men may engage in sexual activities with other women. If these men become infected with HIV, they may then pass the virus to all their wives at home upon their return. The women in the polygamous marriage may in turn also have extra-marital sexual encounters, which expose them all and the husband to possible infection, as well as the women with whom the husband may engage during his stay in the cities.

Within the context of HIV/AIDS, polygamy does not only affect the partners involved in this marriage.¹⁵⁹ Children in a polygamous marriage are also exposed to the risk of infection for the reason that communal breast feeding is practised in many deeply rooted African communities and in polygamous families.¹⁶⁰ The extent of infection among these children is much higher as there are usually more children in a polygamous marriage.

The wives and sexual partners involved in polygamous marriages have little or no control over the sexual behaviours of other members within their family circle.¹⁶¹ The fear of being infected has led some women to oppose polygamy on the basis that it places them at a high risk of not only contracting HIV, but also a variety of sexually

¹⁵⁷ Zeitzen at 176.

¹⁵⁸ Zeitzen at 176.

¹⁵⁹ Zeitzen at 176.

¹⁶⁰ Zeitzen at 176.

¹⁶¹ Zeitzen at 176.

transmitted diseases. Women across Africa have begun inquiring whether a man has a right to have more than one wife in view of the HIV/AIDS pandemic.¹⁶² In Swaziland, where almost forty percent of the population is HIV-positive, protest against polygamy is at its peak.¹⁶³ The king of Swaziland has more than nine wives and traditionally chooses a new bride each year.¹⁶⁴

For the purpose of this study it must be noted that customary marriages, and by implication polygamy, is now recognised in terms of the Recognition of Customary Marriages Act.¹⁶⁵ The requirements for a valid customary marriage are briefly consensus between the parties; a formal ceremony to transfer the bride to the other family, and the payment of *lobolo*.¹⁶⁶ Although the aspect of the transfer of the bride as one of the requirements is not regulated by the Recognition of Customary Marriages Act, it can be regarded as a custom in terms of section 3(6) of the Act. This custom, however, requires a woman to cry when she is formally transferred to her husband, and she has to appear semi-naked in front of the prospective family. If she does not cry, she could be beaten until she does, as was the case in *Mabuza v Mbata*,¹⁶⁷ where the court was asked to consider if this custom (*ukumekeza*) was a legal requirement for a valid Swazi marriage. In this case, Hlophe J found that the custom is not necessarily a prerequisite for a Swazi marriage and that dispensation thereof cannot be regarded as a fatal flaw in the marriage ceremony. He stated that marriage practices evolve as customary law does and that he should consider if such practices are in conflict with the Constitution or not, in this case in relation to the right to human dignity. As the constitutionality of the custom was however not in dispute (but rather whether the

¹⁶² Zeitzen at 176.

¹⁶³ Zeitzen at 176.

¹⁶⁴ Patterson S *The African State and the AIDS Crisis* (2005, Aldershot: Ashgate) at 109.

¹⁶⁵ 120 of 1998, section 2(3) and section 2(4). Section 2(3) recognises all polygamous marriages concluded before the commencement of the Recognition of Customary Marriages Act, whereas section 2(4) provides for the conclusion of polygamous marriages after the commencement of the Act. These marriages, however, must comply with the requirements of this Act.

¹⁶⁶ For a discussion of these requirements, see Herbst M & Du Plessis W "Customary law v common law marriages: A hybrid approach in South Africa" (2008) 12(1) *Electronic Journal of Comparative Law* (accessed at <http://www.ejcl.org>, visited 12 May 2009) 1-15 at 5-8.

¹⁶⁷ 2003 (4) SA 218 (KH).

parties were married or not and whether a divorce decree could be granted), the question on the constitutionality was never answered.¹⁶⁸

It is clear from the above example that polygamy indirectly impacts on the fundamental rights of women. Despite the fact that women's status as perpetual minors has changed since 2000,¹⁶⁹ and despite the fact that the Recognition of Customary Marriages Act states in section 6 that a woman has full status and capacity in addition to any other rights that she may have in terms of the customary law,¹⁷⁰ equality and the full enjoyment of other human rights is still not a reality for women in rural areas whose lives continue in a traditional setting.¹⁷¹

2.4.2 LEVIRATE

Unkungena or the levirate union is a custom that is used when a man dies without a male heir. The widow will then be required to choose another husband from amongst the deceased man's younger brothers in order to bear male children for the deceased's house. The custom is said to provide for the maintenance of the widow and preserve the relationship between the families that was initiated in the original marriage.¹⁷² In the Zulu culture, the practice allows a male relative to marry his sister-in-law or the widow of his brother.¹⁷³ The custom is also referred to as "marriage by inheritance".¹⁷⁴

¹⁶⁸ *Mabuza v Mbata* at 226 [C]-[E].

¹⁶⁹ Eg women outside KwaZulu-Natal in terms of section 11(3) of the Black Administration Act 38 of 1927 and section 38 of the Transkei Marriage Act 21 of 1978.

¹⁷⁰ Section 6 states as follows: "A wife in a customary marriage has, on the basis of equality with her husband, and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law". The term "full status" instead of "equal status", however, may lead to different interpretations by the courts.

¹⁷¹ See in general, Mothokoa M "New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) *South African Journal on Human Rights* 616-641.

¹⁷² Curran E & Bonthuys E "Customary law and domestic violence in rural South African communities" (2005) 21 *South African Journal on Human Rights* 607-635 at 628-629.

¹⁷³ Nkosi at 210

¹⁷⁴ Werner E "Preferential marriage correlation of the various modes among the Bantu tribes of the Union South Africa (1928) 1(4) *Journal of the International African Institute* 413-428 at 416.

The fundamental nature of a customary marriage does not only involve the union between two spouses but includes the two families of the spouses. It goes as far as including the two families of the spouses. Upon the death of the husband the marriage is not dissolved unless the widow's family pays back the bride price or *lobolo* to her husband's family. A widow thus does not gain her private independence upon her husband's death.¹⁷⁵ Since a male relative may marry the divorced and widowed wife of his brother,¹⁷⁶ chances are that a brother who inherits a wife from his brother whose cause of death is AIDS, may pass the virus to his other wives.

The whole family unit is at risk of becoming infected owing to the "inheritance" of the infected wife. The infected wife may perhaps not be aware of her HIV-positive status when marrying the brother of her deceased husband, or alternatively, if she is aware that she is infected, may decide to withhold this fact from the family out of fear of being rejected or losing her means of income. This practice could also force women into unwanted marriages, expose them to unwanted sex and domestic violence.

Apart from exposing women to an increased risk of contracting HIV, this practice is in conflict with the equality rights of women, as well as their human dignity and personal autonomy.

2.4.3 EARLY MARRIAGE AND VIRGINITY TESTING

In a so-called gerontocratic society, wives may inadvertently be the principal source of carrying and spreading of HIV.¹⁷⁷ In a gerontocratic society, older men marry young girls.¹⁷⁸ In most African societies this practice is known as early marriage. Some of these young women often have young lovers of their age.¹⁷⁹ These old bachelors may, in turn, be involved with commercial sex workers or they may have affairs with a number

¹⁷⁵ Werner at 416.

¹⁷⁶ Nkosi at 210.

¹⁷⁷ Zeitzen at 176.

¹⁷⁸ Zeitzen at 176.

¹⁷⁹ Zeitzen at 176.

of married women,¹⁸⁰ which places them at a high risk of contracting HIV. The virus may consequently be passed on to both other sex partners who themselves may be in polygamous relationships,¹⁸¹ or those young girls, if they are not already infected. The young bride herself may perhaps be the source of the virus herself, and then transmitting it to the older man and his other sexual partners.

In South Africa, especially in the province of KwaZulu-Natal there has been a recent revival of the traditional practice of virginity testing.¹⁸² Reference was made in the introductory chapter to the fact that a higher value is traditionally placed on virgin brides, evidenced in the higher amount of *lobolo* paid for them. However, supporters of virginity testing presently claim that it will assist in the reduction of HIV/AIDS and teenage pregnancy, as well as the detection and prevention of child sexual abuse.¹⁸³ It is submitted that the opposite is in fact true: the fear of the detection of the loss of virginity may in fact be used by males to control girls' sexual activity, leaving young males free to engage in premarital sex.¹⁸⁴ This result indorses double standards regarding sexuality. In view of the current belief that sex with a virgin may cure or protect against AIDS and venereal diseases, public identification as a virgin may in fact increase the risk of sexual abuse and HIV-infection. Young girls may be less keen to report sexual abuse for fear of disclosing that they are no longer virgins.¹⁸⁵

¹⁸⁰ Zeitzen at 176.

¹⁸¹ Zeitzen at 176.

¹⁸² Leclerc-Madlala "Protecting girlhood? Virginity revivals in the era of AIDS" (2003) 56 *Agenda* 16-25 at 17-18.

¹⁸³ Leclerc-Madlala at 20.

¹⁸⁴ See Curran & Bonthuys at 624.

¹⁸⁵ Curran & Bonthuys 624.

2.5 PRIMOGENITURE

Before the operation of the Reform of Customary Law of Succession and Regulation of Related Matters Act,¹⁸⁶ section 23 of the Black Administration Act¹⁸⁷ endorsed the principle of primogeniture. This whole process of inheritance to a specific male heir instead of the wife is known as primogeniture. The principle of primogeniture places women and extra-marital children under the guardianship of an heir.¹⁸⁸ In terms of this principle, women are not entitled to share in the intestate succession of the deceased estate.¹⁸⁹ The heir, however, has a duty to discharge support of the widow.¹⁹⁰ The elimination of women from heirship and subsequently from being able to inherit property was in observance with a patriarchal structure which subjected women under a position of “subservience and subordination.”¹⁹¹ Within such a system women were looked upon as perpetual minors under the guardianship of their fathers, spouses or the head of the extended relatives.¹⁹² Extra-marital children were not permitted to inherit their father’s estate under customary law.¹⁹³ They were nevertheless competent to inherit in their mother’s family unit subject to the principle of primogeniture.¹⁹⁴

In his minority judgement in *Bhe v The Magistrate, Khayelitsha and Others*,¹⁹⁵ Ngcobo J described the concept of succession, in particular the rule of primogeniture, in

¹⁸⁶ 11 of 2009.

¹⁸⁷ Section 23(1) & (2) of the Black Administration Act 38 of 1927. Section 23 (1) reads as follows: “All movable property belonging to a black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.” Section 23(2) reads as follows: “All land in a tribal settlement held in individual tenure upon quitrent conditions by a black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection 10.”

¹⁸⁸ Van Niekerk GJ “Succession, living indigenous law and *Ubuntu* in the Constitutional court” (2005) 26(3) *Obiter* at 474-487 at 476.

¹⁸⁹ *Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC) at 28 paragraph [77] [C].

¹⁹⁰ Bradshaw Y W & Ndegwa S N *The uncertain promise of Southern Africa* (2001: Indianapolis, Indiana University Press) at 289.

¹⁹¹ *Bhe v The Magistrate, Khayelitsha and Others* at 28 paragraph [78] [E].

¹⁹² *Bhe v The Magistrate, Khayelitsha and Others* at 28 paragraph [78] [E].

¹⁹³ *Bhe v The Magistrate, Khayelitsha and Others* at 28 paragraph [79] [F].

¹⁹⁴ *Bhe v The Magistrate, Khayelitsha and Others* at 28 paragraph [79] [F].

¹⁹⁵ *Bhe v The Magistrate, Khayelitsha and Others* at 52 paragraph [162] [E].

indigenous law as originating from a society whose social system laid emphasis on obligations and responsibilities and not rights. It was from this societal context that the rule of succession, principally primogeniture, built up and functioned.¹⁹⁶ The duty to care for the family is imperative and is an essential role in the African social system.¹⁹⁷ Kroeze describes such a society as one based on “the idea of “natural” privileges based on sex, birth and status”.¹⁹⁸

Research in some countries shows that some of these designated heirs fail to discharge their duty as guardians to maintain or support the relevant wives and children.¹⁹⁹ This phenomenon is described as “property grabbing”.²⁰⁰ The system leaves the widow with nothing to depend on and this is often the reason why these widows consider sex work for a living. This situation makes these widows extremely vulnerable to contracting HIV/AIDS. This problem of “property grabbing” has transformed the original nature of the customary law principle of primogeniture which was originally intended as a form of social security or support system.²⁰¹

The customary law principle of primogeniture as it applies in the customary law of succession was the focus in the case of *Bhe*.²⁰² This case was brought in the interest of the public and as a group action on behalf of all women and children prohibited from becoming the heir to on grounds of the impugned rule of male primogeniture.²⁰³ The *Bhe* case concerns two daughters who failed to secure their father’s house because of the

¹⁹⁶ *Bhe v The Magistrate, Khayelitsha and Others* at 53 paragraph [164] [E].

¹⁹⁷ *Bhe v The Magistrate, Khayelitsha and Others* at 53 paragraph [164] [F].

¹⁹⁸ Kroeze I “The open society: from Plato to Popper and *Bhe*” (2007) (unpublished document on file with author) at 12. This article, based on a lecture presented in the department of Jurisprudence at Unisa in March 2007 by Professor Kroeze, was made available to the author.

¹⁹⁹ Viljoen F & Stefiszyn K (eds) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007, Pretoria: Pulp) at 289.

²⁰⁰ Viljoen & Stefiszyn at 289.

²⁰¹ Viljoen & Stefiszyn at 289.

²⁰² *Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) SA 580 (CC). For a discussion of this case, see Knoetze E & Olivier M “To develop or not to develop the customary law: That is the question in *Bhe*” (2005) *Obiter* 126-132.

²⁰³ See <http://41.208.61.234/uhbincgirsirsi/20090119060100/SIRSI/0/520/S-CCT49-03> (visited 28 January 2008).

rule of primogeniture, which was subsequently challenged.²⁰⁴ The two girls from Khayelithsa had been living with their parents up to the time that their father died.²⁰⁵ Under customary law the house was deemed to be the property of the eldest son or the eldest male relative. As a result of this, the grandfather of the two girls was the surviving eldest male relative. The grandfather proposed to sell the house.

The court had to determine the constitutional legitimacy of section 23 of the Black Administration Act, together with the rules promulgated with it and the validity of the principle of primogeniture. The majority judgment held that section 23 of the Black Administration Act contains a violation of the rights of black African persons as it constitutes unfair discrimination on the grounds of gender and sex, violated women's dignity and also discriminated against female and extra-marital children.²⁰⁶ The judgment was critical of the failure of customary law to take account of changing social conditions and the hardship which this caused for women and children. Langa DCJ further held that section 23 and its regulations are transparently inequitable and in violation of the rights to equality entrenched in section 9(3) and dignity in section 10 of the South African Constitution, and for that reason must be struck down.²⁰⁷ It was noted in this judgment that the exclusion of women from inheritance is a kind of unfairness which embodies an ancient representation of disadvantage towards a susceptible group, which is incompatible with the assurance of equality.²⁰⁸ The constitutional right to dignity recognises the importance of all persons as part of our society.²⁰⁹ The court ordered that the Intestate Succession Act²¹⁰ be applied to African people as it does to all South Africans who die without leaving wills.

²⁰⁴ *Bhe v The Magistrate, Khayelitsha and Others* at 74 paragraph [241] [B].

²⁰⁵ *Bhe v The Magistrate, Khayelitsha and Others* at 74 paragraph [241] [B].

²⁰⁶ *Bhe v The Magistrate, Khayelitsha and Others* at 4 paragraph [4] [A].

²⁰⁶ *Bhe v The Magistrate, Khayelitsha and Others* at 31 paragraph [88] [A].

²⁰⁷ *Bhe v The Magistrate, Khayelitsha and Others* at 32 paragraph [91]-[92] [B]-[C].

²⁰⁸ *Bhe v The Magistrate, Khayelitsha and Others* at 32 paragraph [91] [B].

²⁰⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCRL 837 1517 at paragraph 28.

²¹⁰ 81 of 1987, sections 1(1)(c)(i) and 1(4)(f).

The solution of developing customary law in line with the Constitution was not viable in this matter, since the rule of primogeniture could not be reconciled with the contemporary theories of equality and human dignity as laid down in the Bill of Rights.²¹¹ The consequence was that the limitation imposed by this rule on the rights of women, girl children, extra-marital children and young males is “not reasonable and justifiable in an open and democratic society” based on the principles of fairness, human dignity and freedom”.²¹²

The outcome of this judgement is highly significant for the reason that it regarded the customary law rule of primogeniture as accordingly unconstitutional and invalid against women, and illegitimate children.

The promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act²¹³ introduces a shift from the succession principle of primogeniture to devolution of intestate estates which takes all children and spouses into account.²¹⁴ This fundamental change is in line with the Constitution since its provisions are consistent with the notions of equality and human dignity.²¹⁵

²¹¹ *Bhe v The Magistrate, Khayelitsha and Others* at 33 paragraph [95] [C]-[D].

²¹² *Bhe v The Magistrate, Khayelitsha and Others* at 32 paragraph [91] [B].

²¹³ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, published in GG No 32147 of 21 April 2009.

²¹⁴ Section 2(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act reads as follows: “The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of a will of such a person, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2). (2) In the application of the Intestate Succession Act – (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such spouse must inherit a child’s portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the Gazette, whichever is the greater; (b) a woman, other than the wife of the deceased, with whom he had entered into a union in accordance with Customary law for the purpose of providing children to the house of his wife must, if she survives him, be regarded as a descendant of the deceased.”

²¹⁵ Section 2(1) of the Act, extends the application of the Intestate succession Act to apply to the intestate estates of a deceased whose estate was previously administered by the Black Administration Act. This new Act has finally curbed all uncertainties with respect to customary law inheritance.

The *Bhe* case verdict resulted in the ending of unfair legislation which embedded unfairness and which fossilised indigenous law.²¹⁶ It is also a significant step in doing away with legal pluralism founded on unfairness.²¹⁷

It is useful to examine foreign case law on the continent which has so far proved to advance the status of African women, more importantly to remove the disabilities suffered under the application of the customary law principle of primogeniture. The supreme court of Zimbabwe in the case of *Chihowa v Mangwende*²¹⁸ was faced with the facts similar to those in *Bhe*. The *Chihowa* case is an appeal against the decision of the community court which appointed Auxilia Mangwende as the intestate heiress of the deceased who was Auxilia's father.²¹⁹ The appellant (the deceased's father) appealed this decision on the grounds that the magistrate in the court *a quo* erred in finding that Auxilia was the intestate heiress.²²⁰ His further argument was that the magistrate erred when he found that "real and substantial justice" demanded that Auxilia be the heiress.²²¹ Overturning the judgment of the court *a quo*, Chief Justice Dumbuthsena explained how the customary law of inheritance had put women in dire situations.²²² She remarked in her judgement that "where a man used to inherit for the benefit of the dependants of the deceased, now a woman can do the same."²²³

Despite the above legal developments, the principle of primogeniture is still practiced. The impact of this exacerbates the situation of women and children living under customary law, specifically if this discriminatory practice leaves them without any means. Often these women have to resort to sex work to survive, or become involved in abusive relationships, whereas the children are left in the care of other family members or join the large number of street children. Primogeniture is one cultural custom whose

²¹⁶ Van Niekerk "Succession, living indigenous Law and *Ubuntu* In the Constitutional court" at 475.

²¹⁷ Van Niekerk 475.

²¹⁸ *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC).

²¹⁹ *Chihowa v Mangwende* at 229 paragraph [C].

²²⁰ *Chihowa v Mangwende* at 233 paragraph [G].

²²¹ *Chihowa v Mangwende* at 229 paragraph [G].

²²² *Chihowa v Mangwende* at 233 paragraph [E].

²²³ *Chihowa v Mangwende* at 230 paragraph [B].

impact on the lives of women and children is indirect and subtle, yet instrumental in increasing the vulnerability of women and children in respect of HIV/AIDS and violence.

2.6 FEMALE GENITAL MUTILATION²²⁴

Female circumcision or excisions are terms used interchangeably with female genital mutilation (hereafter referred to as FGM).²²⁵ FGM is also known as genital cutting.²²⁶ FGM is a collective name relating to a number of diverse traditional rituals that highlight the physical disfigurement connected with this exercise.²²⁷ FGM is predominantly practised in the sub-Saharan countries and in Egypt.²²⁸ Of the forty-three African countries, twenty-six practice FGM.²²⁹ It is also said to be practised among certain communities in the Middle East and Asia, including parts of United Arab Emirates, Yemen, India, Indonesia, and Malaysia.²³⁰ In 2004 it was reported that eighty-nine percent of the total population of women in Sudan were circumcised.²³¹ Female genital mutilation is practiced by Muslims, Christians and one Jewish sector, the Falasha of Ethiopia.²³² It is also practiced in some communities in North and South America.²³³

Some non-governmental organisations (such as *No Peace without Justice*, an Italian non-governmental agency) aim to have FGM abolished.²³⁴ According to this organisation, approximately 120 to 130 million women worldwide have undergone

²²⁴ See also introductory discussion on female genital mutilation in chapter one above.

²²⁵ Richmond & Gestrin at 46.

²²⁶ McMichael P *Development and social change: A global perspective* (2004, California: Pine Forge Press) at 265.

²²⁷ See <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153> (visited 16 September 2008)

²²⁸ Richmond & Gestrin at 46.

²²⁹ See http://www.rho.org/html/hthps_overview.htm (visited 13 September 2008).

²³⁰ See http://www.rho.org/html/hthps_overview.htm (visited 13 September 2008).

²³¹ McMichael at 265

²³² Richmond & Gestrin at 46.

²³³ See <http://www.ugpulse.com/articles/daily/Health.asp?id=587> (visited 12 October 2008).

²³⁴ See <http://www.ugpulse.com/articles/daily/Health.asp?id=587> (visited 14 October 2008).

FGM.²³⁵ Experts report that almost all of the 120 million women who were subjected to FGM come from twenty-eight countries, including South Africa.²³⁶

In South Africa alone, approximately two million girls are subjected to this practice annually. Female circumcision is symbolically analogous to male circumcision.²³⁷ The difference between the male and the female circumcision is that female circumcision is far more extensive and its consequences are physical, psychosomatic, violent and long lasting.²³⁸

Female genital mutilation is not a requirement of any religious doctrine but is mainly based on cultural belief.²³⁹ Its origins are vague. It is believed to have originated in Egypt more than 2000 years ago.²⁴⁰

FGM involves the procedure in which parts of girls external genitals are expurgated without anaesthesia. The girls subjected to this procedure experience pain, trauma, and regularly severe physical problems such as blood loss, infections or even death.²⁴¹

The age required to qualify for this ritual differs from place to place.²⁴² In Ethiopia the required age for the ritual to be performed is a seven days after birth,²⁴³ whereas in Somali the ritual is performed between the ages of six and seven years.²⁴⁴

Among Africans the procedure is said to be requested by a child's parents or conservative grandparents.²⁴⁵ Such parents and grandparents see this procedure as a

²³⁵ See <http://www.ugpulse.com/articles/daily/Health.asp?id=587> (visited 14 October 2008).

²³⁶ Gutto S *Equality and non-discrimination in South Africa: The political economy of law and law making* (2001, Cape Town: New Africa Books) at 86.

²³⁷ Richmond & Gestrin at 46.

²³⁸ Richmond & Gestrin at 46.

²³⁹ Richmond & Gestrin at 46.

²⁴⁰ Richmond & Gestrin at 46.

²⁴¹ Richmond & Gestrin at 47.

²⁴² Denniston G C & Mibs M F *Sexual mutilations: A human tragedy* (1997, New York: Springer) at 140.

²⁴³ Denniston & Mibs at 140.

²⁴⁴ Denniston & Mibs 140.

²⁴⁵ Richmond & Gestrin 47.

rite of passage which transforms a girl into a woman.²⁴⁶ Some parents firmly believe failing to carry out this procedure will prevent daughters from finding husbands. Traditionalists argue that this ritual keeps girls pure and clean for their marriage and this will result in the women's devotion and faithfulness to their husbands.²⁴⁷

2.6.1 TYPES OF FEMALE GENITAL MUTILATION

Normally a village expert, lay person, or midwife does the ritual at a cost. The procedure is done by means of an assortment of tools, such as knives, razor blades, broken glass, or scissors.²⁴⁸ In developed countries doctors may be required to carry out FGM in sterilized conditions and making use of anaesthesia.²⁴⁹

Figure A²⁵⁰ below shows the typical genital structure of a pre-pubertal girl before the ritual has been performed. FGM is classified into three categories based on the invasiveness or severity of the structural disfigurement. Figures B, C and D below show the different types of FGM.

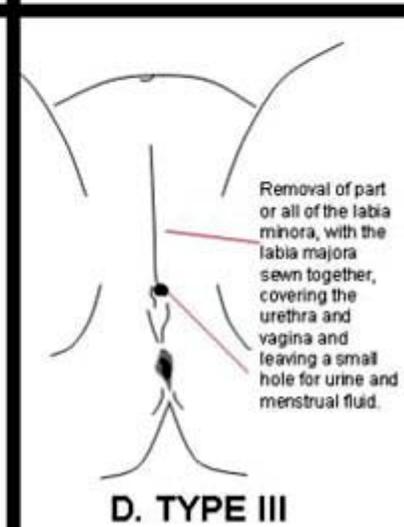
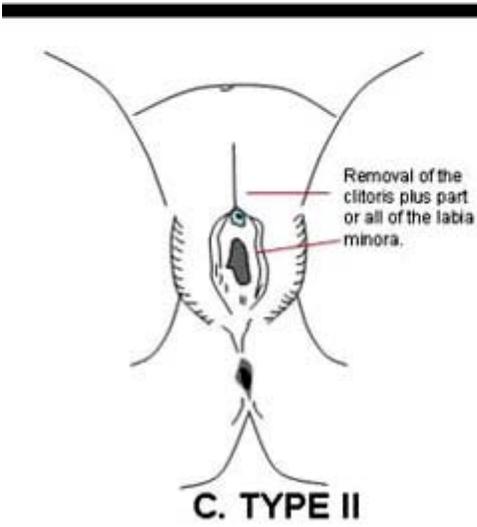
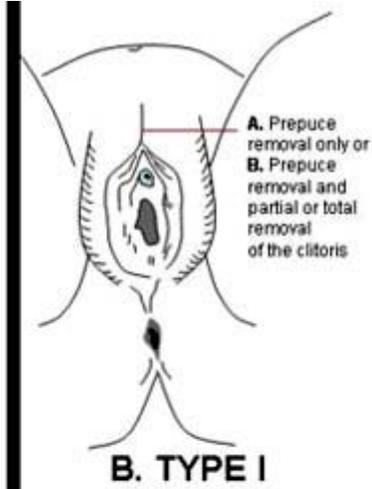
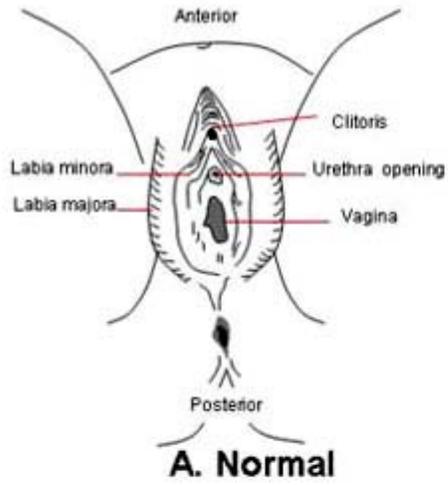
²⁴⁶ Richmond & Gestrin 47.

²⁴⁷ Richmond & Gestrin 47.

²⁴⁸ See <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153> (visited 16 September 2008).

²⁴⁹ See <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153> (visited 16 September 2008).

²⁵⁰ <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153> (visited 09 February 2009).



2.6.2 EFFECTS OF FEMALE GENITAL MUTILATION

FGM has turned out to be a health and human rights matter in western countries such as Australia, Canada, England, France and the United States of America. Its physical harm has drawn world-wide attention. In 1996 the United States legislative body passed criminal law legislation prohibiting the ritual in the United States.²⁵¹ The legislation also mandated education of specific immigrant groups on the health effects of this practice. Considering the unclean surroundings under which FGM takes place, attention should be drawn to the fact that the practice presents a risk to the spread of the HIV.²⁵² Researchers in Ethiopia who studied the probable connection between FGM and HIV/AIDS²⁵³ established that there is a crystal clear-risk, especially in cases where FGM is practiced as an initiation rite in conditions where the same unwashed and unsterilised knives are used in the process of operating.²⁵⁴ The health risks associated with the use of crude equipment that circumcisers use to deform guiltless girls should be widely communicated.²⁵⁵ If the utilisation of these tools is not stopped, they become instruments causing death and serious physical and psychological harm to young innocent girls in the name of culture and tradition.²⁵⁶

From a human rights perspective, FGM constitutes an abuse of women's rights, including an impairment of women's sexual pleasure, physical and physiological health that are extremely invasive and uncalled for.²⁵⁷

The question arises whether FGM should be proscribed as a customary practice for the reason that it authorises the torture of female children and submits them to degrading treatment. It places them at a high risk of contracting HIV/AIDS. This and other

²⁵¹ Richmond & Gestrin 47.

²⁵² Denniston & Mibs at 140.

²⁵³ Denniston & Mibs at 140.

²⁵⁴ Denniston & Mibs at 140.

²⁵⁵ Karanja N D *Female genital mutilation in Africa: Gender, religion and pastoral care* (2003, Virginia: Xulon Press) at 65.

²⁵⁶ Karanja at 65.

²⁵⁷ McMichael 265.

questions raised earlier in this chapter will be discussed in the subsequent chapter which will also examine this ritual more closely from a human rights perspective.

2.7 THE PRACTICE OF DRY SEX²⁵⁸

Dry sex is also known as vaginal drying.²⁵⁹ Literature on dry sex suggests that dry sex is widely practiced by women²⁶⁰ for hygienic purposes.²⁶¹ As explained in chapter one above, this practice entails the artificial drying of the vagina for the sexual gratification of males.²⁶² The purpose of vaginal drying is to make sure that the vagina is “hot, tight and dry”.²⁶³

Despite the dangers associated with this practice for HIV transmission, people continue to practice dry sex. In an interview conducted amongst sex workers who practice dry sex, thirty-three percent of the sex workers remarked that dry sex is a painful customary practice.²⁶⁴ In spite of the painful process, it is continued in an attempt to attract male clients²⁶⁵ who in turn pay higher prices for sex offered by sex workers who engage in this practice.²⁶⁶ Eighty-six percent of women in Tanzania who were randomly interviewed in relation to dry sex admitted to practice dry sex.²⁶⁷

²⁵⁸ See also the introductory discussion on the practice of dry sex in chapter one above.

²⁵⁹ Kitts J *et al* *The health gap: Beyond pregnancy and reproduction* (1996, Ottawa: International Development Research Centre) at 73.

²⁶⁰ Davis A J & Tschunin V *Essentials of teaching and learning in nursing ethics* (2006, Oxford: Elsevier Health Science) at 295.

²⁶¹ Karim A *HIV/AIDS in South Africa* (2005, Cambridge: Cambridge University Press) at 291.

²⁶² Karim at 291.

²⁶³ Baleka A “Concern voiced over ‘dry sex’ practices in South Africa” *The Lancet* 352 at 1292.

²⁶⁴ Karim at 291.

²⁶⁵ Karim at 291.

²⁶⁶ Segal S J *Under the Banyan tree: A population scientist’s odyssey* (2003, Oxford: Oxford University Press) at 188. See also Baleka at 1292 in this regard who noted that an interview conducted on prostitutes between the ages of 15 and 45 in South Africa showed that they favoured dry sex. These sex workers are said to focus on truck stops in South Africa. The mobility of truck drivers who may become infected with HIV poses a huge problem that contributes towards the spreading of HIV.

²⁶⁷ Baleka at 1292.

KwaZulu-Natal is said to be the province in South Africa where dry sex is mostly practiced. It is incidentally also the area with the highest prevalence of HIV/AIDS in South Africa.²⁶⁸

Despite the fact that dry sex is practiced to please male sex partners and clients, it is also reported that to be practised to remove the wetness in the vagina caused by Depo-Provera, a contraceptive injection, which leads to increased vaginal wetness.²⁶⁹ Some men are said to complain about this excess wetness.²⁷⁰ Certain women hence remove the excess wetness through the practice of vaginal drying²⁷¹ or alternatively by failing to continue with the contraceptive injection. Both these actions have dire consequences for their exposure to HIV.

2.7.1 FOCAL CONCERNS OF DRY SEX IN THE HIV/AIDS ERA

- Dry sex generates conditions where friction of the genital area is highly probable.²⁷² The substance used by women may cause disturbances in the membrane lining the vagina and the uterine wall.²⁷³
- Friction in the genital organs correlates with irritation of the white cells causing optimum exposure to HIV.²⁷⁴
- Dry sex is linked with the failure or reluctance to use condoms, while condom usage is linked with a decrease in HIV transmission.²⁷⁵
- Dry sex wipes out the bacteria which assist in fighting infection.²⁷⁶
- The practice also increases the likelihood that a condom may be torn.²⁷⁷

²⁶⁸ Baleka at 1292.

²⁶⁹ Davis & Tschunin at 295.

²⁷⁰ Davis & Tschunin at 295.

²⁷¹ Davis & Tschunin at 295.

²⁷² Davis & Tschunin at 295.

²⁷³ Baleka at 1292.

²⁷⁴ Davis & Tschunin at 295.

²⁷⁵ Davis & Tschunin at 295.

²⁷⁶ Alcamo E *AIDS* (2003, Boston: Jones and Bartlett publishers) at 136.

²⁷⁷ Alcamo 136.

There is no doubt that the cultural practice of drying of the vagina places women at a very high risk of becoming infected by HIV. The practice is again also linked with women's gender inequality and their subordinate position in rural societies.

2.8 CONCLUSION

The discussion above has pointed to a number of cultural practices that in varying degrees increase women's vulnerability, be it from an economic or physiological perspective. Some of these customs directly place women at an increased risk of HIV. The result brought about by these cultural practices is physical, sexual or psychological harm. The effects brought about by such practices are clearly not in conformity with human rights instruments such as the South African Constitution and CEDAW. The human rights aspects associated with these practices will be considered in more detail next.

It must be made clear that not all customary practices have this discriminatory effect. Customary law, like any other laws, is open to change and resistance and needs to adapt to keep up with social and other developments. It is often ironical that the purpose of a specific custom may initially indeed have been to provide financial security or stability to women and children, but over time may have changed as a result of various factors, leading to a practice that now in fact provides the opposite and discriminates against vulnerable and marginalised groups in society. Although outside the scope of this dissertation, it is suggested that it would be impractical and impossible to blindly discard those practices which date back many years. Customary institutions that discriminate against or which are harmful to women (by increasing their exposure to HIV) should be identified, and where possible, be developed in line with the constitutional objective of gender equality, without relinquishing the true and positive values that underlie a relevant custom.

“To achieve aspirations for public health and human rights, society must carefully examine its duties to promote public health, to respect human dignity, and to empower vulnerable persons to protect themselves.” (Gostin L O *et al Human rights and public health in the AIDS pandemic* (1997, Oxford: Oxford University Press) at 55.

CHAPTER 3

PART 1: HIV/AIDS AND GENDER EQUALITY: A REVIEW OF CONSTITUTIONAL ISSUES

3.1 INTRODUCTION

Just as culture is not an aspect which has to be barred from the human rights equation, so too it should not be given the position of a metanorm which challenges rights.¹ A number of cultural practices do not meet the universal human rights standards and seem too complex if not impossible to reconcile with such standards.² Foot binding, child slavery or oppression, and female infanticide in various societies are instances of customs which have by now yielded in response to heated culture-based discussions in support of human rights standards.³ Closer to home the customary principles and practices of patriarchy, dry sex, polygamy, primogeniture, early marriage and female genital mutilation pose a potential threat to the fundamental human rights of certain women, as discussed in a previous chapter.

HIV/AIDS is unquestionably not only a private sphere matter, but also a public health matter.⁴ Health and human rights have not often been correlated in a precise manner.⁵ Yet health and human rights are mutually dominant, contemporary approaches to defining and advancing the well-being of persons.⁶ Health matters have often been

¹ Alston P “The best interest principle: Towards a reconciliation of culture and human rights” (1994) 8 *International Journal of Law and the Family* 1-25 at 20.

² Alston at 20.

³ Alston at 20.

⁴ Valdiserri R O *Dawning answers: How the HIV/AIDS epidemic has helped to strengthen public health* (2003, Oxford: Oxford University Press) 4.

⁵ Mann J M *et al Health and human rights* (1990, New York: Routledge) at 7.

⁶ Mann at 7.

neglected in human rights talks with the exception of instances where an apparent harm and possible human right threat was evident.⁷

One of the reasons for the lack of interaction between the fields of health and human rights include the nature of the contemporary models of both human rights and health which are often both viewed as obscure and progressively developing.⁸ Health professionals often question the effectiveness of integrating human rights theories into their work and vice versa.⁹ Regardless of ground-breaking work attempting to bridge this perceived gap in bioethics, jurisprudence and public health law, a record of discordant connections between health professional and public advocates or between medicine and law may perhaps appear to add to the uncertainty regarding the prospective of a successful joint collaboration.¹⁰ The extent of health issues resulting from an abuse of fundamental rights and dignity remains to a large extent under appreciated.

It is clear from the preceding chapters that the risk of HIV infection amongst women is an apparent health issue which cannot be resolved without a review and consideration of human rights. Upholding and protecting the human rights would strengthen women's capacity to negotiate for example safe sex, thus protecting them against possible HIV infection.¹¹

This chapter will provide a detailed overview of specific human rights which are under threat by certain cultural practices and customs which continue to be harmful to many women in the contemporary social and legal context. This chapter consists of two parts: Part one will examine the nature of the right to equality with specific emphasis on

⁷ Mann 7.

⁸ Mann 7.

⁹ Mann 7.

¹⁰ Mann 7.

¹¹ Oesstreich J E *Power and principle: Human rights programming in international organizations* (2007, Georgetown: Georgetown University) at 133-134.

gender equality, considering also the framework that courts apply when faced with a matter concerning sex or gender discrimination (eg the equality test).

The second part of the chapter will turn to the rights of dignity, freedom and security of the person, the right to access to health care services, as well as the right to education. The purpose of this discussion is to provide the backdrop against which the constitutionality of some of these cultural customs and practices, some nothing but glaring examples of gender violence, will be more closely scrutinised. The discussion will be limited to these selected rights, despite the fact that some of these practices may also infringe other constitutional rights, notably the right to privacy, which is relevant in relation to HIV-testing and disclosure.¹²

¹² The right to privacy was briefly discussed in chapter one above. An example of an invasion of a person's constitutional right to privacy is the taking of a person's blood for testing without consent, see *S v Orrie* 2004 3 SA 584 (C) 589–590, regarding the taking of a DNA blood test for criminal investigations; *C v Minister of Correctional Services* 1996 4 SA 292 (T) on a blood test for HIV/Aids, or *Klein v Attorney-General WLD* 1995 3 SA 848 (W) regarding the restoring of previously erased computer information. Neethling refers to *M v R* 1989 1 SA 416 (O) 426 where Kotze J describes the wrongfulness in principle (except if a ground of justification, such as a court order exists) of a blood test: “[T]he taking of a blood sample which is normally in effect not much more than a prick of a needle, can be regarded technically as a violation of the right to privacy, as is contemplated in the law of personality”. See *Neethling's Law of personality* (2005) (2nd ed) at 224, fn 65. In *C v Minister of Correctional Services* 1996 (4) SA 292 (T), which deals with a HIV test on a prisoner without his informed consent, it was held that the manner in which the test was carried out not only constituted an assault on the prisoner's, C's, *corpus*, but also an *iniuria* in the form of an invasion of C's privacy (per Kirk-Cohen J at 301B). In the later case of *NM v Smith (Freedom Institute as Amicus Curiae)* 2007 (5) SA 250 (CC), which concerns the unauthorised disclosure and publication of the HIV-status of the applicants by the respondents, the Constitutional Court held that the publication of the HIV-status of the applicants constituted a wrongful publication of a private fact and that the applicants' right to privacy was breached by the respondents (per Madala J). For a detailed discussion of patient privacy in the context of medical law, see in general Carstens & Pearmain *Foundational principles of South African medical law* (2007, Durban: LexisNexis) chapter 11 and the cases referred to there.

3.2 THE RIGHT TO EQUALITY

3.2.1 THEORETICAL OBSERVATIONS

The customary-law principle of patriarchy as well as how this principle affects the legal position of women in society was examined in the previous chapter. As noted earlier, this principle subjects women, especially black rural women, under the entire control of their husbands. These women are consequently marginalised as a group dominated by male authority in almost every decision within these families.

It is evident from the previous chapter that poverty and inequality are gendered and that most of the victims of poverty and gender inequality are black women, specifically black rural women.

The Constitution of South Africa¹³ prohibits discrimination by the state or any other person on inter alia the grounds of gender, age and race. Equality is said to be at the centre and heart of the Constitution as well as its organising principle.¹⁴ The Constitution is irreconcilable with any laws and practices that support the subordination of disadvantaged groups and undermine their worth.¹⁵ It follows that any law, practise or rule which is founded on the notion of inferiority of women should be condemned.

¹³ Section 9 of the Constitution reads as follows:

9(1) "Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

¹⁴ Kommers D P *American constitutional law essays cases and comparative notes* (2004, Lanham: Rowman & Littlefield) at 995.

¹⁵ O' Sullivan M, in Woolman *et al Constitutional law of South Africa* (2nd ed) (2007, Cape Town: Juta) at 37-12.

Equality is not merely a fundamental right of women, but is also a social and political instrument to bring about a more just, impartial, and sustainable advancement for everyone.¹⁶ Equality stands as an indispensable standard in interpreting the Constitution. What reinforces the importance of the right to equality is that within the Bill of Rights, the right to equality is the first substantive right.¹⁷ Together with the concepts of dignity and freedom it influences the explanation and application of all other rights contained in chapter 2 of the Constitution.¹⁸ The idea of an “open and democratic society based on human dignity, equality and freedom” flows evenly through the Constitution.¹⁹

Both natural and juristic persons can invoke the rights contained in the Bill of Rights.²⁰ Section 8(2)²¹ asserts that a stipulation in the Bill of Rights binds natural or juristic persons if, and to the extent that it is applicable, considering the attributes of the right as well as the nature of any duty imposed by the right. The wording of section 8(2) denotes that some rights such as the right to dignity, privacy and equality before the law and equal protection and benefit before the law may perhaps apply as between private persons whilst other rights for example, the right to citizenship, and rights that relate to arrest and detention do not apply as between persons but between the state and an

¹⁶ Alger C F *The future of the United Nations system: Potential for the twenty-first century* (1998, United Nations University Press) at 259. See also Leonen T & Rodrigues P R *Non discrimination law: Comparative perspectives* (1999, The Hague: Martinus Nijhoff) 3.

¹⁷ Van Reenen TP “Equality, discrimination and affirmative action: An analysis of section 9 of the Constitution of the Republic of South Africa” (1997) 12 *SA Public Law* 151-165 at 152. See also International Association for Philosophy of Law and Social Philosophy *et al Pluralism and law: Proceedings of the 20th IVR World Congress, Amsterdam* (2004, Stuttgart: Franz Steiner Verlag) at 134.

¹⁸ Van Reenen at 152.

¹⁹ Van Reenen at 152.

²⁰ Andrew B *The international survey of family law* (1998, The Hague: Martinus Nijhoff Publishers) at 436.

²¹ Section 8(2) of the Constitution reads as follows: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by their right.” Also see *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC) at 667 paragraph [8].

individual as per section 8(1).²² The former denotes a horizontal application of the bill of rights while the latter indicates a vertical application of the Bill of Rights.

Section 9 of the Constitution is open to diverse interpretations.²³ The most important question is whether section 9 in its entirety should be construed to embed equality in a formal or substantive sense.²⁴ Formal equality holds that every person is an equal bearer of rights and obligations within a fair and lawful order,²⁵ for example in analysing a specific statute in order to establish if a pertinent explanation exist for similar or different treatment.²⁶ Equality is hence a “state of affairs” which can be realised by awarding equal rights to everyone in conformity with the “same, general, non-preferential” standard.²⁷ The formal meaning of equality has thus nothing to do with “institutionalised, structural distinctions” in equality.²⁸ It pays no attention to real social and economic differences between persons and categories in society. As a result it has a propensity to support and establish rather than do away with inequalities.²⁹

Substantive equality, on the other hand, entails the analysis of the real material circumstances of persons and categories of persons, at the same time exploring how government action can restructure and improve unfavourable social and economic conditions.³⁰ Substantive equality is hence sensitive to and concerned with the concrete

²² Section 8(1) of the Constitution reads as follows: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” For an in-depth discussion on the horizontal and vertical application of the Bill of Rights see the following cases: *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC) at 667 paragraph [8], where the Constitutional court stated that the term “vertical application” is used to indicate “that the rights conferred on persons by a bill of rights are intended only as a protection against the legislative and executive power of the State in its various manifestations. The term “horizontal application” on the other hand indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private law disputes.”

²³ Van Reenen 154.

²⁴ Van Reenen 154.

²⁵ Macklem P *Indigenous indifference and the Constitution of Canada* (2001, Toronto: University of Toronto Press) at 212. See also Van Reenen at 153.

²⁶ Macklem 212.

²⁷ Van Reenen 153.

²⁸ Macklem 212. See also Van Reenen 153.

²⁹ Van Reenen 153.

³⁰ Macklem 212.

social and economic circumstances which may result in disparities and discrimination between persons and categories of people.³¹

Section 9(1) of the Constitution assures every individual the right to be “equal before the law” and to “equal protection and benefit of the law”.³² Whereas each of these expressions denotes an individual and different meaning, they have common characteristics and harmonise each other in providing a complete legal framework when applying the right to equality.³³

Against the background of South Africa’s history of inequality and subjugation along with the call for transformation and restructuring, procedural equality seems to be the essential nature of equality before the law.³⁴ Besides its authoritarian and beneficiary functions, “equal protection and benefit of the law” denotes government action that will advance the safeguard of susceptible and disadvantaged persons and categories of people from abuse by more dominant individuals and groups.³⁵

Section 9(3) provides that the state may not unjustly discriminate directly or indirectly on the sixteen grounds established. Some of these grounds relevant to this study are those of gender and sex.³⁶ Sections 9(3) and 9(4) make the equality clause pertinent to both the government and private person jointly in public and private law dealings.³⁷ This unambiguously planned vertical and horizontal function of section 9 is also substantiated by the Constitutional court in dealing with the final text of section 8(2) in the *Certification* case.³⁸

³¹ Van Reenen 153.

³² Van Reenen 154.

³³ Van Reenen 154.

³⁴ Campbell T *Sceptical essays on human rights* (2001, Oxford: Oxford University Press) at 304. See also Van Reenen at 155.

³⁵ Van Reenen 156.

³⁶ Van Reenen 156.

³⁷ Van Reenen 156.

³⁸ *In re Certification of the Constitution of the Republic Of South Africa* 1996 (10) BCLR 1253 (CC) at 1280D-1281C.

The final Constitution of South Africa is much clearer on the horizontal application of the Bill of Rights compared to the interim Constitution.³⁹ Considering the historical background of South Africa as well as the necessity for transforming the South African society, the horizontal application of the Bill of Rights is essential as a vertical application is not at all times sufficient to deal with the existing discrepancies.⁴⁰

Section 9 states that everyone has a right to be equal before the law as well as a right to the equal protection and benefit before the law.⁴¹ It is indispensable to state that section 9(4) also explicitly states that “[n]o person may unfairly discriminate ... against anyone [...]” This expression is completely different from the extensively used words (“everyone has the right to...”) central to the general application of the Bill of Rights,⁴² making it clear that the proscription in respect of unfair discrimination binds private persons in their dealings with each other.⁴³ It is as a result possible to argue that in South Africa, private dealings, be they administered by legislation, customary law or a religious systems of law, are not protected from the application of the Bill of Rights.⁴⁴ The potential for conflict between customary law and the right to equality, as this study will illustrate, is great. Equality as protected in section 9 and the customary law principle of patriarchy are irreconcilable. If patriarchy leads to an unequal relationship between the sexes in a specific community, the matter is between private persons and hence the horizontal application of the Bill of Rights will be applicable.

³⁹ Bradshaw Y W & Ndegwa S N *The uncertain promises of Southern Africa* (2001, Bloomington: Indiana University Press) at 277.

⁴⁰ Rabe J *Equality, affirmative action and justice* (2001, Norderstedt: Books on Demand GmbH) 329. Rabe further points out the negative aspects of involved with application of the Constitution in a horizontal way. He states that “there are however both positive and negative aspects involved with regards to the application of the horizontal application of the constitutional provisions. The negative side of the horizontal application is the state’s encroachment in the private sphere and the difficulty containing the ambit of the application. The complete horizontal application of the Bill of rights is unacceptable as this would for example mean that it would apply to family relationships and a child may claim a violation of his/her rights if other children in the family received some other benefits”. Rabe at 329.

⁴¹ Andrew B *International survey of family law* (1998, The Hague: Martinus Nijhoff Publishers) at 437.

⁴² Andrew 437.

⁴³ Andrew 437.

⁴⁴ Bradshaw & Ndegwa 278.

Discrimination may be direct or indirect.⁴⁵ Direct discrimination takes place in circumstances where a person is disadvantaged merely on the basis of race, sex, ethnicity, religion and the like.⁴⁶ Motive or intention seems immaterial in finding whether behaviour resulting in harm amounts to direct discrimination.⁴⁷ In the *City Council of Pretoria v Walker* case⁴⁸ the Constitutional court found that motive or intention is not a requisite in finding whether harmful conduct amounts to direct discrimination. The application of a precise standard, for instance gender or disability is all that is pertinent in a bid to establish discrimination.⁴⁹

Indirect discrimination takes place when, for example, impartial policies are related in a way that unfavourably influence a unequal number of a portion of an explicit group.⁵⁰ Both direct and indirect discrimination can be premeditated or inadvertent.⁵¹ The neutral criterion may perhaps be implemented with the purpose of selecting out affiliates of a particular group, or it may be implemented in good faith and even so have a disadvantageous effect on a disproportionate amount of a particular group.⁵² The peculiarity between direct and indirect discrimination is as a result not merely a distinction between deliberate and inadvertent discrimination.⁵³

⁴⁵ Cotter A M *et al* *Discrimination law: Professional practice guide* (2005, London: Routledge Cavendish) at 1.

⁴⁶ Van Reenen at 158. The South African Constitution, particularly sections 9(3) and (4) prohibit both direct and indirect discrimination. For interest's sake, the American Constitution and the German Constitution do not contain any reference to indirect discrimination and the prohibition has gradually developed via case law. The South African Constitution has evaded this problem by expressly prohibiting both direct and indirect discrimination. With respect to the aforementioned, see Rabe J *Equality, affirmative action and justice* (2001, Norderstedt: Books on Demand GmbH) at 322.

⁴⁷ Rabe 322. Rabe points out that the South African position, which does not require motive or intention in establishing whether harmful behaviour amounts to direct discrimination, is different from the position in the United States of America. In the US a form of intent is required and in Germany the position is that there has to be a causal connection between the harm suffered and the prohibited characteristic. See also Van Reenen at 159.

⁴⁸ *City Council of Pretoria v Walker* 1998 (2) SA 363 CC at paragraph [31].

⁴⁹ Van Reenen 159.

⁵⁰ Cotter at 2. See also Van Reenen 159.

⁵¹ Van Reenen 159.

⁵² Van Reenen 159.

⁵³ Van Reenen at 159.

The implicit proscription of both direct and indirect discrimination in sections 9(3) and 9(4) guarantees that our courts will implement an adequately wide approach in respect of what comprises discrimination. The reason of enclosing both expressions is to undoubtedly offer an ample protection against unfair discrimination.⁵⁴ Hence both direct and indirect discrimination should be interpreted as descriptions of the diverse forms which discrimination may assume and not as two jointly exclusive groups into which claims should be fixed.⁵⁵

Applying the notion of equality, labelled by Albertyn and Goldblatt as a “complex right”,⁵⁶ however, has shown to be quite challenging.⁵⁷ In *Prinsloo v Van der Linde and Another*⁵⁸ it was remarked that issues of equality need to be brought about “incrementally and on a case by case basis with special emphasis on the actual context in which the problem arises”.

It is now necessary to examine how the Constitutional court has interpreted the right to equality in order to give meaning to it.⁵⁹ The starting point and basis for the discussion that follows on what constitutes unfair gender discrimination will be the *Harksen case*.⁶⁰ The next discussion will hopefully assist in illustrating not only the complexity of adjudicating on sex and gender equality, but also provide the theoretical context against which the subsequent constitutional scrutiny of some of those cultural customs examined earlier will become more clear.

⁵⁴ Van Reenen at 159.

⁵⁵ Van Reenen at 159.

⁵⁶ Albertyn C & Goldblatt B “Section 9 -The right to equality”, paper presented at the Constitutional Law of South Africa Conference, 29 March 2006, at Constitutional Hill, at 1. (Copy of paper on file with author).

⁵⁷ Jagwanth S “South Africa: The inequality challenge” (2000) 15(3) *South African Report Archive* 3-30 at 30.

⁵⁸ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR paragraph [20].

⁵⁹ Campbell T *Sceptical essays on human rights* (2001, Oxford: Oxford University Press) at 303.

⁶⁰ *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC). Also see Campbell 303.

3.2.2 WHAT CONSTITUTES UNFAIR DISCRIMINATION ON THE GROUND OF GENDER?

A question whether specific conduct unfairly discriminates on the ground of equality firstly needs to determine whether the given conduct or statutory provision makes a distinction between people or categories, and if so, whether this distinction is a rational one.⁶¹

3.2.2.1 *Does the given provision make a distinction between people or categories?*

In the *Harksen case*⁶² the applicant challenged section 21 of the Insolvency Act⁶³ on ground that it violated the applicant's constitutional guarantee to equality. It was argued that the effect of the stipulations contained in section 21 constitutes an unequal treatment of solvent spouses and unjustly discriminates against them⁶⁴ by inflicting a heavy load and debt on the applicant (solvent spouse) different than those relevant to other persons with whom the insolvent had transactions or associations or whose possessions were found in the control of the insolvent.⁶⁵ On appeal it was held that

⁶¹ *Harksen v Lane NO & Others* at 1505 at paragraph [42]. See also Albertyn & Goldblatt at 4.

⁶² *Harksen v Lane NO & Others* at 1490.

⁶³ Section 21(1) of the Insolvency Act 24 of 1936 reads as follows:

"Effect of sequestration on property of spouse of insolvent – (1) The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section. The trustee shall release any property of the solvent spouse which is proved - (a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or (b) to have been acquired by that spouse under a marriage settlement; or (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or (d) to be safeguarded in favour of that spouse by section twenty-eight of this Act or by the Insurance Act, 1923 (Act No. 37 of 1923); [...]."

⁶⁴ *Harksen v Lane NO & Others* at 1505 at paragraph [40].

⁶⁵ *Harksen v Lane NO & Others* at 1491. The widely published judgment by Goldstone J, Chaskalson P, Langa DP, Ackermann and Kriegler JJ (concurring) established section 21 was not inconsistent with the equality clause. Justices O'Regan, Madala and Mokgoro, on the other hand, found that section 21 ought to be found to be incompatible with the equality clause.

section 21 indeed differentiated between the solvent partner of an insolvent and others with whom the insolvent had transactions or associations or whose possessions were found in the control of the insolvent.⁶⁶

In the case of *Jordan v State*⁶⁷ the question of whether section 20(1)(aA) of the Sexual Offences Act⁶⁸ (which criminalised sex work) differentiated between sex worker and a client had to be answered. The court *a quo* established that there was indeed a differentiation between two categories of people and that this differentiation was “obviously unjustified discrimination between not only sexes but also persons.”⁶⁹

On appeal in the Constitutional court, however, the majority decision regarded the relevant provision of the Sexual Offences Act as gender-neutral as it the provision refers to both sexes, eg “any person” who engages in sex for reward.⁷⁰ Ngcobo J observes that there is a qualitative distinction between a prostitute who carries out the trade of prostitution for a reward and is as a result likely to be a recurring offender on the one hand, and the client who seeks the services of a prostitute simply on an instance and therefore might or possibly will not be a repeat offender.⁷¹ He describes the differentiation resulting from the relevant provision as an ordinary distinction found in a number of statutes such as the Dangerous Weapons Act⁷² and the Sea Fishery Act,⁷³ to mention but a few.⁷⁴

⁶⁶ *Harksen v Lane NO & Others* at 1512 paragraph [55].

⁶⁷ *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) at 1119-1123.

⁶⁸ 23 of 1957. Section 20(1)(aA) reads as follows: “Persons living on earnings of prostitution or committing or assisting in commission of indecent acts - (1) Any person who (a) knowingly lives wholly or in part on the earnings of prostitution; or (b) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person shall be guilty of an offence [...]”

⁶⁹ *S v Jordan and Others* 2001 (10) BCLR at 1058 paragraph [a].

⁷⁰ *Jordan and Others v S and Others* 2002 (11) BCLR 1117 at 1120 paragraph [8].

⁷¹ *Jordan and Others v S and Others* at 1120 paragraph [10].

⁷² Section 3(3) of the Dangerous Weapons Act 71 of 1968 reads as follows: “Any person who manufactures, sells or supplies any object in contravention of the provisions of any notice issued in terms of subsection (1), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.”

⁷³ Section 47(f) of the Sea Fishery Act 12 of 1988 reads as follows: “Any person who -possesses, sells or displays or offers for sale any fish or any portion of fish the catching of which is prohibited by this

The majority (as per Ngcobo J with Chaskalson CJ, Kriegler, Madala JJ, Du Plessis and Skweyiya AJ concurring) held that section 20(1)(aA) was constitutional and valid.⁷⁵ In reaching this conclusion, Ngcobo J emphasised the following points, namely that (1) the impugned stipulation did not directly differentiate because it is gender neutral;⁷⁶ (2) the impugned provision did not indirectly discriminate between women for the reason that there is a “qualitative difference” between sex workers and their customers;⁷⁷ (3) any outcome of unfairness is not unfair for the reason that the purpose of the law is so important, and any disgrace and stigma that relates to sex workers is owed to social attitudes and not to the law;⁷⁸ and that (4) any discrimination which results when the law is applied does not indicate that there is a defect contained by that law.⁷⁹

The minority judgement, on the contrary (as per O’Regan and Sachs JJ with Langa DCJ, Ackermann and Goldstone JJ concurring) established that section 20(1)(aA) constituted unfair discrimination on the basis of gender.⁸⁰ The minority judgement also noted that the section promoted “harmful sexual stereotypes” which must be avoided in a society that strives for gender equality.⁸¹

Act; shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment”.

⁷⁴ The minority judgement in the *Jordan* case attempted the issue from the question whether a constitutionally compatible interpretation of the section 20(1)(aA) exists. Counsel for the state argued that a broader approach to interpreting the section should be used which approach would consequently lead to the outcome of no differentiation. The broadening of the description of an offence in an effort to avoid unfair discrimination was something a court does in extraordinary situations. Where a criminal offence results in unfair discrimination there are only two ways to deal with such a problem to avoid unfair discrimination: to obliterate the criminal prohibition, and to expand its scope to the excluded groups. The minority then concluded that broadening the description of the offence would amount to a contravention of the principle of legality which calls for certainty on the scope of the definition of a crime, and would also not be in accordance with constitutional values. See *Jordan and Others v S and Others* paragraph [45]-[46].

⁷⁵ *Jordan and Others v S and Others* at 1118. The Constitutional court accordingly upheld the constitutionality of the brothel provisions and by a majority declined to confirm the order of the Court *a quo* invalidating the prostitution provisions.

⁷⁶ *Jordan and Others v S and Others* at 1122 paragraphs [15] and [17].

⁷⁷ *Jordan and Others v S and Others* at 1122 paragraph [18].

⁷⁸ *Jordan and Others v S and Others* at 1122 at paragraph [16].

⁷⁹ *Jordan and Others v S and Others* at 1123 at paragraph [18].

⁸⁰ *Jordan and Others v S and Others* 2002 at 1118.

⁸¹ *Jordan and Others v S and Others* 2002 at 1118.

The decision in *Jordan* is undoubtedly a serious setback for women's rights.⁸² Albertyn⁸³ points out that unlike other cases decided on gender inequality, the decision in *Jordan* failed inter alia to observe the private sphere of sexuality and took no notice of context, but instead reinforced entrenched and detrimental stereotypes regarding sex workers. It is particularly disappointing following a string of celebrated decisions where the courts accepted the necessity for "substantive equality".⁸⁴

In the context of the present study, the consequences for poor, black women forced to engage in sex work in order to survive, are clear. Driven from their own oppressed backgrounds, many of these women find themselves with no other choice but to become sex workers. The majority's conclusion that prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, as well as attracting the stigma associated with prostitution, does not take cognisance of the reality of the lives of many of these women.⁸⁵ Moreover, the majority's reluctance to recognise the effect of the distinction that the relevant provision of the Sexual Offences Act draws between not only the male client and the female prostitute, but between women generally (those involved in sex work and those not), is deeply disappointing.

Bonthuys⁸⁶ raises an important point that the stigmatisation of particular types of sexual conduct is in conflict with evolving debates of sexuality connected with human rights and gender equality. This stigmatisation of certain forms of sexual conduct differs from debates in modern literature on HIV/AIDS prevention which relate HIV/AIDS prevention to gender equality in sexual relationships.⁸⁷ The decision in *Jordan* case reverberate with some Christian and Western ideas advocating restrictive "sexual expression" for

⁸² See, for example, Bonthuys E "Women's sexuality in the South African Constitutional court" (2006) 14 *Feminist Legal Studies* 391-406 at 392. Bonthuys describes the decision of the *Jordan* case "as an unpleasant surprise to the community of feminist lawyers in South Africa".

⁸³ Albertyn C "Defending and securing rights through Law: Feminism, law and the courts in South Africa" (2005) 32(2) *Politikon* 217-238 at 229-230. See also Albertyn & Goldblatt "Section 9 -The right to equality" at 9.

⁸⁴ Bonthuys "Women's sexuality in the South African Constitutional court" at 392.

⁸⁵ *Jordan and Others v S and Others* at 1122 at paragraph [16].

⁸⁶ Bonthuys 392.

⁸⁷ Bonthuys 392.

women and which indirectly blames women for the spreading of HIV/AIDS.⁸⁸ It also reinforces women's powerlessness in intimate relationships, as well as their incapacity, by perpetuating their inability to shield themselves and others from sexually transmitted diseases and HIV.

Turning now from the court's initial stage of enquiry in determining whether unfair discrimination exists, namely to find whether there has been a differentiation between categories of people, the next stage of the enquiry is the consideration of the following question:

3.2.2.2 Does the alleged differentiation stand in a rational relation to a lawful purpose?

The approach in the *Harksen* case requires one to enquire whether the alleged differentiation stands in a rational relation to a lawful government purpose.⁸⁹ If at this juncture there seems to be no rational connection to a lawful government purpose, then the courts normally declares that a violation of section 9(1) exists.⁹⁰ Section 9(1) may hence be seen as the initial sieve within the equality clause whose focus is the bar of unfair discrimination.⁹¹ If however it is justified that the differentiation stands in a reasonable relation to a lawful government purpose, the next step turns to the question whether the differentiation is unfair.⁹²

3.2.2.3 Is the differentiation unfair?

This enquiry firstly determines whether the differentiation amounts to discrimination,⁹³ establishing whether the differentiation is based on a listed ground contained in section 9(3).⁹⁴ There are sixteen grounds listed in section 9(3) of the Constitution. A large

⁸⁸ Bonthuys 392.

⁸⁹ *Harksen v Lane NO & Others* at 1506 at paragraph [42]. See also Albertyn & Goldblatt at 5.

⁹⁰ Albertyn & Goldblatt 5.

⁹¹ Albertyn & Goldblatt 5.

⁹² *Harksen v Lane* at 1507 at paragraph [44].

⁹³ *Harksen v Lane* at 1508 at paragraph [45]. See also Albertyn & Goldblatt 4.

⁹⁴ *Harksen v Lane* at 1508 at paragraph [45]. See also Albertyn & Goldblatt 4.

number of cases so far heard by our courts were determined on a small number of the listed grounds listed in section 9(3).⁹⁵

Most cases dealing with discrimination so far specifically related to race, gender and sexual orientation.⁹⁶ The first case dealing with sex and gender as a basis for discrimination was that of *Brink v Kitshoff*.⁹⁷ It has been argued that this case has not been of great assistance for the majority of the women in South Africa most probably because it dealt with issues relating to an insurance policy.⁹⁸ The impact of the cases of *Fraser*⁹⁹ and *Hugo*¹⁰⁰ is more pertinent. Both cases were brought by men and their respective outcomes were substantive equality decisions. Both decisions considered the lives and backgrounds of certain women and the reasons why the law ought to take cognisance of the often disparate roles that men and women fulfil in relation to children in society.

Another important case dealing with gender discrimination specifically was that of *President of the Republic of South Africa and Another v Hugo*¹⁰¹ which came to the

⁹⁵ Albertyn & Goldblatt 7. The issue of discrimination on grounds of sex and gender was, for example, determined in the following cases: *Fraser v Children's Court Pretoria North and Others* 1997 (2) BCLR 153 (CC); *Hugo v State President of the Republic of South Africa and another* 1996 (6) BCLR 876 (D); *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC); *Volks NO v. Robinson*, 2005 (5) BCLR 446 (CC); *Bhe and Others v The Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC). The issue of race was addressed in the following case: *Robinson and Others* 2005 (5) BCLR 446 (CC). The issue of discrimination on the ground of race was determined in *Moseneke and Others v Master of the High Court* 2001 (2) BCLR 103 (CC); *Mabaso v Law Society of the Northern Provinces and Another* 2005 (2) BCLR 129 (CC) and *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).

⁹⁶ For a detailed discussion on the cases dealing with discrimination specifically related to race, gender and sexual orientation, see *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *Hugo v State President of the Republic of South Africa and Another* 1996 (6) BCLR 876 (CC) and *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; *Bhe and Others v The Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC); *Brink v Kitshoff* No 1996 (6) BCLR 752 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, 2000 (2) SA 1 (CC) [NCGLE 2000].

⁹⁷ *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC).

⁹⁸ Albertyn & Goldblatt at 8.

⁹⁹ *Fraser v Children's Court Pretoria North and Others* 1997 (2) BCLR 153 (CC).

¹⁰⁰ *Hugo v State President of the Republic of South Africa and Another* 1996 (6) BCLR 876 (CC) & *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708.

¹⁰¹ *President of the Republic of South Africa and Another v Hugo* at 711.

Constitutional Court as an appeal against the judgement of Magid J in the case of *Hugo v State President of the Republic of South Africa and Another*.¹⁰² The applicant, serving a sentence at the time when President Mandela was inaugurated as the first democratic president, claimed that the President's special remission of the sentences of mothers with small children under the age of twelve constituted discrimination based on gender. The applicant, a male, was also the sole caretaker of a child younger than twelve, but because he was a man, he could not be released.

Despite the fact that the majority decision in *Hugo* recognised women's gender role in caring primarily for small children in the South African society, this has a down side too.¹⁰³ Goldstone J correctly depicts women's social burden in child rearing as a fact which he describes as "one of the root causes of women's inequality in our society".¹⁰⁴ Although this observation is true, the danger that lurks in entrenched perceptions and stereotypes may in the long run be more harmful to women's struggle for gender equality. This is borne out by the reality of many rural women whose traditional role of submission and inequality will remain unchanged and stagnant if attention is not drawn to the real circumstances that they find themselves on a daily basis. If society continues to perceive women as sole care takers of small children, or in a customary setting, as so-called "Western", promiscuous or even a "witch" for being more assertive regarding reproduction and family planning, South African still have a very long road ahead as far as gender equality is concerned.

The cases of *Jordan*,¹⁰⁵ *Bhe*¹⁰⁶ and *Volks*¹⁰⁷ came to the respective courts as claims by women supported by women's movements in an attempt to claim fairness were some

¹⁰² *Hugo v State President of the Republic of South Africa and Another* 1996 (6) BCLR 876 (D). Magid J upheld the application ruling that the Presidential Act discriminated against the respondent and his son on the basis of gender (at 884 and 886).

¹⁰³ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 at 727, paragraph [37].

¹⁰⁴ *President of the Republic of South Africa and another v Hugo* at 728, paragraph [38].

¹⁰⁵ *Jordan and Others v S and Others* 2002 11 BCLR 1117 *Volks NO v. Robinson* 2005 (5) BCLR 446 (CC).

¹⁰⁶ *Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC).

legislation restricted women of certain advantages.¹⁰⁸ The case of *Bhe*,¹⁰⁹ discussed earlier, held that the customary law rule of primogeniture unfairly discriminated on women on the ground of gender. For Albertyn, this decision has

both normative value in setting the terms of the relationship between custom and gender equality, and practical value in extending inheritance rights to all women married in customary law.¹¹⁰

If the alleged differentiation is not based on any listed ground in section 9, then a determination should be made if the differentiation is founded on aspects and features potentially harmful to the basic human dignity of persons or may have a comparably negative effect.¹¹¹ The issue whether there is differentiation on a listed ground or not should be viewed objectively.¹¹²

Returning again to the *Harksen* case which sets out the equality test, the question whether the differentiation was fair was answered in the positive. Although it was established that the differentiation between the solvent spouse and other persons who had dealings with insolvents does not constitute differentiation on one of the specified grounds,¹¹³ the court held that the rest of persons who had dealings with the insolvent or whose assets were found in the care of an insolvent are not encroached upon in the same way as the assets of the insolvent's spouse.¹¹⁴

The next part of the test now has to determine the following:

¹⁰⁷ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

¹⁰⁸ Albertyn & Goldblatt at 9.

¹⁰⁹ *Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC) at 31 paragraph 88 [A].

¹¹⁰ Albertyn "Defending and securing rights through law: Feminism, law and the courts in South Africa" at 228-229.

¹¹¹ *Harksen v Lane NO & Others* at 1508, paragraphs [46] and [47] See also Albertyn & Goldblatt at 4.

¹¹² *Harksen v Lane NO & Others* at 1508, paragraph [47].

¹¹³ *Harksen v Lane NO & Others* at 1514, paragraph [61].

¹¹⁴ *Harksen v Lane NO & Others* at 1514, paragraph [61]. Their assets do not befall to the Master or the trustee and they do not have trouble with the obligation of providing evidence of proving their property prior its release. No one prohibits them to dispose of their belongings except and until they prove their ownership right in a way that convinces the trustee or a court of competent jurisdiction. The inconveniences of section 21 are not applicable to the children of the insolvent.

3.2.2.4 Does the discrimination amount to unfair discrimination?

The analysis for unfairness is said to be the significant part of the equality analysis as it addresses permissible constitutionally sanctionable discrimination.¹¹⁵ If, however, the discrimination is on a ground listed in section 9(3), then it is presumed that unfairness exists.¹¹⁶ The consequence of this is that if differentiation exists on an explicit ground, a presumption of unfairness is created in addition to the alleged discrimination.¹¹⁷ However, if the alleged discrimination is not on any of the listed grounds in section 9(3), unfairness must first be established.¹¹⁸ For example, on appeal against the judgment in *Hugo v President of the Republic of South Africa*,¹¹⁹ the majority judgment concluded that there was indeed a form of discrimination on the basis of gender but that such discrimination was not unjust.¹²⁰ As the discrimination related to a ground listed in section 8 of the interim Constitution, the court deduced that the discrimination was unfair, hence requiring that the contrary be proven.¹²¹

The test in *Harksen* designed to determine unfairness looks at the following: (1) the status of the complainants in society, if they have been affected by past patterns of disadvantage, and whether the alleged unfairness is listed in section 9(5);¹²² (2) the nature of the provision or authority and the function required to be accomplished by it;¹²³ and (3) the degree to which the complainant's constitutional rights or interests have been infringed and whether the infringement of such rights impacted on their fundamental right to human dignity or whether the impairment constitutes an infringement of a comparably serious nature.¹²⁴

¹¹⁵ Campbell *Sceptical essays on human rights* at 303-304.

¹¹⁶ Campbell 303.

¹¹⁷ Campbell 303.

¹¹⁸ *Harksen v Lane NO & Others* at 1509, at paragraph [47].

¹¹⁹ *Hugo v State President of the Republic of South Africa and Another* at 878.

¹²⁰ *President of the Republic of South Africa and Another v Hugo* at 709.

¹²¹ *President of the Republic of South Africa and Another v Hugo* at 709.

¹²² *Harksen v Lane NO & Others* at 1510, paragraph [51]. See also Campbell 303.

¹²³ *Harksen v Lane NO & Others* at 1510, paragraph [51]. See also Campbell 303.

¹²⁴ *Harksen v Lane NO & Others* at 1510, paragraph [50]. See also Campbell 303.

The above test considers the impact caused by the unfair conduct, illustrating both the historical and the contextual.¹²⁵ The central value in this comprehensive test is the right to dignity.¹²⁶ The more susceptible a person or group to be a victim of discrimination, the more inequitable the discrimination may be found to be.¹²⁷ Such a notion of equality revolves around an understanding that aims to break with past patterns of disadvantage and interpret discrimination against the background of past and existing social, political and economic inequalities.¹²⁸ This places emphasis on the necessity for a corrective or restitutive equality, ensuring that dealing with past patterns of discrimination is an important purpose of the equality clause.¹²⁹ Regrettably, it has *not* been the historically most disadvantaged groups who have approached the courts seeking the protection of the equality clause.¹³⁰

The focus of this study is a neglected and deeply disadvantaged category, namely black rural women. The Constitutional court's recognition in the *Hugo* case¹³¹ of the daily social context of women, often left to fend alone for themselves and their children, must be welcomed. Despite the concerns raised above regarding the possible entrenchment of already harmful stereotypes, this decision recognises the powerlessness of many women who are either unemployed, or employed in low paying jobs. Rural women are the worst off: those depending on husbands or partners who work elsewhere in urban areas have little say in matters relating to reproduction and have to put up with whatever the men may demand in return for some form of financial security. They are extremely vulnerable to contracting HIV from these male partners who may return HIV-positive from their places of work in larger cities. As observed in the *Hugo* case, women's obligation (many abandoned by husbands or partners) of child nurturing makes it extremely hard for these women to compete for gainful employment.¹³² Each case

¹²⁵ Albertyn & Goldblatt 5.

¹²⁶ *Harksen v Lane NO & Others* at 1510, paragraph [51].

¹²⁷ Campbell 304.

¹²⁸ Campbell 304. Also see Van Reenen 155.

¹²⁹ Campbell 304.

¹³⁰ Campbell 304.

¹³¹ *President of the Republic of South Africa and Another v Hugo* at 710.

¹³² *President of the Republic of South Africa and Another v Hugo* at 709.

before the courts will thus require a cautious and methodical consideration of the impact of the inequitable conduct upon the specific persons to decide if the impact is one advancing the constitutional objective of fairness or not.¹³³

The nature of the authority in terms of which the unfairness resulted from, as well as the nature of the interests affected by the discrimination is amongst other factors that are taken into account when determining whether the discrimination is fair or not.¹³⁴

Turning to the *Harksen* case again, the court considered all three factors in the test explained above.¹³⁵ Although Mrs Harksen belonged to a group that had not experienced unfairness in the past¹³⁶ and was hence not part of a susceptible category,¹³⁷ the nature of the authority in terms of which the unfairness resulted from, as well as the nature of the interests affected by the discrimination were factors taken into account by the court,¹³⁸ which in the final instance held that section 21 does not amount to unfair discrimination.¹³⁹

4.2.2.5 *Is the unfair discrimination justifiable?*

¹³³ *President of the Republic of South Africa and Another v Hugo* at 710. Although the Act may well have deprived men a chance which it afforded women, it is wrong to say that such an opportunity essentially impaired their right to dignity or sense of equal worth. It had been accepted that the head of state had performed his discretion moderately and in a way that is agreement with the Constitution (at 710).

¹³⁴ *President of the Republic of South Africa and Another v Hugo* at 710. It would have been practically and judicially impossible to release all fathers and mothers in prison. Male prisoners outnumbered the female prisoners. It is apparent that the discharge of male prisoners would not have saved the achievement of the president's objective which was to benefit children. The discharge of a great figure of male prisoners is presumed to might possibly have sourced a considerable public protest. (at 710).

¹³⁵ *Harksen v Lane NO & Others* at 1515, paragraph [62].

¹³⁶ *Harksen v Lane NO & Others* at 1515, paragraph [63].

¹³⁷ *Harksen v Lane NO & Others* at 1515, paragraph [63].

¹³⁸ The power to place the solvent spouse's estate to vest in the Master was exercised by Parliament whose right and obligation is to protect the public interest. In the Insolvency Act this duty culminates in protecting the rights of the creditors of insolvent estates, which is the rationale behind section 21. This purpose was accordingly held not to be incompatible with the fundamental values protected by the then section 8(2) of the Interim Constitution (see paragraph [64]).

¹³⁹ Goldstone J remarked that in cases where the solvent spouse has a choice to litigate, this leads to inconvenience to the solvent spouse, as well as to possible humiliation. In many instances, the solvent spouses will require legal assistance, which is not an option to many, resulting in additional prejudice (paragraph [66]). This is however an unavoidable result between a trustee of an insolvent estate and a solvent spouse with regard to ownership of assets. The consequence of such prejudice does not justify a conclusion that section 21 amounts to unfair discrimination (paragraph [68]).

The final stage in the comprehensive test for unfair discrimination is to determine whether the unfair discrimination is justifiable under the limitation clause.¹⁴⁰ The Bill of Rights may never unjustifiably violate the rights of others or irrationally and indefensibly hinder the state in its lawful government functions.¹⁴¹ Most contemporary Bills of Rights enclose a limitation clause that allows for rights to be restricted in certain appropriate conditions.¹⁴²

The limitation clause as expressed in section 36 of the Constitution will be examined in detail in chapter 4 below.

3.2.3 PRELIMINARY CONCLUSION

The discussion above on the equality test and relevant gender discrimination cases illustrate that despite the advances that have been made regarding gender equality over the past decade and longer, the successes are limited.¹⁴³

As was seen in an earlier chapter, gender violence and gender discrimination which most rural women experience on a daily basis place them in a vicious cycle, often forcing some of them to leave rural areas to look for employment in urban areas. Here their vulnerability and powerlessness are even more acute, as many of these have no

¹⁴⁰ *Harksen v Lane NO & Others* at 1511, paragraph [52].

¹⁴¹ Buhlungu S *State of the nation* (2005-2006: Pretoria, HSRC Press) at 101.

¹⁴² Buhlungu 101.

¹⁴³ *Bhe and Others v the Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC). See also chapter two above under the discussion of primogeniture for more detail of the *Bhe* case. Another example is that of *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), for the reason that women are more prone than man to be living under unbearable circumstances. The *Grootboom* case provides a good structure for an analysis of women's housing rights. In this case it was noted how women's access to housing is influenced by the past social and economic background and that discriminatory laws and practices have restricted women's access to housing and socio-economic rights. These discriminatory practices were remarked as having inconsistently affected black women. The Constitutional court determined that although the state is obliged to improve the circumstances of the homeless, it is not obliged to go beyond available resources or to realise these rights immediately. The prerequisite is that the rights to housing be progressively realised.

choice but to engage in sex work and are often physically and economically exploited by ruthless pimps, as well as by male clients or abusive partners. Their exposure to HIV is extremely high, particularly in view of the high incidence of drug use that is associated with the sex work industry.¹⁴⁴ The decision in the *Jordan* case, discussed above, clearly shows that the stigmatisation and social prejudice regarding sex workers is deeply entrenched.

Poor, black rural women do not have an organised mechanism of dealing with gender equality violations. This raises uncomfortable legal questions which will be dealt with subsequently in this study. Legislation pertaining to equality seems more than enough. The fact remains that a large segment of the South African society suffers severe and constant discrimination in their homes, families and certain communities.

The discussion above has alluded to the fact that in developing a jurisprudence relating to equality, courts have drawn a distinction between cases of differentiation based on grounds that affect a person's dignity as a human being and those cases that do not have this effect.¹⁴⁵ The courts will closely examine the impact of an alleged discriminatory provision or conduct to determine whether it is in fact unfair. The extent to which a measure entrenches or strengthens patterns of disadvantaged experienced by groups in society is particularly important.

As all human rights are not absolute, the study will also examine the possible limitations on the right to equality. What follows next in the second part of this chapter is broad examination of the rights to human dignity, the right to freedom and security of the person, the right to privacy, the right to education and also the right to access to health care. These fundamental rights are relevant to the position of the women described in this study. It is necessary to establish to what extent these may assist in addressing their dire position.

¹⁴⁴ Parry C D H *et al* "Rapid assessment of HIV risk behaviour in drug using sex workers in three cities in South Africa" (2008) 1 *AIDS and Behaviour* 1-12 at 7,8 & 9.

¹⁴⁵ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

CHAPTER 3

PART 2: THE RIGHT TO HUMAN DIGNITY

3.3 THEORETICAL OBSERVATIONS

The assertion of innate human dignity as one of the founding values of our Constitution is important.¹ Section 1(a) of the Constitution opens with the reference that the attainment of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”² are the principles on which South Africa is founded. The founding values in section 1 of the Constitution are the guiding principles that currently revise all facets of our legal order.³

The vital and foundational place of the values of dignity and equality is clear from section 7 of the Constitution which “affirms the values of human dignity, equality and freedom”.⁴ The limitation clause also requires the restriction of rights to be done in a manner that is “reasonable and justifiable in an open and democratic

¹ Chaskalson A “Human dignity as a foundational value of our constitutional order” (2000) 16 *South African Journal on Human Rights* 193-205 at 196.

² Section 1 of the Constitution reads as follows: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” In this regard also see Cowen S “Can ‘dignity’ guide South Africa’s equality system?” (2001) 17(1) *South African Journal on Human Rights* 17 at 36.

³ Chaskalson 195. In the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paragraph [44], the Constitutional court confirmed that the South African legal system is based on the Constitution which is the supreme law, and the entire law as well as the common law, is subject to the Constitution, expressed also in section 2 of the Constitution.

⁴ Section 7 of the Constitution reads as follows: “(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.” Also see Cowen at 36.

society based on human dignity, equality and freedom”.⁵ Section 39(1)(a) of the Constitution requires the South African courts to promote human dignity when interpreting the Bill of Rights.⁶

The right to dignity is entrenched in section 10 of the Constitution which states that “everyone has inherent dignity and the right to have their dignity respected and protected.”⁷ Kroeze⁸ points out that the inclusion of all these provisions guaranteeing the right to dignity illustrates that dignity is protected as both a constitutional value as well as an individual right. Inherent human dignity also brings the words of the Constitution closer to the Charter of the Organisation of African Unity⁹ and the African Charter on Human and Peoples’ Rights¹⁰ which confirm that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of African peoples”.

⁵ Section 36(1) of the Constitution reads as follows: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

⁶ Section 39(1) of the Constitution reads as follows: “When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

⁷ Unlike South Africa’s Constitution, the Canadian Charter of Rights and Freedoms is silent on the right to human dignity. To stress the importance of this right (despite its absence in that Constitution) the Canadian Supreme court in the case of *R v Oaks* (1986 19 CRR 308 at 334-35) remarked that the basis of the human rights and freedoms in the Canadian Charter incorporates “respect for the inherent dignity of the human person”. It was also noted by Judge Wilson in *In re Morgenthauer* (1998 31 CCR 1 at 82) that all other rights and freedom guaranteed in the Canadian Charter find expression in the right to dignity.

⁸ Kroeze IJ in: *Pôle universitaire européen de Montpellier et du Languedoc-Roussillon et al The principle of the respect of human dignity: Proceedings of the UniDem seminar* (1999: Council of Europe) at 87. Also see Woolman *et al Constitutional law of South Africa* at 34-116.

⁹ Charter of the Organisation of African Unity Adopted at Addis Ababa on 25 May 1963.

¹⁰ African Charter on Human and Peoples’ Rights, adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity on 17 June 1981. See also Chaskalson at 196.

Similar to the South African Constitution, the German Constitution¹¹ lays down the right to dignity within the opening section in an exceptionally profound manner: “The dignity of man shall be inviolable. To respect and protect it is the duty of all state authority.” This reference in the German Constitution is set before all other primary rights. Chaskalson¹² asserts that by so doing, the German Federal Constitutional Court is allowed to construe all the basic rights against the background of the founding value of dignity. In this regard, it is significant that article 1 of the German Constitution is a constitutional value and not a human right.

Dignity is a vague notion expressing diverse ideas of what a life with dignity comprises. The term dignity is derived from the Latin words *dignitas* and *dignus*¹³ which respectively mean “merit” and “worthy”.¹⁴ Needless to say, the word dignity is open to a number of interpretations as there are also a number of different dictionary explanations¹⁵ and scholarly interpretations to this term. Dignity has been described as an experience of pride about how one feels about herself;¹⁶ a life filled with pride without shame. It may well refer to a life that is guided by a principled and honourable model of the moral or the “good life”.¹⁷ Jayawickrama¹⁸ points that dignity naturally comes as a feature of human life. The right to dignity is interpreted as involving an acknowledgement of the inherent value of human beings and the appreciation that human beings are supposed to be taken care of as worth of respect and concern.¹⁹

¹¹ Article 1 of the Constitution of the Federal Republic of German, promulgated by the Parliamentary Council on 23 May 1949 (as amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990).

¹² Chaskalson 198.

¹³ Johnstone M J *Bioethics: A nursing perspective* (2008, Chatswood: Elsevier Health Sciences) at 173.

¹⁴ Johnstone 173.

¹⁵ Johnstone 173.

¹⁶ Johnstone 174.

¹⁷ Connell R O “The role of dignity in equality law: Lessons from Canada and South Africa” (2008) 6(2) *International Journal of Constitutional Law* 267-286 at 272.

¹⁸ Jayawickrama N *The judicial application of human rights law: National, regional and international jurisprudence* (2002, Cambridge: Cambridge University Press) at 258.

¹⁹ Van der Merwe C G & Du Plessis J at 96. Johnstone (*Bioethics* at 175) give a list of what different scholars believe to be the common elements of what constitutes dignity: Dignity entails a person’s intrinsic moral worth and hence needs to be treated with reverence; it involves the idea that person should be appreciated as autonomous choosers; it involves a life filled with support when a person

The theoretical foundation for a successful equality challenge is based on the reality that a procedure that distinguishes between categories of people may have the consequence of harming the dignity of such people.²⁰ The function of dignity in the equality jurisprudence is apparent in three diverse ways.²¹ First dignity is pertinent when establishing whether discrimination exist on an unspecified ground.²² Secondly, dignity is relevant when establishing whether discrimination based on either a specified or unspecified ground is unfair. (The court in the *Harksen* case,²³ for example, also asked whether the alleged infringement of the right to equality also damaged the complainant's fundamental right to human dignity.²⁴) Thirdly, the right to dignity is applicable when establishing whether unfair discrimination is justifiable under the limitation clause as shall be seen in the next chapter. In the event of assessing rights in the Bill of Rights under the provisions of section 36, the crucial question to ask is how dignity has been impinged on.

Devoid of dignity, a person is excluded from society.²⁵ A social safety system aspires to include an individual in society through channels put into practice by the state and or civil society to show harmony towards such an individual.²⁶ Through social security channels a person can be placed in a situation to fulfil his or her function in society with dignity.²⁷ Cases such as the *Bhe*²⁸ and *Grootboom*,²⁹ for example, have taken a step in

exercises his autonomous choices; it involves the support for self respect and esteem. These characteristics of dignity may well lead one to conclude that dignity entails an exceptional interest that individuals hold in being treated as persons with inherent moral worth, whose independence and competence for implementing self determining decisions must be valued.

²⁰ Cowen 36.

²¹ Cowen 35.

²² See also Albertyn & Goldblatt at 4, and Cowen at 36.

²³ *Harksen v Lane NO & Others* at 1516, paragraph [67].

²⁴ In his decision Goldstone J found that the burden of litigating did not result in the harm of the complainant's dignity or comprise an injury of a comparably severe nature. *Harksen v Lane NO & Others* at 1508, paragraphs [46] and [47].

²⁵ Brand D *et al Socio-economic rights in South Africa* (2005, Pretoria: PULP) at 235.

²⁶ Brand 235.

²⁷ Brand 235.

²⁸ *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C) at paragraph [6].

²⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

the right direction regarding the rights of women, the underprivileged and other susceptible groups of society.³⁰

The centrality of human dignity to the prohibition of unfair discrimination was recognised in the *Hugo case*.³¹ The Court remarked that at the heart of the proscription of unfair discrimination lies recognition that the intention of our novel constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.³² In the case of *Grootboom*,³³ it was remarked that it is certain that those without food, clothing and shelter are often deprived of human dignity, freedom and equality, the founding values of our society. Finally, the landmark decision of *S v Makwanyane*³⁴ emphasised that the right to dignity as a manifestation of the intrinsic worth of human beings, shapes the basis of several other constitutional rights including the rights to freedom, physical integrity and the right to equality.

The few theoretical observations regarding the right to human dignity in the South African context clearly point towards the relevance and significance of the realisation of this right to those South African women who find themselves at the intersection of HIV/AIDS, gender inequality, and violence.

³⁰ Woolman at 34-119.

³¹ *President of the Republic Of South Africa v Hugo* 1997 (4) SA 1 (CC) at paragraph [41].

³² *President of the Republic Of South Africa v Hugo* 1997 (4) SA 1 (CC) at paragraph [41].

³³ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at paragraph [23].

³⁴ *S v Makwanyane* 1995 (3) SA 391 paragraph 328 and 144.

3.4 HIV/AIDS IN THE CONTEXT OF THE RIGHT TO HUMAN DIGNITY

The abuse of power in the private sphere, eg within families and intimate relationships, undoubtedly contributes towards the unequal treatment that many South African women face. These women's inability to make decisions concerning reproduction or the patrimonial affairs of the family not only impacts on their right to equality, but also their right to human dignity. As will be seen in the discussion that follows, matters relating to equality, human dignity, freedom and security of the person, and access to health care services are often intertwined. The impairment of human dignity can assume many forms that may impact on the last-mentioned rights to varying degrees.

The situation of a large number of rural women is exacerbated by their socio-economic position, characterised by poverty and lack of basic resources. This is unquestionably demeaning. In terms of a "materialistic conception of dignity",³⁵ the question is asked whether shared community supplies are uniformly dispersed to everyone's material benefit.³⁶ This question will be addressed in more detail below in the discussion on the right to access to health care services. Addressing women's exposure to HIV/AIDS and promoting women's health generally, including reproductive health specifically, depends on the interaction of most human rights, specifically those examined more closely in this study.

3.5 THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON

3.5.1 THEORETICAL OBSERVATIONS

Section 12 of the Constitution provides for the right to freedom and security of the person.³⁷ This right safeguards the physical and psychological integrity of human

³⁵ Connell 274.

³⁶ Connell 274.

³⁷ Section 12 of the Constitution which reads as follows: "12(1) Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or

beings. Section 12(1) refers to the right to be free from all forms of violence from either public or private sources (section 12(1)(c)), including not to be tortured in any way (section 12(1)(d)), and not be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e)).

This section draws its objective from the Convention on the Elimination of All forms of Racial Discrimination (hereafter CERD).³⁸ Article 5(b) places an obligation on state party to protect human beings within their state from violence or bodily harm whether inflicted by government officials or by any individual, group or institution. Article 2 of CERD includes a positive duty on the state to proscribe, reprimand and to deject violence in all its forms. It is important to stress that the CERD is solely fixed towards “racially-motivated carnage” whilst the provisions of section 12(1)(c) are broad in the sense that they are directed to prevent all forms of violent behaviour.³⁹

Violence has been described by some law reviewer as a “grave invasion of personal security”.⁴⁰ Bishop and Woolman⁴¹ criticise this definition of violence by asserting that there is very small or no basis to differentiate between serious invasions of personal security and ordinary invasions. Women or men trapped in violent relationships may possibly experience emotional as well as physical violence, with the first-mentioned not categorised as “grave”. As violence may perhaps be a characteristic in some

without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right - (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”

³⁸ Article 5(b) of the Convention on the Elimination of All forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 of 21 December 1996, protects “[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” Also see Bishop & Woolman in Woolman at 40-48.

³⁹ Bishop & Woolman, in: Woolman 48-49.

⁴⁰ Currie I & De Waal J *The Bill of rights handbook* (2005, Lansdowne: Juta) at 304.

⁴¹ Bishop & Woolman, in: Woolman 40-49.

relationships, the term violence should hence not be narrowly interpreted. Violent behaviour should denote some instant danger to life or physical safety.⁴²

The Constitutional court initially acknowledged the constructive dimensions of Section 12(1)(c) when it had to regard a dispute to the Domestic Violence Act.⁴³ In the case of *Carmichele*⁴⁴ the court established the constructive duty imposed on the state by virtue of section 12(1)(c). This case involved a man who had been only just freed from jail and was alleged to have raped a woman at some point when the state through its applicable officials had awarded bail to the attacker.⁴⁵ It was argued by the complainant that the release of the criminal from prison led the alleged criminal to rape the woman.⁴⁶ On a reflection of the facts in *casu* the plaintiff had clearly discharged the burden of proving a causal connection between the omissions and the assault on her.⁴⁷

Contrary to the High Court's decision the Constitutional court found that

The constitutional duty to protect is enshrined in sections 10, 11 and 12 of the Constitution which entrench the right to dignity, life, and freedom and the security of all persons. Section 7(2) moreover imposes a duty on the State to respect, protect, promote and fulfil these rights. The responsibility for these constitutional duties imposed on the State rests, *inter alia*, with the police and prosecution services.

This judgment generated a transformation in the law of delict.⁴⁸ This innovative obligation placed in section 12(1)(c) of the Constitution extends the state's main liability to shield its citizens from harm.⁴⁹ In his judgement, Chetty J remarked that there was an adequately close connection between the omissions and the harm caused to the plaintiff.⁵⁰ As a result it was found that the defendants were jointly and severally liable to the plaintiff in delict for the damages she suffered due to the assault committed by the

⁴² Bishop & Woolman, in: Woolman at 40-49.

⁴³ Domestic Violence Act 116 of 1998. *S v Baloyi (Minister of Justice & Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC).

⁴⁴ *Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C) at 1101 & 1112.

⁴⁵ *Carmichele v Minister of Safety and Security and Another* at 1100.

⁴⁶ *Carmichele v Minister of Safety and Security and Another* at 1101.

⁴⁷ *Carmichele v Minister of Safety and Security and Another* at 1101.

⁴⁸ Bishop & Woolman, in: Woolman 40-48.

⁴⁹ Bishop & Woolman, in: Woolman 40-48.

⁵⁰ *Carmichele v Minister of Safety and Security and Another* at 1115 paragraph [38].

defendant to her.⁵¹ Bishop and Woolman⁵² argue that a number of successful delictual actions in this regard have justified the right of women to be free from violence.

3.5.2 HIV/AIDS IN THE CONTEXT OF THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON

For the purpose of this study, section 12(2)(b)⁵³ of the Constitution is very important. This section creates a subject of “individual inviolability with two components”.⁵⁴ These components are “security in” and “control over” one’s body. These two components are not the same. “Security in” means the safeguard of the body against physical attack by the state and any other person, whilst “control over” refers to a concept of bodily autonomy and self-determination regarding one’s body. In the case of *S v Xaba*⁵⁵ the High Court established that the removal of a cartridge from the suspect’s body for the reason of a police enquiry was a restriction of the suspect’s right to bodily integrity.

“Control over” presupposes that persons are competent of making choices that are in their personal interest and as functioning as “responsible moral agents”. Significant is the fact that section 12(2)(b) and the legitimate limitations on its implementation are confined by the similar core standard, namely joint concern and joint reverence for others.⁵⁶ Poor health, age or mental incompetence, on the other hand, may lead to impaired individual autonomy.⁵⁷

Many South African women do not have the benefit of protection and power over their bodies. The high rate of rape, sexual exploitation, compelled sex, sexual threats, marital

⁵¹ *Carmichele v Minister of Safety and Security and Another* at 1115 paragraph [38].

⁵² Bishop & Woolman, in: Woolman at 40-48.

⁵³ See discussion above.

⁵⁴ Bishop & Woolman, in: Woolman at 40-85.

⁵⁵ *S v Xaba* 2003 (2) SA 703 at 708, paragraph [H].

⁵⁶ Bishop & Woolman in Woolman at 40-88.

⁵⁷ Preceding the endorsement of the final Constitution, South African law accorded partial acknowledgment to the assurance to control over one’s body in the situation of euthanasia. In *Clarke v Hurst* 1992 (4) SA 630 (D) the patient had earlier on made a request that the artificial feeding should be discontinued. An order was granted to cease the artificial feeding of a patient. This verdict is a vital assurance of the recognition of bodily autonomy.

violence and femicide in South Africa indicates that marital exploitation and family violence is a persistent and commonly concealed predicament which challenge society at all times. Violent behaviour within the family is organised, persistent and devastatingly gender-oriented.⁵⁸ As was discussed in an earlier chapter, women's reproductive autonomy is severely hampered by the fact that their spouses or partners refuse to wear condoms during sexual intercourse, or prevent them from accessing contraceptives. They are often forced to have sex with these men against their will.⁵⁹

HIV/AIDS infection is an additional result of the coercive sexual atmosphere. Women in abusive relations in South Africa are at a higher risk of being infected with HIV opposed to women in peaceful affiliations.⁶⁰ The combination of sections 12(2)(a) ("everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction") and 12(2)(b) ("to security in and control over their body") make it clear that decisions regarding one's body relate to both a physical and psychological dimension. A husband preventing his wife from using contraceptives infringes on her physical and psychological integrity by exposing her not only to the risk of possible HIV-infection, but also unwanted pregnancy. Both these results have serious physical and mental consequences.

The history of reproductive rights in South Africa shows a "pervasive, highly invasive regulation" of women's reproductive capacity.⁶¹ Women were under the patrimonial control of their spouses and downgraded to the position of perpetual minors.⁶² They were given the same rank as guardian of their own offspring's up until 1993.⁶³ In terms of racist guidelines under the apartheid administration black women's reproductive rights were severely undermined by the use of "injectable contraceptives", the latter an

⁵⁸ O'Sullivan, in: Woolman 37-16.

⁵⁹ O'Sullivan, in: Woolman 37-17.

⁶⁰ O'Sullivan, in: Woolman 37-17.

⁶¹ O'Sullivan, in: Woolman 37-17.

⁶² See Sinclair J "Family rights" in: Van Wyk D, Dugard J, De Villiers B *et al* (eds) *Rights and constitutionalism* (1994, Cape Town: Juta) 502-572 at 566-570. One such example is section 11(3) of the Black Administration Act 38 of 1927 in terms of which African customary wives, except those living in KwaZulu-Natal, were deemed to be minors subject to the guardianship of their husbands.

⁶³ O'Sullivan, in: Woolman at 37-17.

additional grave invasion of their bodily integrity, dignity and equality.⁶⁴ Until recently, abortion was illegal.⁶⁵ Women carried fetuses against their will and as a result had to resort to unsafe abortions.⁶⁶

The right to freedom and security of the person hence includes the right of women to have the ability to engage in safe sexual relations. Refusing vulnerable women the power to insist on the use of contraceptives (eg condoms) not only inflict severe potential hardship on them in the form of either unwanted pregnancies or likelihood of HIV-infection, but constitutes ill-treatment and torture in terms of section 12 of the Constitution. This also impairs the dignity of these women, all the result of their inequality in the private sphere.

3.6 THE RIGHT TO ACCESS TO HEALTH CARE SERVICES

3.6.1 THEORETICAL OBSERVATIONS

⁶⁴ O'Sullivan, in: Woolman at 37-17.

⁶⁵ Prior to the enactment of the Choice on the Termination of Pregnancy Act 92 of 1996, abortion in South Africa was regulated by the Abortion and Sterilization Act 2 of 1975. Before the enactment of the Abortion and Sterilisation Act, abortion law in South Africa was regulated by the common law which allowed the performance of abortion only when the mother's life was to be endangered by the continued pregnancy. The Abortion and Sterilization Act described a very limited number of conditions under which abortion was legally permissible. Most of these grounds made it practically impossible for black women to obtain lawful abortions. For a detailed study on these circumstances, see Slabbert M N *The human embryo and foetus: Constitutional and other legal issues* (unpublished LLD thesis, 2000, Unisa) at 131-137. The Choice on the Termination of Pregnancy Act 92 of 1996, which currently regulates abortion in South Africa, allows the termination of a pregnancy upon request by the pregnant women during the first twelve weeks of pregnancy. For a critical analysis of this Act, see Slabbert 139-153. Slabbert argues that the insertion of section 2(b)(iv) of the Act (which provides for the termination of a pregnancy upon request of a woman referred to above) illustrates the government's commitment to addressing the predicament of unintended pregnancies amongst the poor. It has been observed that those most acutely affected by unwanted pregnancies are poor black women. This study submits that these women are often the victims of sexual oppression in the context of their patriarchal communities and family homes. The Choice on the Termination of Pregnancy Act at least allows these poor black woman carrying unwanted pregnancies to terminate such pregnancies within a prescribed time.

⁶⁶ It is estimated that 200 000 women worldwide die each year as a result of illegal and unsafe abortions. See World Health Organization *Coverage of maternity care: A tabulation of available information* WHO/FHE/MSM/93.7 (3rd ed 1993) at 12.

The right to access to health care and health care services is pivotal to women who find themselves at the intersection of HIV/AIDS, gender inequality and gender violence. The discussion below will briefly touch on the content of this right as it has been interpreted by the courts in recent decisions.

Section 27 protects the right to access to health care services, which include reproductive health care.⁶⁷ Just like other socio-economic rights, this right is subject to “budgetary implications” and limitations, in that the positive duties imposed on the state are explicitly restricted.⁶⁸ Current campaigns to increase access to important drugs in developing countries have focused on the right to health care.⁶⁹ In South Africa several of these campaigns were centred on the need for access to the anti-retroviral and nevirapine drugs.

One of the landmark decisions regarding section 27 is the case of *Soobramoney*⁷⁰ which concerned a 41-year old man with a chronic renal failure, as well as suffering from heart disease and diabetes.⁷¹ As he was not eligible for a kidney transplant, he required lifelong dialysis to survive.⁷² His nearest hospital had only twenty dialysis machines, not nearly enough to provide dialysis for everyone who needed it in that area.⁷³ In terms of the hospital’s policy, only patients with acute renal failure were eligible for life-long dialysis.⁷⁴ During the subsequent court proceedings the department of health argued that this policy met the government’s duty to provide emergency care in terms of the Constitution. Patients with chronic renal failure, such as the patient in question, did not automatically qualify.⁷⁵

⁶⁷ Section 27(1) provides as follows: “Everyone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

⁶⁸ Cameron E “Responses to the HIV/AIDS epidemic” (2006) 1 *Stellenbosch Law Review* 47-90 at 82.

⁶⁹ Gruskin S *et al Perspectives on health and human rights* (2005, New York: Routledge) at 507.

⁷⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) All SA 268 (CC) at 270.

⁷¹ *Soobramoney v Minister of Health, KwaZulu-Natal* at 270.

⁷² *Soobramoney v Minister of Health, KwaZulu-Natal* at 270.

⁷³ *Soobramoney v Minister of Health, KwaZulu-Natal* at 270.

⁷⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* at 270-271.

⁷⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* at 271.

In determining whether the Constitution mandated the department of health to supply an adequate amount of machines to each person whose life may perhaps be saved by it, the court pointed out that under the Constitution, the state's duty to provide health care services is qualified by "its available resources".⁷⁶ Moreover, the court pointed out that offering very expensive medical treatments to everyone would make substantial inroads into the health budget [...] to the prejudice of the other needs which the state has to meet."⁷⁷ Finally, the Constitutional court decided that the administrators of provincial health services, not the courts, should oversee budgetary priorities and that the courts should not impede with decisions that are rational and made "in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."⁷⁸

Similarly, in the case of *Grootboom*, that involved the right to housing, the Constitutional court determined that although the state is obliged to improve the circumstances of the homeless "it is not obliged to go beyond available resources or to realise these rights immediately."⁷⁹ The prerequisite is that the rights to housing be "progressively realised."⁸⁰ The court noted that there is at the very least a negative duty placed on the state and all other units and people to desist from preventing or impairing the right of access to adequate housing.⁸¹

The South African government's limitations on the use of nevarapine to prevent the transmission of HIV from mothers to infants led to another important judgment. The Treatment Action Campaign (TAC) instituted a case against the Minister of Health for

⁷⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* at 275, paragraph [19].

⁷⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* at 276, paragraph [28].

⁷⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* at 269.

⁷⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at 1208 at paragraph [94].

⁸⁰ Section 26 of the Constitution reads as follows: "Everyone has the right to have access to adequate housing. (1) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (2) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

⁸¹ *Government of the Republic of South Africa and Others v Grootboom and Others* at 1171.

refusing to offer the nevirapine drug to HIV infected women. The TAC asserted that the government's failure to have the drug more widely available violated the right to health of pregnant women who are HIV-positive.⁸² The High court noted that the government clearly failed to deal with the issue of possible transmission of the HI-virus from the mother to the child.⁸³

Cameron⁸⁴ points out that the decision of the High court resulted in powerful political and legal debates on the government's answerability to implement socio-economic rights, as well as the power of the courts to put into effect such rights.

The Constitutional court subsequently concluded that the right to health care services must be read in relation to the state's available resources.⁸⁵ The government's duty to value rights, as expressed in the housing case of *Grootboom*, applies equally to the right to health care services. The Constitutional court accordingly ordered the government to, without delay, remove restrictions preventing that nevirapine be made available for the purpose of reducing mother-to-child transmission of HIV at public hospitals and clinics.⁸⁶

3.6.2 HIV/AIDS IN THE CONTEXT OF THE RIGHT TO ACCESS TO HEALTH CARE SERVICES

The decision demonstrates that the Constitution operates as an influential tool in the hands of civil society to guarantee that the government provide appropriate notice to the essential needs of the poor, the vulnerable and the marginalised.⁸⁷ The justification of the right to have access to health care services in the *TAC* judgment to a great extent

⁸² *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T).

⁸³ *Treatment Action Campaign and Others v Minister of Health and Others* at 387.

⁸⁴ Cameron at 85.

⁸⁵ *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) at 1034.

⁸⁶ *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) at paragraph [135].

⁸⁷ Cameron 87.

also confirmed public responsibility to lessen the burden HIV/AIDS.⁸⁸ This has also drastically improved the health-related autonomy of pregnant HIV-positive women by means of allowing reproductive choice and permitting them to prevent the transmission of HIV to their infants.⁸⁹ The discussion on the right to education below is closely linked to the above exposition on the right to access to health care services. Many illiterate women find themselves in remote rural areas in South Africa. Their lack of education contributes to their predicament, as they are mostly either unaware of the above legal developments that may improve their physical and legal position, or unable to visit local clinics or hospitals to receive the required treatment to prevent them from passing HIV on to their unborn. They often only become aware of their HIV-status once AIDS sets in. As was pointed out already, having their HIV-status disclosed is another dilemma, as this put them at risk of rejection by their male partners or husbands, or alternatively may subject them to violence within their own families and communities.

The availability of anti-retroviral treatments is directly linked to the ability to manage HIV infection and AIDS.⁹⁰ Although the *TAC* judgment has led to a great improvement of the position of HIV-positive women, many others, as has been explained above, are still unable to reap the benefits of this legal development.

Another controversial issue which relates to the right to health care in the context of HIV/AIDS is the issue of subordinate women who are deprived of their freedom to go for HIV/AIDS testing or counselling or to either take nevirapine or anti-retroviral drugs upon a disclosure of their status to their partners and husbands. Pieterse⁹¹ points out that the health status of a person is influenced by a combination of cultural, economic, biological and health policies. These factors largely apply to the socially marginalised or disempowered segment of society.⁹²

⁸⁸ Pieterse M “The interdependence of rights to health and autonomy in South Africa” (2008) 125(3) *The South African Law Journal* 553-572 at 570.

⁸⁹ Pieterse 570.

⁹⁰ Cameron 81.

⁹¹ Pieterse 555.

⁹² Pieterse 555.

Section 12 of the Constitution⁹³ protects a person's health related autonomy. Section 12(2)(a) is considered as the significant section for the attainment of equality and is mainly associated to choices regarding contraception, or the termination of pregnancies.⁹⁴ The choice to use contraception may perhaps be analogous to a choice to take any other medication or not, including nevaripine or anti-retroviral drugs.

3.7 THE RIGHT TO EDUCATION

3.7.1 THEORETICAL OBSERVATIONS

The apartheid period was characterised by an ethnically divided and an imbalanced system of education.⁹⁵ The financing of education was unequal in the sense that the black community was given the smallest amount.⁹⁶

Section 29 of the Constitution⁹⁷ makes education a fundamental aspect for all. A basic education should be available to everyone.⁹⁸ This places a duty on the state to ensure that a quality educational structure is instituted and maintained in South Africa.⁹⁹ An explanation of section 29 should as a result be geared in the direction of redressing this historical difference.¹⁰⁰ This right to education imposes an obligation on the state to make access to the right accessible by taking into account past racial discriminatory laws and practices. At the outset the word "everyone" in section 29 explains that education should be made available to all people, regardless of race and gender. In the

⁹³ See paragraph 3.5 above.

⁹⁴ Pieterse 558. Pieterse further remarks that section 12(2)(a) should be interpreted as a section which sustains or boost the right to access to health in section 27 of the Constitution.

⁹⁵ Brand D & Heyns C H *Socio-economic rights in South Africa* (2005, Pretoria: PULP) at 60.

⁹⁶ Brand & Heyns at 60.

⁹⁷ Section 29(1) of the Constitution reads as follows: "(1) Everyone has the right – (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

⁹⁸ Verheyde M *Article 28: The right to education* (2006, Leiden: Martinus Nijhoff) at 15.

⁹⁹ Verheyde 15-16.

¹⁰⁰ Brand & Heyns 60.

context of this study it is essential to note that black rural women and children are also part of this exercise.

In the case of *In re Education Bill of 1995 (Gauteng)*¹⁰¹ the court dealt with the right to education in terms of the Interim Constitution. The court had to decide whether the provisions of section 32(c) of the Interim Constitution (which guaranteed the set up of non-discriminatory educational institutions for everyone), placed a positive obligation on the state to establish educational institutions to all individuals based on common culture, language or religion. The court explained that this section

creates a positive right that basic education be provided for every person a not merely a negative right that such a person should not be obstructed in pursuing his or her education.¹⁰²

The right to advanced education, the right to learn in a language of one's choice and the right to found private or independent educational organisations is a multi-faceted characteristic of the right to education which elucidates why scholars group the right to education with other rights such as the right to culture, language or religion. The right to education is jointly a civil and political as well as a social and cultural right.¹⁰³

An educated population and labour force is essential to national health.¹⁰⁴ Together with sound macro-economic strategies, education is unquestionably a vital factor in upholding shared interests and poverty alleviation for the reason that it directly affects national productivity, which consecutively determines living standards and a government's capability to participate in the global community.¹⁰⁵

¹⁰¹ *In re Education Bill of 1995 (Gauteng)* 1996 (4) BCLR at 537, paragraph [9].

¹⁰² *In re Education Bill of 1995 (Gauteng)* at 546, paragraph [9]

¹⁰³ Gutto S *Equality and non discrimination in South Africa: The political economy of law and law making* (2001: Clement, New Africa Education) 251.

¹⁰⁴ World Bank *Education and HIV/AIDS: A window of hope* (2002: World Bank Publications) at 3.

¹⁰⁵ World Bank at 3.

Like access to resources, health and security, formal and informal education is essential.¹⁰⁶ Gutto¹⁰⁷ accepts that the acquisition of knowledge skills and principles is fundamental to every society's interests and continued existence. Education rights hence filter through other rights.¹⁰⁸ Investment in education is important as it facilitates the realisation of six of the eight millennium development goals, which are: (1) the reduction of extreme poverty and hunger; (2) realising global primary education: (3) the promotion of gender equality and the empowerment of women; (4) reduction of infant and child mortality; and (5) the lowering of the prevalence of HIV/AIDS.¹⁰⁹

Evidence shows that education dramatically shapes young peoples' reproductive health.¹¹⁰ According to Coomb and Kelly,¹¹¹ HIV transmission rates are lower and continually dropping among young educated women compared to the less educated. This sharp decline is linked to women with secondary and higher levels of education compared to women who did not advance further than the primary level.¹¹² Urban women in the 15 to 19 age group who left school early are more likely to be HIV-infected than those of the similar age group who advanced with their schooling.¹¹³

The World Education Forum, launched in Dakar in April 2000, points out that

Girls are more likely than boys to care for a sick family member and help keep the household running. Deprived of basic schooling, they are denied information about how to protect themselves against the virus. Without the benefits of an education, they risk being forced into early sexual relations, and thereby becoming infected. Thus, they pay many times over the deadly price of not getting an education. But by the same token, education is the tool whereby we can break the vicious cycle of AIDS and ignorance. The key to all the locks that are keeping girls out of school - from poverty to inequality to conflict - lies in basic education for all.¹¹⁴

¹⁰⁶ Gutto at 251.

¹⁰⁷ Gutto 251.

¹⁰⁸ Gutto 251.

¹⁰⁹ World Bank 3.

¹¹⁰ World Bank 4.

¹¹¹ Coomb C & Kelly M J "Education as a vehicle for combating HIV/AIDS" at 1, see http://lobby.la.psu.edu/107th/127_Basic_Education/Organizational_Statements/Basic%20Education%20Coalition/BEC_Educ_combating_AIDS.pdf (visited 31 March 2009).

¹¹² Coomb & Kelly 1.

¹¹³ Coomb & Kelly 1.

¹¹⁴ Document accessed at <http://www.un.org/News/Press/docs/2000/20000426.sgsm7369.doc.html> (visited 5 April 2009).

The view that education is a vehicle for addressing the spread of HIV is promising. HIV/AIDS education provides an expectation that there is an approach, “the well-known as well as the tried way” of worldwide and improved quality education, for curbing the advanced increase of the HIV/AIDS pandemic. Twenty years into the HIV/AIDS pandemic, millions of the younger generation, including those in the most adversely affected countries are largely still uninformed about the disease and have mistaken beliefs about the disease as well.¹¹⁵ South Africa’s Minister of Education in 2008, Naledi Pandor, noted that all educational institutions are now required to include HIV/AIDS in their curricula.¹¹⁶ Presenting the national educational budget in 2006, she reported that the purpose of the second additional grant that had been set aside was to co-ordinate and support the structured integration of life skills and HIV/AIDS programmes across all learning areas in the school curriculum.¹¹⁷ She further noted that the Department of Education planned to develop educational programmes on the impact of HIV/AIDS.¹¹⁸ The youth must have a comprehensive knowledge of the virus so that when they make decisions regarding sexual activity, these decisions are informed decisions that take into account the implications of their decisions and behaviour.¹¹⁹ Information on HIV/AIDS should be enhanced by attitudes and values which will result in proper and constructive decisions.¹²⁰

Ultimately, education holds the potential to transform the socio-cultural environment in which persons live and behave,¹²¹ adjusting in the process some of the features of the family environment and community.

¹¹⁵ World Bank at 5.

¹¹⁶ Department of Education, “Pandor: Education Dept Budget Vote 2006/07 NCOP”, document accessed at http://us-cdn.creamermedia.co.za/assets/articles/attachments/02735_pandor23-05-06.pdf (visited on 2 March 2009) at 2. See http://us-cdn.creamermedia.co.za/assets/articles/attachments/02735_pandor23-05-06.pdf (visited on 2 March 2009) at 2.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ World Bank *Education and HIV/AIDS* at 4.

¹²¹ Coomb & Kelly 11.

3.7.2 HIV/AIDS IN THE CONTEXT OF THE RIGHT TO EDUCATION

All women and girls eventually have to make decisions affecting their sexual and social life. Attitudes regarding harmful cultural practices that may possibly put persons at risk of HIV infection should gradually change over time as a result of proper and comprehensive HIV/AIDS education. Enhanced knowledge and information, better future planning of informed and educated individuals, as well as the improved economic position of these persons all work together to foster a social environment that will assist in the prevention of HIV. Despite that no vaccine presently exists for HIV infection, the public has a “social vaccine”: the vaccine of education.¹²²

HIV/AIDS education is included in the curricula of all levels of educational systems. The sad fact remains many black adult women living in rural areas today are still illiterate, with no hope of accessing or entering the education system. Many of these women either never entered school or left school at a young age to get married.

Perhaps part of the solution lies in the example of a certain community-led participatory group whose objective is to decrease HIV/AIDS infection amongst commercial sex workers in one of South Africa’s mining areas.¹²³ Similarly should the government and NGO’s target specifically rural areas in order to reach these vulnerable women through activities and programmes that aim to educate them regarding the risks of HIV/AIDS, as well their fundamental rights.

The Constitutional provision which value the right to education is theoretically bold yet it has not been practically implemented.¹²⁴ In our day, regardless of the survival of an innovative and rights based curricula and a policy agenda of the transformation of

¹²² Coomb & Kelly 13.

¹²³ Campbel C Mzaidume Z “Grassroots participation, peer education, and HIV prevention by sex workers in South Africa” (2001) 91 (12) *American Journal of Public Health* at 1.

¹²⁴ Bauldaf RB & Kaplan RB *Language planning and practice in Africa* (2004: Cape Town: Multilingual Matters) at 255.

education, the legacy of the apartheid structure persists.¹²⁵ The disproportionate access to education in the past is still a factor which impacts on the human rights of women, reinforcing their disadvantaged status. This situation renders them susceptible to repression and eventually violence.¹²⁶

Bunch¹²⁷ submits that respect for women's rights ought to begin with the implementation of the right to education. The successful implementation of the right to education will undoubtedly influence young girls confidently to refuse marriage at an early age and prioritise education.

The educational system also presents an opportunity for challenging attitude regarding violent behaviour for both boys and girls.¹²⁸ The World Bank perceives education as the most potent weapon for reducing the social and economic susceptibility that increases women's risk of HIV/AIDS infection.¹²⁹

Having gainful employment will obviously raise a women's self esteem and their position in the community as a whole.¹³⁰ A lack of education therefore perpetuates the position of women that live under dreadful social and economic conditions which place them at a high risk of becoming infected with HIV/AIDS.

Basic awareness educational programmes on HIV/AIDS are crucial in order to reach the rural illiterate community. Alertness programmes aimed at the illiterate would undeniably influence the disproportionate HIV/AIDS infection in the rural areas.¹³¹

¹²⁵ Brand & Heyns at 60.

¹²⁶ Bunch C "The intolerable status quo: Violence against women and girls" *Women's Commentary* (1997) 40-49, at 44, compiled by UNICEF, in: *The progress of the nation* (1997, Popline document number 133031).

¹²⁷ Bunch at 44.

¹²⁸ Bunch at 44.

¹²⁹ World Bank *Education and HIV/AIDS* at 7.

¹³⁰ Bunch at 44.

¹³¹ Kandasamy W V B *Analysis of social aspects of migrant labourers living with HIV/AIDS using fuzzy theory and neutrosophic cognitive maps* (2004, Phoenix: Xiquan) at 221.

3.8 CONCLUSION

Whereas chapter two above has focused on a number of cultural practices that in varying degrees increase women's vulnerability to HIV-infection, this chapter has illustrated a range of fundamental rights that are relevant to the present study. Women's inequality and vulnerability in respect of HIV-infection and gender violence in South Africa is a great concern. A starting point for addressing these issues is to have a closer look at various fundamental rights that are at stake, starting with the right to equality, followed by the right to human dignity, the right to freedom and security of the person, the right to access to health care services, and finally, the right to education. Against this constitutional framework, women's increased vulnerability towards HIV, exacerbated by certain cultural customs, inequality and gender violence will be much clearer. Where relevant, this chapter has contextualised the relevant human rights, as well as explained the interaction between factors such as HIV/AIDS, gender inequality and violence. It is impossible to isolate anyone of these factors as a primary contributing factor to women's increased vulnerability in respect of HIV/AIDS, as well as their extreme susceptibility towards gender violence.

To complete the constitutional framework, the next chapter will turn to the application of the limitation clause in the Constitution to examine possible and justifiable limitations of the rights discussed above.

“But around the globe today, especially in developing countries, girls and women suffer in silence, out of range of the cameras, and off society’s radar. In too many nations and regions, they are still devalued and denied, or treated as second-class citizens. They are the victims of gross inequity, or all too often, much worse.” (Statement of UNICEF Representative Director, Ann Vanemina, on International Women’s Day in Washington DC, 8th of March 2006.)

CHAPTER 4

PART 1: THE LIMITATION OF RIGHTS IN THE CONTEXT OF HIV/AIDS, GENDER EQUALITY AND GENDER VIOLENCE

4.1 INTRODUCTION

The discussion of specific human rights¹ affected by the intersection of HIV/AIDS, gender inequality and violence in the South African context cannot be complete without an investigation of possible limitations of these rights. This discussion is also necessary to provide the framework for the exercise in the second part of this chapter where the constitutionality of a specific indigenous custom will be scrutinised more closely. Such an exercise cannot be undertaken without a thorough and complete understanding of the underlying theoretical principles and its application with reference to relevant constitutional cases.

Rights in the Bill of Rights can neither be used to incompetently violate the rights of others or to irrationally and unjustifiably obstruct the state in its lawful government purpose.² If this were the case, the Bill of Rights would become a hollow instrument; a “charter for the abuse of rights”.³ The majority of contemporary bills of rights hence have a limitation clause which allows for human rights to be restricted in a legitimate manner.⁴

¹ E.g. those human rights discussed in chapter two above.

² Buhlungu S “State of the nation: South Africa, 2005-2006” (2006: Pretoria, HSRC Press) at 101.

³ Buhlungu 101.

⁴ Buhlungu 101.

Infringement of human rights does not always render such infringement necessarily as unconstitutional.⁵ Section 36, the limitation clause in the 1996 Constitution,⁶ affords a device for the open assessment of challenging values and interests, and for settling the tension involving democracy and rights.⁷ If an infringement passes the limitation test, then the violation is constitutionally valid.⁸ The weighing of rights discards an “absolute” or “rigid” set of principles.⁹

The grounds for restricting any fundamental rights are required to be very strong.¹⁰ The Constitution permits the limitation of a right only by law and also requires a justifiable ground for the restriction of such rights.¹¹ In other words, the reason for the limitation should be compellingly vital.¹²

The general limitation clause is qualified by the word “general” for the reason that it relates to all the rights in the Bill of Rights and that it also makes provision that all the rights must be restricted by using the same standard.¹³ In determining whether a right has been unreasonably limited, it firstly has to be ascertained whether a law of general

⁵ De Waal J & Currie I *The Bill of rights handbook* (2005, Lansdowne: Juta) at 164.

⁶ Section 36 of the Constitution reads as follows: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

⁷ Woolman S *et al Constitutional law of South Africa* (2006, Juta: Cape Town) at 34-67 and 34-69.

⁸ Woolman at 34-67. See also De Waal & Currie 164.

⁹ Woolman 34-69. This was affirmed in *S v Manamela* 2000 (3) SA (CC) paragraph [32]. Also see Axam H S *If the interest of justice permits: Individual liberty, the limitation clause and the qualified constitutional right to bail* (2001) 17 *South African Journal on Human Rights* at 320, where the Constitutional court explained that it does not mechanically adhere to a sequential checklist list, but engages in a balancing exercise.

¹⁰ Axam 325. See also De Waal & Currie 164.

¹¹ De Waal & Currie 164. See also Axam at 325.

¹² Axam 325. See also De Waal & Currie 164.

¹³ De Waal & Currie 165. It is also interesting to note that the United States Constitution does not contain a limitation clause. The German Bill of Rights does not have a “general limitation clause” but has a particular limitation for each right. The Canadian Charter of Rights and Freedoms, on the other hand, has a general limitation clause.

application violates a right in the Bill of Rights.¹⁴ In other words, the constraint of the right is required to be sanctioned by the law. The phrase “law of general application” is the term used for a fundamental standard of “liberal political philosophy and constitutional law”, viewed by many as the rule of law.¹⁵

The meaning of “law” in the phrase “law of general application” has been interpreted to include all forms of original and subordinate legislation. This was pointed out in the case of *Larbi-Odam v MEC for Education*¹⁶ where the Constitutional court held that subordinate legislation applicable to all teachers in South Africa constitutes “law of general application”. Common law public and private rules and customary law both qualify as “law of general application”.¹⁷ In *Hoffmann v South African Airways*¹⁸ the Constitutional court ruled that a policy or practice does not meet the criteria of law. In this case the South African Airways had a policy that applicants for the position of cabin attendant within the airline should not be HIV positive.¹⁹

The second component to the rule, namely “general application” denotes that it must apply to each person affected by it in the same way.²⁰

¹⁴ *S v Makwanyane* 1995 (6) BCLR (CC) at 706 paragraph [98].

¹⁵ De Waal & Currie 168. It appears that there are two connotations to this rule. To begin with, this rule denotes that the authority and control which the government possess derives from the law. To this end, the government ought to have lawful power for its conduct or else it will be a dictatorship government. The case of *August v Electoral Commission* 1999 (4) BCLR 363 (CC) exemplifies this component of the rule. In this case the Constitutional court was faced with a complex issue to decide whether the failure of the electorate commission to register prisoners on the voter’s role was unfounded. The failure to register the prisoners on the voter’s role resulted in the deprivation of the prisoners’ rights to vote. See *August v Electoral Commission and Others* at 374, paragraph [22]. The Electorate Act 73 of 1998 does not contain a provision which deprives prisoners their right to vote. Hence the failure of the Electorate Commission to register eligible voters was not prescribed by any law. The court hence found that the application of section 36 in this regard was not feasible for the reason that there seemed not to be an opportunity for justifying the infringement since there was no law (at paragraph [23]).

¹⁶ *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) paragraph [27].

¹⁷ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) paragraphs [44] and [136].

¹⁸ See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) paragraph [41].

¹⁹ See *Hoffmann v South African Airways* paragraph [41].

²⁰ De Waal & Currie 169. In the case of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) the idea that the Code of Conduct was applicable to board of directors only and inapplicable to the public as a whole was not an issue of concern.

4.2 THE PROPORTIONALITY TEST

Section 36(1) states that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”. Reasonableness in this context means that the law that limits the right should only do so in a rational manner which does not exceed its purpose.²¹ Hence there is need to prove the relativeness of the impairment done and the benefits intended to be attained.

In addition to “all relevant factors”, section 36(1)(a) requires a consideration of the nature of the right affected by the alleged infringement.²² The weighting of rights is not strictly equal: the more significant a particular right to an open and democratic society based on human dignity, equality and freedom, the heavier the burden of proof convincing the justification for the restriction of the particular right.²³ The significance of the rights to human dignity, equality and freedom and security of the person is clear from South Africa’s history of apartheid and violence. The intersection of these rights in the context of HIV/AIDS, as evidenced in the previous chapters, clearly testifies to the need for serious consideration of the effects of conduct and customs that continue to perpetuate and entrench inequalities. The proper realisation of these rights is significant in furthering the objectives of the Constitution “to create an open and democratic society

²¹ De Waal & Currie 176.

²² It is remarkable to note that not all academic scholars favour that the nature of the right in question must be examined in the section 36 enquiry. Cheadle (see Cheadle H “Limitation of Rights” in: Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: F The Bill of Rights* (2002) at 693) points to the fact that a right cannot be rationally restricted. For a contrary view, see Woolman at 34-73. It seems illogical to evaluate whether a right has been violated without analysing that particular right.

²³ Woolman 34-71.

based on human dignity, equality and freedom". It is the duty of the courts to figure out the value of the specific right in question.²⁴

The next factor set out in section 36(1)(b) which instructs that the importance of the purpose of the limitation be considered, suggests that the reason for a limitation of a right must be indispensable.²⁵ If the reason for the restriction of a right is not transparent, then such a reason cannot be described as reasonable.²⁶ Additionally, if the reason for the restriction is not founded on a democratic society based on human dignity, equality and freedom, such a restriction cannot as a result be regarded as reasonable.²⁷

The importance of the purpose for the limitation requires two separate investigations:²⁸ Firstly, the purpose for the restriction of the right must be examined,²⁹ followed, secondly, by an evaluation of the importance of the recognised purpose.³⁰

²⁴ De Waal & Currie 178. The best practical example to illustrate this point is found in the case of *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 666 where the constitutionality of the death penalty was considered. Didcott J found that the death sentence violated the rights to life, human dignity and to freedom from cruel, inhuman or degrading sentence (at 670). For the death penalty to limit the right to life validly it was required that such a punishment should be realistic and reasonable. Hence the intention of the death sentence was supposed to be weighed against the infringement of three fundamental human rights. The court found that the right to life and dignity are the principal human rights and all other rights emanate from them (at 669). It is an obligation of everyone including the state to respect these rights in all they do including the mode in which sentences are conducted. For this reasons it was required of the state to provide forceful and convincing reasons for clarifying the restriction of such rights.

²⁵ De Waal & Currie 179.

²⁶ De Waal & Currie 178.

²⁷ De Waal & Currie 178.

²⁸ Woolman at 34-73.

²⁹ Woolman at 34-73.

³⁰ Courts are often faced with complications to determine the purpose of the restriction since the object is frequently not presented or made clear in the Act. The other complex issue is that the purpose can be written in general terms. In the case of *S v Makwanyane*, three important rights were violated (at 662). The state had to prove whether the purpose for limiting the three rights was vital in an open and democratic society based on human dignity, equality and freedom. The state argued that the death sentence provided three functions which could not be served by any other type of penalty (at 669). In the first place, it was said to serve as a deterrent to violent crime; secondly, it was said to prevent the repetition of violent crime so that a murderer would not murder again; and thirdly, it was seen as serving the purpose of retributing violent crime. The third purpose, however, was disputed on the grounds that retribution is not aligned to the principle of *ubuntu* and the standards of reconciliation (at 717-718, paragraphs [129]-[130]).

Examining of the nature and extent of the limitation in section 36(1)(c) requires the court to evaluate the manner in which the infringement impinges on the fundamental right.³¹ The question is to determine the degree of the violation of the right; in other words, whether the violation of the right is more than the scope of the purpose for the limitation. In *S v Manamela*³² the judge correctly observes that “[t]he level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.”³³

Examining the “relation between the limitation and its purpose” (section 36(1)(d)) in plain language means that the reason for the infringement must be good and there has to be a fundamental link between the law and its purpose.³⁴ A determination of “less restrictive means to achieve the purpose” (section 36(1)(e)) requires a consideration of the fact that a limitation cannot appropriately be considered as reasonable, relative or ultimately reasonable and justifiable when its purpose(s) could be achieved by a less invasive means.³⁵

The limitation of a fundamental right is valid only when the benefits that are meant to be realised are relative to the costs of the restriction.³⁶ The limitation is regarded as not proportional if other means exist that may perhaps be applied to realise the similar ends which optional means may perhaps not restrict rights at all or will not limit such rights to such an extent.³⁷

³¹ De Waal & Currie 181.

³² *S v Manamela* 2000 (3) SA 1 (CC) paragraph [34].

³³ The courts at times consider the question of whether the restriction is perpetual or provisional or whether it is as an absolute or partial denial of the right under enquiry. See Woolman at 34-81. In the case of *Makwanyane* the Constitutional court had to establish the proportionality of the harm inflicted by the death sentence on the one hand and deterrence and prevention of crime on the other hand (at 713-717 at paragraphs [116]-[128]). If the harm is more than the purpose achieved, then there is a clear disproportionate case (at 723, paragraphs [145]-[146]).

³⁴ De Waal & Currie 182.

³⁵ Woolman S “Out of order? Out of balance? The limitation clause of the final Constitution” (1997) 13 *South African Journal on Human Rights* 102 at 111.

³⁶ De Waal & Currie 183.

³⁷ The death sentence was clearly a critical infringement of the rights to life, dignity and freedom from cruel punishment (see *Makwanyane* at 753, paragraph [234]). It is difficult to assert that the option used to limit the right is reasonable and justifiable in a case where alternative methods exist that does not result in a grave limitation. The Constitutional court remarked that imprisonment for a long

Against the background of the constitutional framework relating to the human rights discussed in chapter three above, as well as theoretical introduction on the limitation of human rights outlined in part I above, the discussion now turns to a critical evaluation of customary law practices that seriously impact on the human rights of the women subjected to these practices (part II below).

period or for life was an alternative method which could be used in place for a life sentence (at 753, paragraph [234]).

CHAPTER 4

PART 2: INDIGENOUS CUSTOMS AND PRACTICES THROUGH THE LENS OF THE CONSTITUTION

4.3 OVERVIEW OF SOCIAL AND CULTURAL FACTORS CONTRIBUTING TOWARDS WOMEN'S INEQUALITY AND INCREASED EXPOSURE TO HIV

South Africa's history of apartheid rule and colonialism has resulted in a marked overlap between the factors of race and poverty. In addition, because poverty and inequality are so strongly gendered, rural black women are the most marginalised in society. Many of them are still subjected to a cultural regime and practices that reinforce their subordination and inequality. It is therefore also not a surprise that they are also the worst affected by HIV/AIDS. The impact of HIV/AIDS on the lives of these women reflects the complexity of the interface between race, gender, poverty and inequality.

The extent to which African customary law is compatible with the notion of the fundamental right of equality entrenched in the Constitution is a topic that has been addressed in detail by some authors.³⁸ The patriarchal nature of customary law is undisputed.³⁹ It is clear from the first two chapters that many of these highly controversial customary practices have remained unchallenged. Nhlapo⁴⁰ correctly asks what it is about custom that is inimical to women's rights and replies that it is "everything that emanates from an attitude to women in marriage and in the family which sees them

³⁸ See Bennett TW et al (eds) *African customary law* (1991, Cape Town: Juta), also published in (1991) *Acta Juridica*. This volume consists of a range of contributions on the nature of customary law; patriarchy, etc. Albie Sachs regards the practice of polygamy as incompatible with the notion of sex and gender equality in a democratic South Africa - see "The constitutional position of the family in a democratic South Africa" in: Sachs A *Protecting human rights in a new South Africa* (1990, Oxford: Oxford University Press) 64 at 72.

³⁹ See, for example, Nhlapo RT "The African family and women's rights: Friends or foes" in: Bennett *African customary law* at 137.

⁴⁰ Nhlapo "The African family and women's rights" at 138-139.

solely as adjuncts to the group ... rather than as valuable in themselves and deserving of the recognition for the human worth on the same terms as men.” Patriarchy is the main obstacle that needs to be challenged in order to achieve equality.⁴¹

The persistence of harmful indigenous practices has a vast impact on the human rights of women. For many women, the family home is the locus of horror.⁴² Under these circumstances it is not the assault of strangers that these women need to fear the most, but the brutality at the hands of relatives, friends and lovers.⁴³ In addition to the combined impact of HIV/AIDS, poverty and gender inequality, violence by women’s intimate partners has become a grave public matter.⁴⁴ Intimate partner violence is not a once in a lifetime occurrence, but a series of actions or a constant pattern of ill-treatment.⁴⁵ The practical reality of all of these factors working together is that the lives of women are literally worth less than men.⁴⁶

Domestic violence is not only a personal or cultural matter, it is also intensely political.⁴⁷ Until recently, domestic violence was not strongly reprimanded by the public or political sphere.⁴⁸ Only when women and girls gain their places as strong and equal members of society, will violence against them perhaps be viewed as a shocking aberration rather than an invisible norm.⁴⁹

⁴¹ See Kaganas F & Murray C “Law, women and the family: The question of polygamy in a new South Africa” in: Bennett *African customary law* 116 at 132.

⁴² Bunch C “The intolerable status quo: Violence against women and girls” *Women’s commentary* 40-49, compiled by UNICEF, in: *The progress of the nation* (1997, Popline document number 133031) at 42.

⁴³ Bunch 42.

⁴⁴ Lipshitz M & Ekstrom I *Domestic violence and its reverberations* (2006, New York: Nova Publishers) at 200.

⁴⁵ Lipshitz & Ekstrom 200.

⁴⁶ Bunch 45.

⁴⁷ Bunch C “Women’s rights as human rights: Toward a re-vision of human rights” (1990) 12 *Human Rights Quarterly* 486-498 at 491.

⁴⁸ Kramarae C & Spender D (eds) *Routledge International encyclopaedia for women* (2001, New York: Routledge) at 418.

⁴⁹ Bunch *Women’s commentary* 42.

Female subordination is embedded so deeply that unless contested, it is observed as unavoidable or natural, rather than viewed as a politically construed reality, preserved by patriarchal interests, beliefs and institutions.⁵⁰ The *ubuntu botho*-curriculum, for example, used in schools in KwaZulu-Natal, still promotes the traditional Zulu family with the man as the head of the family.⁵¹ If sex discrimination continues to be observed as natural, it will persist unchanged, reaching into subsequent generations.⁵² The methodical repression of women and girls within the family consequently shapes societal views on the subordinate role and position of women and the so-called “benefits” associated with male dominance in general.⁵³

4.4 FEMALE GENITAL MUTILATION UNDER CONSTITUTIONAL SCRUTINY

4.4.1 INTRODUCTION

The conflict involving cultural norms and the right equality is not new in South Africa.⁵⁴ There seems, however, to be support for the view that the right to equality supersedes the right to culture where a clash of these rights arises. The Constitution obliges the limitation of any right to be done in a manner that is reasonable in an “open and democratic society based on freedom and equality.”⁵⁵ It is argued that although this way of limiting rights does not have a direct effect on the clash between the right to equality and culture, it nevertheless reasserts the honoured position that the right to equality finds in the constitutional dispensation.⁵⁶ Section 39 of the Constitution⁵⁷ gives central

⁵⁰ Bunch C “Women’s rights as human rights: Toward a re-vision of human rights” at 486.491. See also Kaganas F & Murray C “The contest between culture and gender equality under South Africa’s Interim Constitution” (1994) 21(4) *Journal of Law and Society* 409-433 at 411.

⁵¹ Kaganas & Murray at 411.

⁵² Bunch *Women’s commentary* 42.

⁵³ Bunch *Women’s commentary* 42.

⁵⁴ Kaganas & Murray “The contest between culture and gender equality under South Africa’s Interim Constitution” (1994) 21(4) *Journal of Law and Society* 409-433 at 411. A typical example of such a clash is found in the case of *Bhe* (discussed in detail in chapter two above).

⁵⁵ See Section 36 of the Constitution above.

⁵⁶ Kaganas & Murray 411.

⁵⁷ Section 39(1) of the Constitution reads as follows: “When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based

concern to equality by giving the courts a duty to interpret the Bill of Rights in a manner that upholds the principles that underlie an “open and democratic society based on human dignity, equality and freedom”. Equality should hence be the guiding principle where there is a conflict of the right to equality and the right to culture. It is submitted that it is illegitimate to protect a culture that maintains and reinforces the unequal status of women.

The Constitutional court considers dignity as the most imperative right and constitutional value.⁵⁸ It is sometimes argued that female genital mutilation has a range of physical, aesthetic and psychological advantages.⁵⁹ It is submitted that the harmful health consequences of this procedure, however, override any alleged advantages that it allegedly may have.⁶⁰

Characteristically, the women who submit to female genital mutilation suffer from severe pain, shock, infection, complications in urinating and menstruating, abnormality and scarring of the genitalia, physical and psychological strain with sexual intercourse, bleeding and an increased vulnerability to HIV-infection.⁶¹ Additional complications are an increased threat of sterility and infant mortality. Death may result as a direct effect of female genital mutilation.⁶² These consequences clearly cannot make people to take pride in their culture.⁶³ As this practice is usually performed on girls barely able to grasp the full consequences of this invasive procedure, the question arises as to how “well-

on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

⁵⁸ Woolman at 34-116.

⁵⁹ James S A “Reconciling international human rights and cultural relativism: The case of female circumcision” (1994) 8 (1) *Bioethics* at 8.

⁶⁰ James 8.

⁶¹ Rahman A & Toubia N (eds) *Female genital mutilation: A guide to laws and policies world wide* (2000, London: Zed Books) at 8-10. Also see James 8-9.

⁶² James 9. Rahman & Toubia 23. Death is a rare result, usually caused by haemorrhage. See James at 9.

⁶³ Bunch 43. See also James 9.

informed, independent, mature, free and real” their assent to FGM is.⁶⁴ Yet, some cultures persist in defending the practice.⁶⁵

At the outset, female genital mutilation violates the right to freedom and security of the person, the right to human dignity, the right to life (where death is a direct result) and the right to a person’s physical and psychological integrity. The right to physical integrity is often associated with the right to freedom from torture and includes a number of other of human rights values such as the right to human dignity, the right to liberty and security of the person and the right to privacy.⁶⁶ Violent acts whose result is death or serious physical harm clearly impede on a person right to life and physical integrity.⁶⁷ The Constitution expressly in section 12(1)(c) protects the right to be free from all forms of violence “from either public or private sources”. Additional protection is afforded by virtue of section 12(1)(d) that protects the right not to be tortured in any way and section 12(1)(e) that provides for the right not be treated or punished “in a cruel, inhuman or degrading way”.

Female genital mutilation can be said to diminish a woman’s bodily and sexual autonomy. Section 12(2)(b) of the Constitution provides for a safeguard of the body against physical attack and for an assurance of autonomy regarding one’s body.⁶⁸ Reproductive autonomy is a prerequisite for the sexual and social equality of women.⁶⁹ Arguments in favour of the practice based also on section 12(2)(b) of the Constitution cannot be accepted. Firstly, the right to make decisions regarding reproduction presupposes a person capable of understanding the risks and benefits associated with a particular decision. The very young adolescent girls subjected to the practice are

⁶⁴ James 14.

⁶⁵ Bunch *Women’s commentary* 43.

⁶⁶ Rahman & Toubia at 23.

⁶⁷ Howland C W & Buergenthal T *Religious fundamentalisms and the human rights of women* at 83 (2001, Hampshire: Palgrave Macmillan) at 8. See also Rahman & Toubia at 23.

⁶⁸ Bishop & Woolman, in: Woolman at 40-85.

⁶⁹ Swanepoel M *Embryonic stem cell research and cloning: A proposed legislative framework in context of legal status and personhood* (unpublished LLM thesis, UP, 2006) at 122.

hardly “free” to make an objective decision in this regard.⁷⁰ Young women who assent to the practice are greatly vulnerable to compulsion by their elders.⁷¹ These elders may coerce these young women by persuading them in various ways to undergo the operation.⁷² Rejecting to undertake the operation may endanger a woman’s family affairs, her shared life with her cultural group and her chances to find a spouse.⁷³ Secondly, as was alluded to above, the extent of and grave nature of the procedure that impacts on a range of human rights far outweigh any so-called ‘positive’ benefits attributed to it.

The practice of female genital mutilation is based on the perception that women’s bodies are innately defective and require correction.⁷⁴ This is also evident in the customary practice of dry sex which is intended to alter the original structure of the vagina for the purpose of enhancing sexual pleasure for men. Female genital mutilation is also intended to preserve female chastity and female marriage prospects.⁷⁵ This in itself violates women’s inherent dignity.⁷⁶ Respect for the human dignity of women entails the recognition of their innate physical qualities, which among others include the normal form and functioning of their reproductive organs and women’s sexual role.⁷⁷

Female genital mutilation also discriminates against women on the ground of their sex. Article 1 of the CEDAW defines sex discrimination as

[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁷⁸

⁷⁰ Karanja D N *Female genital mutilation in Africa* (2003, Longwood: Xulon Press) at 51. Rahman & Toubia 23.

⁷¹ Karanja 36.

⁷² Rahman & Toubia 23.

⁷³ Rahman & Toubia 23.

⁷⁴ Rahman & Toubia 23.

⁷⁵ Bunch 43.

⁷⁶ Rahman & Toubia 23.

⁷⁷ Rahman & Toubia 23.

⁷⁸ Article 1 of the CEDAW.

As a form of discrimination against women under human rights law, female genital mutilation will need to meet the terms of the above definition, eg meeting the criteria of:

- 1) the distinction must be on ground of sex;
- 2) the purpose of the distinction should be harmful to women's equal enjoyment of rights.

Female genital mutilation is said to pass the above test for the reason that it is a customary practice designed for women and girls specifically; and its result constitutes a grave violation of human rights. It also aims to control women's sexuality.⁷⁹ Moreover, the practice supports the view that women's role is one only destined for motherhood. This reinforces their subordination in political, economic, social and cultural spheres.⁸⁰

It is often argued that because in some cultures, both sexes are subjected to a form of initiation or circumcision, female genital mutilation cannot be regarded as discrimination on the ground of sex.⁸¹ It is submitted that despite the fact that both men and women undergo circumcision of some sort, female genital mutilation is far more severe than male circumcision and carries a critical and degrading social message.⁸² This does not mean that male circumcision is above constitutional scrutiny, however.⁸³ This is however a question that will not be addressed in this study.

4.4.2 FEMALE GENITAL MUTILATION: UNFAIR DISCRIMINATION?

As was explained in chapter 3 above, section 9(5) of the Constitution establishes a rebuttable presumption that discrimination on either of the grounds listed in section 9(3)

⁷⁹ Rahman & Toubia 21.

⁸⁰ Bunch 43. See also Rahman & Toubia 21.

⁸¹ Vandenhole W *Non-discrimination and equality in the view of UN human rights treaty bodies* (2005, Antwerpen: Intersentia) at 134. See also Cook R J *Human rights of women: National and international perspectives* (1994, Pennsylvania: University of Pennsylvania Press) at 541. See also Rahman & Toubia 21.

⁸² Rahman & Toubia 21. See also Cook at 541.

⁸³ Rahman & Toubia 21.

amount to unfair discrimination.⁸⁴ It is clear from the discussion in chapter two above, as well as the introduction above on the nature of female genital mutilation as a procedure, that it constitutes discrimination on the basis of equality in respect of the following grounds listed in section 9(3):

- (1) sex
- (2) gender

In addition, it is submitted that following from the discussion above, female genital mutilation also pose a threat to the following fundamental human rights:

- (1) The right to human dignity (section 10); and
- (2) The right to freedom and security of the person (specifically sections 12(1)(c), 12(1)(d) and section 12(1)(e), and also sections 12(2)(a) and 12(2)(b)).

The constitutionality of the practice of female genital mutilation in light of the foregoing analysis will next be considered, particularly in relation to the right to equality.

The practice of female genital mutilation is part of customary law, more specifically unwritten customary law. A lot of the unwritten customary law, as is pointed out by Van Niekerk,⁸⁵ is recited and has traditionally been recited by men. If evidence of female genital mutilation is given by men, it is submitted that the actual impact and scope of this custom will not be accurately portrayed to any court in question.

Customary law is subject to the provisions of the Constitution, including the Bill of Rights, by virtue of section 211(3) of the Constitution which provides that the courts may

⁸⁴ Van Reenen T P "Equality, discrimination, and affirmative action: An analysis of section 9 of the Constitution of the Republic Of South Africa" (1997) 12 *SA Public Law* at 151-165 at 163-164.

⁸⁵ Van Niekerk G "Indigenous law and narrative: Rethinking methodology" (1999) 32 *Comparative and International Law Journal of Southern Africa* 208 at 212.

apply customary law where it is applicable, “*subject to the Constitution and any legislation that specifically deals with customary law*”.⁸⁶

The discussion above in chapter three has already indicated that the Bill of Rights also applies horizontally, as is clear from section 8(2) of the Constitution.

Turning now to the three-stage enquiry discussed in chapter three above, the first question that needs to be answered in determining whether the practice of FGM unfairly discriminates against women on the ground of equality, is whether the alleged provision (in this case customary practice which forms part of unwritten customary law) makes a distinction between people or categories.⁸⁷ Although a statutory provision is not at issue here, the question should be answered in the affirmative, as female genital mutilation is practiced disparately across the country. Not all African women are affected by the practice. The application of the practice hence differentiates not only between women themselves, but also between the sexes, as the practice, although also applicable in respect of young boys in some communities, is not as invasive and severe as in the case of young girls.⁸⁸

The question next is whether the differentiation is unfair, which, as was explained in chapter three above,⁸⁹ involves determining whether the differentiation amounts to discrimination. This is established by determining whether the differentiation is based on a listed ground under section 9(3) of the Constitution. In the case of female genital mutilation, this is also answered in the affirmative, as the practice is said to discriminate

⁸⁶ Emphasis added. Section 8(1) of the Constitution makes it clear that the Constitution applies to “all law”.

⁸⁷ See paragraph 2.2.1 of chapter three above.

⁸⁸ See discussion under paragraph 6 of chapter two above on female genital mutilation. The term “mutilation” already provides an indication of the severity of FGM. For more reading on this topic, see Brennan K “The influence of cultural relativism on international human rights law: Female circumcision as a case study” (1989) 7 *Law & Inequality* at 367; Funder A “De minimus non curat lex: The clitoris, culture and law” (1993) 3 *Transnational law and contemporary problems* at 417; Oosterveld, V L “Refugee status for female circumcision fugitives: Building a Canadian precedent” (1993) 51 *University of Toronto Faculty Law Review* at 277; Slack A T “Female circumcision: A critical appraisal” (1988) 10 *Human Rights Quarterly* at 473; Toubia N *Female genital mutilation: A call for global action* (1993, New York: Women’s Ink).

⁸⁹ See paragraph 2.2.3 of chapter three above.

against women on the grounds of sex and gender (both listed grounds under section 9(3)).

The next step is the unfairness test, eg determining whether the discrimination amounts to unfair discrimination.⁹⁰ As was explained above, if the discrimination refers to a ground listed in section 9(3), it is presumed that unfairness exists. The consequence of this is that if differentiation exists on an explicit ground, a presumption of unfairness is created in addition to the alleged discrimination. As was seen in the discussion of the unfairness test in the case of *Harksen*⁹¹ in chapter three above, this test is designed to determine unfairness by looking also at the following: (1) the status of the complainants in society, if they have been affected by past patterns of disadvantage; (2) the nature of the provision (or conduct) or authority and the function required to be accomplished by it; and (3) the degree to which the complainants' constitutional rights or interests have been infringed and whether the infringement of such rights impacted on their fundamental right to human dignity (or whether the impairment constitutes an infringement of a comparably serious nature). The above test hence considers the impact caused by the unfair conduct, illustrating both the historical and the contextual. The central value in this comprehensive test is the right to dignity. The more susceptible a person or group to be a victim of discrimination, the more inequitable the discrimination may be found to be. Such a notion of equality revolves around an understanding that aims to break with past patterns of disadvantage and interpret discrimination against the background of past and existing social, political and economic inequalities.⁹² Based on this, female genital mutilation undoubtedly constitutes unfair discrimination in terms of section 9.

Now that it has been established the practice constitutes unfair discrimination, the enquiry must turn to the next step, namely to establish whether the said discrimination can be justified under the limitation clause of the Constitution. The court observed in

⁹⁰ See paragraph 2.2.4 of chapter three above.

⁹¹ *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC).

⁹² See discussion under par 2.2.4 of chapter three above.

*Hoffmann v South African Airways*⁹³ that whether this stage arises or not, however, will be dependent on whether the measure complained of is contained in a “law of general application”.

It is clear from the discussion above on the limitation clause that the practice of female genital mutilation does not fall within the category of “law of general application”, as set out in terms of section 36(1).⁹⁴ There is hence no need for justifying the alleged infringement in terms of section 36, as there is no law of general application applicable. Despite the fact that it is not necessary to embark on the rationality enquiry, it may be instructive to consider the arguments relevant to this enquiry in any event.

As far as the question regarding the nature of the violated right is concerned, the previous chapters in this study have presented a detailed discussion of what the right to equality, dignity and freedom and security of the person entail. The importance of these rights within the South African context flows not only from South Africa’s particular history, but cannot be emphasised enough. As a result of the significance of these rights, their infringement requires grave justification. The more significant a particular right to an open and democratic society based on human dignity, equality and freedom, the heavier the justification for the restriction of the particular right, as was explained in chapter three above.

Looking at the reasons offered for the existence of the practice of female genital mutilation, one finds that these centre around the idea of preserving female chastity (by making sex physically impossible or painful); or keeping young girls “pure and clean” before they get married.⁹⁵ The alleged purpose served by the practice, namely female chastity, although a lofty-sounding purpose, cannot be said to serve an important purpose in an open and democratic society based on human dignity, equality and freedom. The invasiveness and harm caused by the practice outweigh any so-called

⁹³ 2001 (1) SA 1 (CC), paragraph [24] per Ncgobo J.

⁹⁴ See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) paragraphs [23] and [41]. See also in general, *August v Electoral Commission* 1999 (4) BCLR 363 (CC).

⁹⁵ See Penn M L & Nardos R *Overcoming violence against girls and women: The international campaign to eradicate a worldwide problem* (2003, New York: Rowman & Littlefield) at 94.

benefits by far. Chapter two above has discussed the far-reaching effect of this practice on young women, not only psychologically, but also physically. The practice is also instrumental in increasing women's exposure to HIV. In this context, women's right to life may also become relevant.

Although this constitutional scrutiny exercise has only focused on the right to equality, the chapters above have outlined the other fundamental rights also under threat by the practice, namely the right to human dignity and the right to freedom and security of the person.

If chastity is the prime objective for the practice, then one may argue that there are many other less restrictive means to achieve this same purpose. Many different cognitive frameworks exist within which girls and young women can organise their thoughts about sexual behaviour. These options, if applied, will not in any way restrict the rights to equality, dignity and freedom and security of the person in the same manner than female genital mutilation. Some chastity or abstinence programmes advise young people to delay sexual activities until they are old enough or married.⁹⁶ One specific approach, better known as the integrated critical health approach, is another alternative approach which may achieve the same purpose.⁹⁷

Finally, no limitation can be regarded as reasonable and justifiable when its purpose(s) can be achieved by less invasive means.⁹⁸

4.5 PRELIMINARY CONCLUSION

⁹⁶ Thomas R M *God in the classroom: Religion and America's public schools* (2007, Wesport: Greenwood Publishing Group) at 221.

⁹⁷ Denniston G C *Male and female circumcision: Medical, legal, and ethical considerations in paediatric practice* (1999, New York: Springer) at 324.

⁹⁸ Woolman S "Out of order? Out of balance? The limitation clause of the final Constitution" (1997) 13 *South African Journal on Human Rights* 102 at 111.

It is apparent from the discussion above that female genital mutilation violates the constitutional rights to equality, human dignity and freedom and security of the person. It is clear that there will in future still be numerous situations where South Africa will need to find answers to the inconsistency between women's desires and cultural claims.⁹⁹ The dynamic character of indigenous culture denotes that it is permeable by innovative norms and that it will not remain as impervious to the mores of emancipation and equality.¹⁰⁰ Culture is always in the process of being reinvented,¹⁰¹ capable of evolving to become more egalitarian.¹⁰² While changing these harmful norms the law does not necessarily transform women's lives, but the law has a normative force and can influence thinking.¹⁰³

It is next necessary to briefly examine the international human rights framework relevant to HIV/AIDS, gender inequality and violence.

4.6 INTERNATIONAL HUMAN RIGHTS IN THE CONTEXT OF HIV/AIDS, GENDER INEQUALITY AND VIOLENCE

The Constitution instructs in section 39(1) that when interpreting the Bill of Rights, a court, tribunal or forum must not only promote the values underlying an open and democratic society based on human dignity, equality and freedom (subsection (a)), but *must* consider international law (subsection (b)), and may consider foreign law (subsection (c)). The international human rights framework relevant to the issues of gender inequality and violence will next briefly be considered. Specific reference will be made to those rights that promote women's struggle for gender equality and reproductive freedom, which in turn may assist in lessening some women's severe

⁹⁹ Kaganas & Murray "The contest between culture and gender equality under South Africa's Interim Constitution" (1994) 21 (4) *Journal of Law and Society* 409-433 at 426.

¹⁰⁰ Kaganas & Murray 426.

¹⁰¹ Robertson D A *Dictionary of human rights* (1997, New York: Routledge) at 1. See also Kaganas & Murray 426.

¹⁰² Kaganas & Murray 426-427.

¹⁰³ Kaganas & Murray 427.

susceptibility to HIV. It must be noted that a complete and thorough investigation of *all* the relevant rights under international human rights law relevant to women in the context of HIV/AIDS, gender inequality and violence falls unfortunately outside the scope of the discussion that follows.

4.6.1 CHARTER-BASED SYSTEM

4.6.1.1 *The Universal Declaration of Human Rights*

The notion of human rights is one of the few ethical visions recognised globally.¹⁰⁴ The support for human rights is a broadly acknowledged objective and as a consequence affords a constructive structure for addressing gender abuse.¹⁰⁵ The Universal Declaration of Human Rights¹⁰⁶ (UDHR), the first comprehensive human rights document to be adopted by an international organisation, signifies this world vision. Although not much is articulated on the subject of women, Article 2 affords everyone

the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰⁷

Bunch¹⁰⁸ submits that the reason why Eleanor Roosevelt and the American women fought for the inception of sex as a ground of non-differentiation was to address women's subordinate position in society.

The UDHR gives assurance of fundamentals civil and political rights, socio-economic rights and the right to health care, all of which are of important to both people vulnerable

¹⁰⁴ Bunch C "Women's rights as human rights: Toward a re-vision of human rights" (1990) 12(4) *Human Rights Quarterly* 486-498 at 486.

¹⁰⁵ Bunch C "Women's rights as human rights: Toward a re-vision of human rights" 487.

¹⁰⁶ Universal Declaration of Human Rights, adopted and proclaimed by GA Res 217A (III) of 10 December 1948.

¹⁰⁷ Article 2 of the UDHR.

¹⁰⁸ Bunch 487.

to HIV/AIDS and people living with HIV/AIDS.¹⁰⁹ The UDHR pays less attention to socio-economic rights.¹¹⁰

Article 25¹¹¹ of the UDHR refers to the right to health care and special assistance to mothers and children. It is argued on the basis of article 25(2) that women and children (who happen to be the most susceptible groups to HIV/AIDS in Africa) merit special consideration with regards to health care.¹¹² The High court decision in the case of the TAC, discussed under the right to access to health care above, is an example of the advancement of the rights of mothers and children.¹¹³

Article 1 and article 2¹¹⁴ of the UDHR gives assurance to the right to equality and dignity. It is argued that the phrase “other status” referred to in article 2 as one of the factors on which no distinction in relation to the guaranteed rights in the UDHR is permitted. This suggests by inference also a person’s HIV-status.¹¹⁵

The right to dignity is reflected in article 5¹¹⁶ which proscribes torture and cruel, inhuman or degrading treatment or punishment. Article 6¹¹⁷ may as well be construed to

¹⁰⁹ Uko E J “Legal rights of people vulnerable to HIV/AIDS in Africa” (2004) 45(1) *Codicillus* 32-46 at 36.

¹¹⁰ Nienaber A G *Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa* (unpublished LLD thesis, UP, 2007) at 200.

¹¹¹ Article 25 of the UDHR reads as follows: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

¹¹² Uko at 36.

¹¹³ Uko at 36-37.

¹¹⁴ Articles 1 and 2 of the UDHR read as follows: “1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

¹¹⁵ Uko at 36.

¹¹⁶ Article 5 of the UDHR reads as follows: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

encompass the right to dignity, as this article points that everyone has the right to recognition everywhere as a person before the law. Despite this assurance, there are still many instances where women are not afforded the equality and dignity that they are entitled to.

The claim to the right to privacy is echoed in article 12 of the UDHR,¹¹⁸ which prohibits arbitrary interference with a person's privacy, family home or correspondence. There is a connection between the rights to privacy, liberty and autonomy.¹¹⁹ Griffin¹²⁰ remarks as follows:

[W]e need certain forms of privacy to develop the confidence and capacity to overcome the enormous barriers to autonomous decision.

Within the context of HIV/AIDS, for example, the right to privacy includes the right of persons not to be subjected to unwarranted "medical tests, experiments or treatment" without their free, voluntary and informed consent.¹²¹

4.6.1.2 *The Declaration on the Elimination of Violence against Women*

On 20 December 1993, the UN general Assembly adopted the Declaration on the Elimination of Violence against Women (DEVW) as an acknowledgment that gender-based violence manifests disparate power relations and is the critical social mechanism for preserving women's subordination to men.¹²²

¹¹⁷ Article 6 of the UDHR states that "[e]veryone has the right to recognition everywhere as a person before the law."

¹¹⁸ As explained in chapter one above, this study did not address the right to privacy in detail, but acknowledges its relevance to persons living with HIV and AIDS.

¹¹⁹ Griffin J *On human rights* (2008, Oxford: Oxford University Press) at 235.

¹²⁰ Griffin 235.

¹²¹ Uko 38. Also see Nienaber at 191 and 250 where she discusses informed consent, the right to privacy and the right to human dignity within the context of clinical research and HIV patients.

¹²² The United Nations Declaration on the Elimination of Violence against Women, (DEVW), proclaimed by the UN General Assembly in its resolution 48/104 of 20 December 1993 (hereafter referred to as the (DEVW)).

This declaration describes gender-based violence as violence directed at women for the reason that they are women.¹²³ Such violence is seen as a form of discrimination that hinders women's realisation of rights and freedoms on a level proportional to men.¹²⁴ Although the DEVW is not an international treaty, it is instrumental in recognising intimate violence against women.¹²⁵ It includes references to private, intimate acts of violence, violence within the community and harmful traditional practices to which women and girls are subjected.¹²⁶

Article 4 of the DEVW provides *inter alia* that "states should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination".

Although important, this strong pronouncement is limited to the elimination of violence against women and does not extend to the broader guarantee of all women's rights. The DEVW places a positive obligation on all states to address and eradicate any customary or religious conduct which has a harmful effect on women. Where cultural and religious practices include or are accompanied by violence

4.6.1.3 *The African Charter on Human and Peoples' Rights*

¹²³ Declaration on the Elimination of Violence against Women. Also see, in general, McGillivray A & Comaskey B *Black eyes all of the time: Intimate violence, aboriginal women, and the justice system* (1999, Toronto: University of Toronto press) at 151.

¹²⁴ McGillivray & Comaskey 150.

¹²⁵ McGillivray & Comaskey 150.

¹²⁶ Article 2 of the DEVW reads as follows: "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

The African Charter on Human and Peoples' Rights is a regional instrument that embodies an African perspective on issues of human rights over and above the support and protection of the rights of African people.¹²⁷

The African Commission on Human and Peoples' Rights is the responsible organ for the enforcement of the rights contained in the African Charter.¹²⁸ Despite the fact that the African Charter recognises the significance of women's rights, it is criticised for covering only a small part of areas in which women require protection.¹²⁹ Regardless of this criticism, the African Charter recognises the significance of women's rights through article 2, the equality clause, which states that the rights and freedoms protected in the Charter are to be enjoyed by everyone irrespective of their sex; as well as article 3, which provides that all individuals are equal before the law and are entitled to the equal protection of the law. Article 18(3)¹³⁰ refers to the protection of the rights of women and children specifically. Article 60 declares that the African Commission on Human and Peoples' rights should draw its insights from various international human rights, including CEDAW.

Despite these assurances, women need noticeably more than these provisions if their rights are to be advanced and efficiently protected.¹³¹

4.6.1.4 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The reason for this protocol was because it was important to have a separate document addressing the rights of women specifically,¹³² as the interpretation of existing rights in

¹²⁷ The African Charter on Human and Peoples' Rights, adopted on June 27, 1981. Also see Musa R *et al Breathing life into the African Union Protocol on Women's Rights in Africa* (2006, Oxford: Pambazuka) at 10.

¹²⁸ Musa 10.

¹²⁹ Musa 10.

¹³⁰ Article 18(3) provides as follows: "The State shall ensure the elimination of [...] discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

¹³¹ Musa 11.

the African Charter that protected women was not sufficient.¹³³ A particular treaty on women's rights was thought to have the advantage of emphasising the topics that impact upon women particularly. A more gendered approach to the interpretation of human rights was necessary.¹³⁴

The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹³⁵ plays an important role in the protection and support of women rights in Africa, generating novel rights for women in terms of international standards. This innovative protocol endeavours to protect the rights of all African women in the political, social and cultural sphere.

Article 14(2)(c) of the Protocol inter alia sets out the reproductive right of women to a medical abortion when pregnancy results from rape or incest or when the furtherance of the pregnancy jeopardises either the health or life of pregnant women.¹³⁶ Additionally, article 14(1)(e) of the Protocol specifically refers to the right to be informed of one's health status, as well as that of one's partner, including HIV/AIDS.

Article 2(1) of the Protocol furthermore protects women from all forms of discrimination. The Protocol places an obligation to all member states to combat all forms of

¹³² Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008, Cambridge: Cambridge University Press) 445.

¹³³ Evans & Murray 445.

¹³⁴ Evans & Murray 445.

¹³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 25 November 2005.

¹³⁶ Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa reads as follows: "(1) States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: (a) the right to control their fertility; (b) the right to decide whether to have children, the number of children and the spacing of children; (c) the right to choose any method of contraception; (d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; (e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; (g) the right to have family planning education. (2) States Parties shall take all appropriate measures to: (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; [...] (c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

discrimination against women by creating legislation and other measures that are likely to contest any form of unfair and discriminatory behaviour. Article 3¹³⁷ in addition protects the dignity of women. Finally, article 5¹³⁸ calls for the lawful proscription of harmful practices that negatively impact on the rights of women and which are contrary to recognised international standards. Female genital mutilation is specifically mentioned in this provision.¹³⁹

4.6.2 TREATY-BASED SYSTEM

4.6.2.1 *The Convention on the Elimination of all Forms of Discrimination against Women*

The Convention on the Elimination of All Forms of Discrimination against Women¹⁴⁰ (hereafter CEDAW) is an international legal instrument against sex discrimination that seeks to make active legal and political instruments work for women and to develop states' accountability for the infringement of the human rights of women.¹⁴¹ This Convention can be described as an international bill of rights for women and a framework for women's involvement in the advancement of rights. CEDAW recognises

¹³⁷ Article 3 reads as follows: "Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights." The same provision instructs states parties to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

¹³⁸ Article 5 states that: "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards" and that "States Parties shall take all necessary legislative and other measures to eliminate such practices [...]", including: (a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; (b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them; [...] (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance."

¹³⁹ See footnote above: "... prohibition [...] of all forms of female genital mutilation ...".

¹⁴⁰ The United Nations Convention on The Elimination of all Forms of Discrimination against Women (CEDAW) of 18 December 1979.

¹⁴¹ Bunch "Women's rights as human rights: Toward a re-vision of human rights" 495.

and echoes international values and principles relative to attaining equality between women and men.¹⁴²

The relevance of CEDAW¹⁴³ for this study relates to its main objective which is to place an obligation on member states to prohibit discrimination against women in all forms. This Convention is the only human rights instrument whose aim is to confirm and mark culture and tradition as powerful forces shaping gender roles and family affairs.¹⁴⁴ Signatory states to the CEDAW are required to create strategies addressing discrimination against women and are obliged to account on their observance to the committee of CEDAW.¹⁴⁵

Article 5¹⁴⁶ of the Convention instructs member states to transform cultural practices and all other practices which are subject to the idea of “inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. Article 16 further provides for the equal status of men and women in issues relating to the regulation of marriage and family affairs.¹⁴⁷ Article 11 inter alia requires member states to eradicate discrimination in all forms against women in the field of employment.

¹⁴² Bunch 495.

¹⁴³ Article 2 of the CEDAW.

¹⁴⁴ See <http://un.org/womenwatch/daw/cedaw/> (visited 10 February 2009).

¹⁴⁵ Bunch 495.

¹⁴⁶ Article 5 states that: “States Parties shall take all appropriate measures: (a) “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

¹⁴⁷ Many aspects of this article are particularly relevant to this study. Article 16 states that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women. [...] (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership,

Despite the fact that the Convention deals with many issues of sex and gender discrimination, one of its shortcomings is that it does not deal with the subject of violence against women.¹⁴⁸ At some point during CEDAW's eighth session in Vienna, CEDAW approved a decree expressing serious concern on the matter of gender violence and by instructing states to incorporate in their review reports information concerning statistics, legislation and support services regarding the subject of gender violence.¹⁴⁹

The human rights agenda for women embodied in CEDAW, if acknowledged and enforced by member states would mark a massive movement forward. Regrettably, the United Nations does not regard this convention as a powerful convention as demonstrated by the problems that CEDAW has in getting countries to account on observance with its provision. In addition, some governments and a large number of non-governmental organisations regard CEDAW as a manuscript concerned with "secondary rights".¹⁵⁰ An understanding of the word "secondary" could refer to something less important or derivative. Despite these perceptions, CEDAW remains a constructive declaration of values and principles approved by the United Nations in terms of which women can constructively start addressing legal and political transformation in their regions.¹⁵¹

4.6.2.2 *The International Covenant on Civil and Political Rights*

On 28 August 2002, South Africa became a signatory state to the International Covenant on Civil and Political Rights.¹⁵² Human dignity as the core value for other

acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

¹⁴⁸ Bunch 495.

¹⁴⁹ Bunch 495-496.

¹⁵⁰ Bunch 496.

¹⁵¹ Bunch 496.

¹⁵² The International Covenant on Civil and Political Rights of 3 March 1976. Also see www.worldcoalition.org/modules/wfdownloads/visit.php?cid=34&lid=162 (visited 14 April 2009).

rights is affirmed in the preamble of the International Covenant on Civil and Political Rights.¹⁵³

The International Covenant on Civil and Political Rights (hereafter the ICCPR) upholds certain human rights that are applicable to people vulnerable to HIV/AIDS. Uko¹⁵⁴ asserts that within the ICCPR the right to life impacts on all other rights. The right to life protects citizens against any pandemics that may be perilous to them by placing a duty on the state to take necessary measures to reduce such epidemics. In this context, individuals vulnerable to HIV/AIDS may invoke this right, for example through demanding appropriate preventative and curative services from their governments to prevent or control HIV/AIDS.

4.6.2.3 *The International Covenant on Economic and Cultural Rights*

Through its significant humanitarian involvement, South Africa became a signatory to the International Covenant on Economic and Cultural Rights on 3 October 1994.¹⁵⁵

Article 12 of the International Covenant on Economic, Social and Cultural Rights¹⁵⁶ obliges member states to take appropriate measures to realise the right to physical or mental health. It is argued that the duty created on member states incorporates the “prevention, treatment and control of epidemic, endemic and occupational and other

¹⁵³ The Preamble of the International Covenant On Civil and political Rights of 3 March 1976 states that “[...] in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person [...].”

¹⁵⁴ Uko 37.

¹⁵⁵ International Covenant on Economic and Cultural Rights of 3 January 1976. See also <http://www.unaavictoria.org.au/media/RMIT%20MUNC/South%20Africa%20Position%20Paper%20-%20Steph%20Bolas.pdf> (visited 14 April 2009).

¹⁵⁶ Article 12 of the International Covenant on Economic, Social and Cultural Rights GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, 1, states as follows: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

diseases” as well as the establishment of circumstances that would guarantee health services and medical interest to everyone upon sickness.¹⁵⁷

Article 12 may perhaps be considered as vague for the reason that it allows state parties undefined discretion. Nearly all, if not all, socio-economic rights are assured on condition of a progressive realisation, thereby allowing justifications by the state parties for the delay in the execution of these rights, or in the instance of non-performance. Uko¹⁵⁸ asserts that the High court and the Constitutional court in South Africa could have relied on section 12 of this Covenant in arriving at the conclusion that the state must provide Nevirapine to all pregnant women at all state hospitals at the state’s cost.

The spirit of the development of the right to dignity is greatly set in international human rights instruments which appeal to human dignity in the logic of our universal humanity. In this Convention inherent dignity is also seen as a foundational value.¹⁵⁹

4.6.2.4 The United Nations Convention on the Rights of the Child

Section 24(2)(d)¹⁶⁰ of the United Nations Convention on the Rights of the Child is of particular importance for pregnant, HIV-positive women. This provision obliges state parties “to ensure appropriate prenatal and postnatal health care for mothers”. Proper pre-natal health care for pregnant HIV-positive women may include access to antiretroviral drugs which will prevent mother-to-child-transmission of HIV. Post-natal health care may include medical advice regarding the danger of breast-feeding in order to prevent mother-child transmission of HIV.

¹⁵⁷ Uko 38.

¹⁵⁸ Uko 39-40.

¹⁵⁹ The Preamble of the International Covenant on Economic and Cultural rights of 3 January 1976 provides inter alia that “[...] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that “these rights derive from the inherent dignity of the human person.”

¹⁶⁰ Section 24(2)(d) of the United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA res 44/25 of 20 November 1989.

4.7 CONCLUSION

The discussion above has only briefly touched on selected rights that are protected in terms of the international human rights framework. As the previous chapters have illustrated, the interdependence of a range of rights that relate to women affected and infected by HIV/AIDS makes the protection of women not a straightforward matter. For example, the vulnerability of women to HIV infection derives in large part from pervasive violations of women's human rights and dignity.

A society based on human rights, equality and freedom, as South Africa strives to be, is obliged to react to the violent and methodical infringement of women's rights locally and internationally.¹⁶¹ It would require a review of patriarchal biases that permeate its customs and institutions.¹⁶² Each and every state has the duty to arbitrate in the exploitation of women's rights within its territory to end its collusion with the forces that commit such violations in other countries.¹⁶³

The discussion in this chapter has, following on the previous chapter, discussed the limitations clause of the Constitution briefly, followed by a closer look at the practice of female genital mutilation through the lens of the Constitution. The conclusion that the practice constitutes a form of unfair discrimination against women on the grounds of equality, human dignity and freedom and security of the person, is echoed and supported by a brief overview of international human rights provisions relevant to women. Some of these instruments refer specifically to customary practices that are harmful to women, such as female genital mutilation.

¹⁶¹ Bunch C 492.

¹⁶² Gordon A A *Transforming capitalism and patriarchy* (1996, Colorado: Lynne Rienner) at 173. See also Bunch 492.

¹⁶³ See in general, Berer M (ed) *Women and AIDS: An international resource book* (1993, London: Pandora Press); Mann J & Tarantola D (eds) *AIDS in the world* (1992, Cambridge: Harvard University Press); Mariasy J *Triple jeopardy: Women & AIDS* (1990, London: Panos Publications).

On a more general level, the reality remains women are to a large extent still seen as the vector of HIV, with their sexuality as something that needs to be managed in order to curb the spread of HIV. The conceptualising of gender violence, reproductive autonomy and the impact of HIV/AIDS on women has still been left exclusively to men, in that men have often been left to formulate, explain and regulate violence against women and reproductive autonomy, resulting in the silencing of women's experiences. Long-term success will be strengthened by a rights-based approach, based on the values of human rights and dignity and which also takes notice of the real lived experiences of women.

“Violence against women is the extreme form of inequality, and it is hard to think of an act against women that can be more damaging or enduring than sexual violence.” (Statement of UNICEF Representative Director, Ann M Vanemina, on International Women’s Day in Washington DC, 8th of March 2006).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

This article explored the intersection between HIV/AIDS, gender inequality and gender violence, and more specifically, critically assessed some cultural practices and customs that contribute towards and exacerbate women’s subordination and inequality, which in the process increase women’s exposure to become infected with HIV. Relevant to this focus is inevitably an investigation of perceived threats to specific fundamental human rights as a result of some entrenched practices that continue to reinforce women’s subordinate position in society, aggravated by the high incidence of gender violence.

One of the secondary objectives of this study was to deepen an understanding of the legal position and vulnerability of women with respect to their rights to equality, dignity, freedom of choice and freedom to be free from any form of violence. The nature of the issues selected for discussion inevitably points to matters related to the private (and personal) sphere. As the study has shown, the family is seen as the unit of male dominance, the location of male violence and hence the main site of women’s oppression. States have traditionally viewed women’s concerns as “private” instead of “public” matters, hence the historical reluctance to intervene in matters such as domestic violence. This study has attempted to emphasise the gendered context in which some women infected and affected by HIV find themselves.

This study has illustrated that gender-based violence and social inequality in intimate relationships are key factors in the spreading of HIV/AIDS. Some of the general factors that influence the pattern of HIV/AIDS in South Africa are the general low status of

women in society and within relationships; women's traditionally subordinate role in the family and limited personal resources in indigenous communities; general misinformation regarding and ignorance regarding HIV/AIDS; disrupted family and communal life due in part to apartheid, migrant labour patterns and high levels of poverty; and finally, a settled transport infrastructure and high mobility of persons, allowing for the rapid movement of the virus into new communities.

There are several ways in which HIV/AIDS, violence and gender inequality may overlap in the context of women's lives. Firstly, male violence may impede a woman's ability to protect herself from HIV. Sexual violence increases a woman's risk through non-consensual sex, or by limiting her efforts or ability to convince her partner to wear a condom. Condom use in some instances is potentially more dangerous than even raising the issue of birth control, as condoms are widely associated with promiscuity, prostitution and disease in these cultures. A woman requesting her partner to use a condom may trigger a violent response. Hence, any HIV-prevention strategy that aims to get woman to "negotiate" condom use is doomed to fail, as it rests on the assumption of equity between the sexes that simply does not exist in both consensual and coercive relationships.

In addition to the direct health harm posed by cultural practices that encourage concurrent sexual networks within a marriage (eg between multiple wives, the husband and other extra-marital sexual contacts of all the spouses permitted in terms of polygyny), the latter significantly amplifying the HIV transmission rate, other seemingly less harmful practices, for example those of "dry sex", female genital mutilation, virginity testing, the levirate, also increase women's vulnerability to HIV as the study has shown. Patriarchy, harmful stereotyping (which equates a woman's worth with her reproductive capacity), women's subordinate role in certain communities, and the compounding factor of gender violence, are all interrelating factors that increase women's vulnerability. Women's vulnerable position often compels them to continue with unsafe or harmful practices, simply because the social, economic and cultural costs of avoiding these risks may be too high. Women lacking economic resources may often resort to

prostitution or informal sexual relationships with several men in exchange for material goods or financial support.

Some women, especially in rural areas, put up with the impact of most of the discriminatory cultural practices, especially within the context of the family or intimate relationships. In the present era of HIV/AIDS, the power imbalance between sexes in the cultural context carries a novel sense of urgency. Women have become especially susceptible to the disease as a result of their limited power in sexual encounters, despite the assurance of the right to reproductive autonomy enshrined in the Constitution. A critical examination of the rights to equality, dignity, education, access to health care services and freedom and security of the person sketched a clear picture of how skewed the realisation of these rights in the lives of some women is. The right to education was specifically selected for discussion as education is one of the most important instruments through which not only HIV/AIDS may be addressed, but also the problem of gender violence. The study has referred to research that shows that young girls are the most affected by the lack of education: they are the ones staying at home to care for relatives who are suffering from AIDS; they are more likely to drop out of school early because of unplanned pregnancies; they are often forced into marriages at an early age; they are more vulnerable to contract HIV as a result of “dry sex” or female genital mutilation, etc. On the other hand, the study has also shown that HIV infection rates are significantly lower for women who completed secondary or tertiary levels of education, a result which is clearly the consequence of a proper education.

A detailed analysis of the equality clause, as well as the limitation clause, was next presented as the backdrop against which one specific cultural practice, namely female genital mutilation, was subjected to constitutional scrutiny. The result of this exercise shows that the practice cannot be defended and in fact constitutes a form of unfair discrimination against women, apart from being a form of gender violence too.

Although the right to belong to a cultural group is recognised in the Constitution, no such group may practice any customs which are inconsistent with the provisions of the

Bill of Rights. A fine balance must be struck between the recognition of cultural customs that contribute towards the sense of belonging of its relevant members, and those customs which are harmful or have a detrimental effect on the fundamental rights of women. Some of these customs are simply outdated, but are maintained without a critical consideration of its true impact. The fact that women themselves voluntarily submit to these customs is often cited in defence of the continuance of these customs, whereas it in fact testifies to their subordination in their communities. The vicious cycle of women's inequality and lack of reproductive freedom often compels them to continue with these as they are often financially dependent on those who endorse it.

5.2 RECOMMENDATIONS

HIV/AIDS flourishes more demonstrably in a society where women are vulnerable. Addressing women's vulnerability is not a straightforward matter, however, as the factors contributing towards women's vulnerability in respect of HIV/AIDS and gender violence, are often the result of deeply engrained social and cultural roles, stereotypes, superstition, ignorance, fear, poverty, to name but a few.

- The first recommendation is that those customs that are harmful to women (most notably "dry sex" female genital mutilation) be eradicated. Traditional customary societies are not culturally inert but diverse, dynamic and are able to change after a certain period of time. Traditional cultural beliefs are as well neither monolithic nor static.¹ In other words they may possibly be changed in reaction to varied social demands. People have the capacity to control their individual destiny even if their choices are restricted by the widespread common structure or culture. Cultural transformation can be an outcome from individuals being exposed to accept novel ideas.² In this regard, individuals who decide to accept innovative ideas, even if influenced by their personal concerns, can start a procedure of

¹ Margaret L *et al* *Sociology: Understanding a diverse society* (2005, New York: Wadsworth Publishing) at 75.

² Ibawoh B "Between culture and Constitution: Evaluating the cultural legitimacy of human rights in the African State" (2000) 22(3) *Human Rights Quarterly* 838-860 at 841.

transformation which may control overriding cultural traditions. The writer concedes that this may not be a simple task, as there is often fierce resistance to change deeply entrenched customs. Accompanied by sensitive briefing to relevant communities on the harm caused and how these practices are in conflict with constitutional values and norms may be a starting point.

- It is convincingly clear that South Africa has enough laws that protect the rights of women. It is therefore out of line to stress the need of new laws to protect the vulnerable group of women whose human rights are being violated. However, there seems to be a huge lack of the implementation of the existing legal norms that protect women. This would require a strong enforcement of women's rights by allowing physically powerful access to the courts for those women whose human rights have been violated. The role of education is crucial in this regard. Strong emphasis should be placed in the media (via NGO's or politicians) on the extremely important role of a proper basic education for all, especially young girls. The problem of illiteracy should be seriously addressed, starting with a stronger governmental action and input into primary education, particularly in respect of remote rural areas where schools function haphazardly and frequently without proper teachers. Only through better education will the message of legal remedies to women subjected to violence and inequality become known. Poverty, however, remains a severe factor which compounds women's position. This study has repeatedly illustrated how a range of factors interact in compounding the problem. Continuous poverty reinforces the vulnerability of women, as this often leads to a situation where everyone vies for himself or herself, where the strongest will prevail, again reinforcing women's vulnerability. Crime flourishes, which in turn breeds increased dependence on kinship and patronage relations.³
- Legal action by most women against perpetrators who infringe on women's human rights has its restrictions. Legal action against perpetrators who violate

³ Van Niekerk A "Moral and social complexities of AIDS in Africa" (2001) 27(2) *Journal of Medicine and Philosophy* 143-162 at 156.

women's human rights is at the disposal of the economically privileged.⁴ Black rural women on the other hand hardly have the resources or the knowledge to bring their cases to the fore. Women living in traditional structures possess restricted capacity to involve themselves in social change litigation.⁵ There is presently a huge delay in the prosecution of cases involving violence against women. It is therefore suggested that more equality courts should be established in order to meet the demands of the pending cases. This will therefore also require the government to train and appoint new magistrates with relevant and appropriate equality expertise. A stipulated reasonable time frame for hearing cases should be set up which will allow all cases to be heard while they are still untainted and while evidence is still fresh.⁶ There is also presently a strong need to review the extent to which legislation has or has not appreciated and facilitated the concerns, preferences and guiding principles that apply to women, especially within the context of delayed justice.

- Although outside the scope of this study, protecting the property rights and rights of access to land of women in customary law could also assist in addressing some of the imbalances and inequality. This reminds us of the customary law principle of primogeniture which still persists, despite its abrogation.
- What is ultimately required, are specific behavioural changes in respect of violence against women; HIV/ADS; and women's reproductive autonomy. Behaviour is most effectively addressed through communication (mass media, peer education, and counselling) that focuses on factors that may reduce risks of HIV-infection (including information on customary practices that contribute towards women's exposure to HIV and women's inequality).
- Involving and reaching out to small and remote communities in order to

⁴ Justice Mokgoro Y "Constitutional claims for gender equality: A judicial response" (2003) 67 *Albany Law Review* 565-574 at 573.

⁵ Ntlama N "Equality: A tool for social change in promoting gender equality" Presentation at the Law Conference of the Law Society of the Northern Province entitled: *The improvement of the quality of life, status, justice and constitutional development of women* (1-2 August 2002).

⁶ Mokgoro 573.

brief and inform women at grass-root level of their constitutional rights and how the Constitution is designed to protect their rights. It makes no sense to target the most vulnerable of these communities (women and young girls) without a proper understanding of the root causes of their vulnerability. This study has hence attempted to illustrate some of the causes of women's vulnerability.

- All of the above recommendations are not the task of the government alone. There are many non-governmental organisations, including a number of foreign interest groups that focus on the problem of HIV and AIDS locally. More success may be gained if these efforts are better coordinated and streamlined.
- Rights that focus on harms sustained by women in particular need to be identified and developed by also bringing these rights discourse into the public sphere.⁷ It is fundamental that women's voices find a public audience.⁸

In the final instance, the boundaries of human rights law must be redefined so that human rights law becomes able to incorporate an understanding of the world from the perspective of the socially subjugated.⁹ The first step forward in human rights law is to challenge the gendered dichotomy of both private and public worlds.¹⁰

⁷ Cook R C "*Human rights of women: National and international perspectives*" (1994, Philadelphia: University of Pennsylvania Press) at 76.

⁸ Cook at 76.

⁹ Cook at 76

¹⁰ Cook at 76.

BIBLIOGRAPHY

EXPLANATORY NOTES ON FORMATTING

- (a) In this dissertation, the initials of the authors are cited in the initial reference only. Subsequent references to these authors will only refer to their last names.
- (b) References to books and journal articles are cited in full in the first occurrence, with a shortened version for subsequent references.
- (c) With reference to books, the last name of the author appears first, followed by his initials, the title of the book, the year of publication, the city of publication, the name of the publisher and finally the specific page cited, eg Karim A *HIV/AIDS in South Africa* (2005, Cambridge, Cambridge University Press) at 2. Subsequent references refer to the last name of the author and the relevant page number(s).
- (d) For journal references, the last name of the writer appears first, followed by his initials, the title of the journal article, the year in which the journal article was published, the volume number and the edition number, the journal name, the range of the page numbers and finally the specific page cited, eg Nienaber A G "The protection of participants in clinical research in Africa" (2008) 8 *South African Journal on Human Rights* 138-162 at 140-141. Subsequent references to the same author will include only the name of the author and the relevant page cited, unless the author has published more than one article to which the study refers.
- (e) The case cited refers first to the case name (in italics), followed by the year in which the case was heard, the volume number of that particular law report, the name of the law report, the page from which the case starts, the division of the court where the case was heard and finally the particular page cited, eg *Bhe v Magistrate Khayelithsa* 2004 (1) BCLR 27 (CC) at 48. Subsequent references to a case will refer to the case name and relevant page number.
- (f) Internet sources are cited as follows: See <http://un.org/womenwatch/daw/cedaw/> (visited 10 February 2009).

BOOKS

Alcamo E *AIDS* (2003, Boston: Jones and Bartlett publishers)

Alger C F *The future of the United Nations system: Potential for the twenty-first century* (1998, United Nations University Press)

Andrew B *The international survey of family law* (1998, The Hague: Martinus Nijhoff Publishers)

Arrehag L *et al The impact of HIV/AIDS on livelihoods, poverty and the economy of Malawi* (2006, Stockholm: Sida)

Bainham A & International Society on Family Law *The International Survey of Family Law: 1996* (1998, Leiden: Martinus Nijhoff Publishers)

Bauldaf RB & Kaplan RB *Language planning and practice in Africa* (2004, Cape Town: Multilingual Matters)

Bhasin K *What is patriarchy?* (1994, New Delhi: Vision Wordtronic)

Beck E J *et al The HIV Pandemic: Local and Global Implications* (2008: Oxford: Oxford University Press)

Bekker *et al Introduction to customary legal pluralism in South Africa* (2002, Durban: Butterworths)

Bennett TW *et al (eds) African customary law* (1991, Cape Town: Juta)

Bennett T W *Human rights and African customary law under the South African Constitution* (1995, Cape Town: Juta)

Bennett T W *Customary Law in South Africa* (2004, Lansdowne: Juta)

Bennett T W *Customary Law in South Africa* (2007, Lansdowne: Juta)

Berer M (ed) *Women and AIDS: An international resource book* (1993, London: Pandora Press)

Bonthuys E & Albertyn C (eds) *Gender, law and justice* (2007, Lansdowne:Juta)

Bourque S C & Warren K B *Women of the Andes: Patriarchy and social change in two Peruvian towns* (1981, Michigan: University of Michigan)

- Bradshaw Y W & Ndegwa S N *The uncertain promise of Southern Africa* (2001, Indianapolis: Indiana University Press)
- Brand D *et al* *Socio-economic rights in South Africa* (2005, Pretoria: PULP)
- Brems E *Human Rights: Universality and diversity* (2001, The Hague: Martinus Nijhoff Publishers)
- Buhlungu S *State of the nation (2005-2006)*: Pretoria, HSRC Press)
- Campbell T *Sceptical essays on human rights* (2001, Oxford: Oxford University Press)
- Carstens P A & Pearmain D *Foundational principles of South African medical law* (2007, Durban: LexisNexis)
- Cheadle H *et al* (eds) *South African Constitutional Law: The Bill of Rights* (2002, Durban: Lexis Nexis Butterworths)
- Collins C F & Pinn V W *African-American women's health and social issues* (2006, Boston: Greenwood Publishing Group)
- Conrad P & Gallagher E B *Health and health care in developing countries: Sociological perspectives* (1993, Philadelphia: Temple University Press)
- Cook R J *Human rights of women: National and international perspectives* (1994, Pennsylvania: University of Pennsylvania Press)
- Curry J (ed) *The reference shelf: Women's rights* (2005, New York: H W Wilson)
- Currie I & De Waal J *The Bill of rights handbook* (2001, Lansdowne: Juta)
- Currie I & De Waal J *The Bill of rights handbook* (2005, Lansdowne: Juta)
- Cotter A M *et al* *Discrimination law: Professional practice guide* (2005, London: Routledge Cavendish)
- Dale R (ed) *Education and the state: Politics, patriarchy and practice* (1981, New York: Taylor & Francis)
- Davis A J & Tschunin V *Essentials of teaching and learning in nursing ethics* (2006, Oxford: Elsevier Health Science)
- Deegan H *South Africa reborn: Building a new democracy* (1999, New York: Routledge)

Denniston G C *Male and female circumcision: Medical, legal, and ethical considerations in paediatric practice* (1999: New York, Springer)

Denniston G C & Mibs M F *Sexual mutilations: A human tragedy* (1997, New York: Springer)

Deveaux M *Gender and justice in multicultural liberal states* (2006, Oxford: Oxford University Press)

Epprecht M *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008, Ohio: Ohio University)

Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008, Cambridge: Cambridge University Press)

George E *et al Scared at school: sexual violence against girls in South African schools* (2001: Human Rights Watch)

Gordon A *Transforming capitalism and patriarchy: gender and development in Africa* (1996, Boulder Colorado: Lynne Rienner Publishers)

Gordon E & Golanty E *Health and Wellness* (2006, Jones & Bartlett)

Ghosh R N *Human resources and gender issues in poverty eradication* (2001, New Delhi: Atlantic Publishers & Distributors)

Gostin L O & Lazzarini Z *Human Rights and Public Health in the AIDS Pandemic* (1997, Oxford : Oxford University Press)

Griffin J *On human rights* (2008, Oxford: Oxford University Press)

Gruenbaum E *The female circumcision controversy: An anthropological perspective* (2001, Pennsylvania: University of Pennsylvania Press)

Gruskin S *et al Perspectives on health and human rights* (2005, New York: Routledge)

Gunderson M *et al AIDS: Testing and privacy* (1989, Utah: University of Utah Press Salt Lake City)

Gutto S *Equality and non-discrimination in South Africa: The political economy of law and law making* (2001, Cape Town: New Africa Books)

Frankowski S *Legal responses to AIDS in comparative perspective* (1998, Hague: Kluwer Law International)

Hassim A *et al* (ed) *Health and democracy* (2007, Cape Town: Siberink)

Henrard K *Minority protection in post-apartheid South Africa: Human rights, minority rights, and self-determination* (2002, Westport: Greenwood Publishing Group)

Heyns H & Viljoen F *The impact of the United Nations human rights treaties on the domestic level* (2002, The Hague: Martinus Nijhoff)

Hitchcock R K & Vinding D *Indigenous peoples' rights in Southern Africa* (2004, Copenhagen: International Work Group for Indigenous Affairs)

Howland C W & Buergenthal T *Religious fundamentalisms and the human rights of women* (2001, Hampshire: Palgrave Macmillan)

International Association for Philosophy of Law and Social Philosophy *et al Pluralism and law: Proceedings of the 20th IVR World Congress, Amsterdam* (2004, Stuttgart: Franz Steiner Verlag)

Irving

H *Gender and the Constitution: Equity and agency in comparative constitutional design* (2008, Cambridge: Cambridge Press)

Johnstone M J *Bioethics: A nursing perspective* (2008, Chatswood: Elsevier Health)

Jayawickrama N *The judicial application of human rights law: National, regional and international jurisprudence* (2002, Cambridge: Cambridge University Press)

Josefina J *et al The complete HIV/AIDS teaching kit* (2007, New York: Springer)

Karanja N D *Female genital mutilation in Africa: Gender, religion and pastoral care* (2003, Virginia: Xulon Press)

Karim A *HIV/AIDS in South Africa* (2005, Cambridge: Cambridge University Press)

Kandasamy W V B *Analysis of social aspects of migrant labourers living with HIV/AIDS using fuzzy theory and neutrosophic cognitive maps* (2004, Phoenix: Xiquan)

Kitts J *et al The health gap: Beyond pregnancy and reproduction* (1996, Ottawa: International Development Research Centre)

Kommers D P *American constitutional law essays cases and comparative notes* (2004, Lanham: Rowman & Littlefield)

Kramarae C & Spender D (eds) *Routledge International encyclopaedia for women* (2001, New York: Routledge)

Kroeze IJ in: Pôle universitaire européen de Montpellier et du Languedoc- Roussillon *et al The principle of the respect of human dignity: Proceedings of the UniDem seminar* (1999: Council of Europe)

LeBaron M & Pillay V *Conflict across cultures: A unique experience of bridging differences* (2006, Boston: Intercultural Press)

Leonen T & Rodrigues P R *Non discrimination law: Comparative perspectives* (1999, The Hague: Martinus Nijhoff) .

Lewis R A & Sussman M B *Men's changing roles in the family* (1986, Philadelphia: Haworth Press)

Lipshitz M & Ekstrom I *Domestic violence and its reverberations* (2006, New York: Nova Publishers)

Marshall K & Keough L *Mind, heart, and soul in the fight against poverty* (2004, Washington DC: World Bank Publications)

Miller W B *Health, Culture and community: Case study of public reactions to health programs* (1955, New York: Russell Sage Foundation)

MacKinnon C *Feminism unmodified: Discourses on life and law* (1987, Harvard: Harvard University Press)

MacKinnon C *Women's lives, men's laws* (2007, Harvard: Harvard University Press)

Macklem P *Indigenous indifference and the Constitution of Canada* (2001, Toronto: University of Toronto Press)

Mann J & Tarantola D (eds) *AIDS in the world* (1992, Cambridge: Harvard University Press)

Mann J M *et al Health and human rights* (1990, New York: Routledge)

Margaret L *et al Sociology: Understanding a diverse society* (2005, New York: Wadsworth Publishing)

Mariasy J *Triple jeopardy: Women & AIDS* (1990, London: Panos Publications)

McGillivray A & Comaskey B *Black eyes all of the time: Intimate violence, aboriginal women, and the justice system* (1999, Toronto: University of Toronto press)

McMichael P *Development and social change: A global perspective* (2004, California: Pine Forge Press)

Moller V & Welch G J *Polygamy and well-being among Zulu migrants* (1985, Durban: Centre for Applied Social Sciences)

Morisky D E *Overcoming AIDS: lessons learned from Uganda* (2006, Norfolk: Information Age)

Musa R *et al Breathing life into the African Union Protocol on Women's Rights in Africa* (2006, Oxford: Pambazuka)

Naylor NM "'Cry the beloved continent': Exploring the impact of HIV/AIDS and violence on women's reproductive and sexual rights in Southern Africa" in: Cook R J & Ngwena C (eds) *Health and human rights* (2007, Aldershot: Ashgate)

Neethling *et al Law of delict* (5th ed) (2006, Durban: Lexis Nexis Butterworths)

Neethling *et al Law of personality* (2nd ed) (2005, Durban: Lexis Nexis Butterworths)

Sachs A *Protecting human rights in a new South Africa* (1990, Oxford: Oxford University Press)

Setel P *et al Histories of sexually transmitted diseases and HIV/AIDS in sub-Saharan Africa* (1999, Westport: Greenwood)

Sinclair J "Family rights" in: Van Wyk D, Dugard J, De Villiers B *et al* (eds) *Right and constitutionalism* (1994, Cape Town: Juta)

Oesstreich J E *Power and principle: Human rights programming in international organizations* (2007, Georgetown: Georgetown University)

Page J *et al Working with HIV/AIDS* (2006, Cape Town: Juta)

Patterson S *The African State and the AIDS Crisis* (2005, Aldershot: Ashgate)

Penn M L & Nardos R *Overcoming violence against girls and women: The international campaign to eradicate a worldwide problem* (2003, New York: Rowman & Littlefield)

Peters J S & Wolper A *Women's rights, human rights: International feminist perspectives* 1995, New York: Routledge)

Peterson B *Cultural intelligence: A guide to working with people from other cultures* (2004, Boston: Intercultural Press)

Rabe J *Equality, affirmative action and justice* (2001, Norderstedt: Books on Demand GmbH)

Rahman A & Toubia N (eds) *Female genital mutilation: A guide to laws and policies world wide* (2000, London: Zed Books)

Rautenbach IM & Malherbe EFJ *Constitutional Law* (4th ed) (2004, Durban: Lexis Nexis Butterworths)

Robertson D A *Dictionary of human rights* (1997, New York: Routledge)

Romm A J *Natural health after birth: The complete guide to postpartum wellness* (2002, Rochester: Inner Traditions / Bear & Company)

Roy K C *et al Economic development and women in the world community* (1996, Westport: Greenwood Publishing Group)

Segal S J *Under the Banyan tree: A population scientist's odyssey* (2003, Oxford: Oxford University Press)

Thomas R M *God in the classroom: Religion and America's public schools* (2007, Westport: Greenwood Publishing Group)

Toubia N *Female genital mutilation: A call for global action* (1993, New York: Women's Ink)

Valdiserri R O *Dawning answers: How the HIV/AIDS epidemic has helped to strengthen public health* (2003, Oxford: Oxford University Press)

Verheyde M *Article 28: The right to education* (2006, Leiden: Martinus Nijhoff)

Van Esterik P *Materializing Thailand* (2000, Oxford: Berg Publisher)

Vandenhoele W *Non-discrimination and equality in the view of UN human rights treaty bodies* (2005, Antwerpen: Intersentia)

Von Lewinski S *et al Indigenous heritage and intellectual property: Genetic resources, traditional knowledge, and folklore* (2003, The Hague: Kluwer Law International)

Viljoen F & Stefiszyn K (eds) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007, Pretoria: PULP)

Walker C *Women and resistance in South Africa* (1982, Salt City: Onyx Press)

Walker L *et al Waiting to happen: HIV/AIDS in South Africa: The bigger picture* (2004, Cape Town: Juta)

Wesley J *et al Culture and human development: The selected papers of John Whitingn* (1994, Cambridge: Cambridge University Press)

Woolman S *et al Constitutional Law of South Africa* (2nd ed) (2007, Cape Town: Juta)

World Bank *Education and HIV/AIDS: A window of hope* (2002, World Bank Publications)

World Health Organisations & Mann J M *Legislative responses to AIDS* (1989, Leiden: Martinus Nijhoff)

Zeitzen M K *Polygamy: A cross-cultural analysis* (2008, Oxford: Berg Publishers)

PERIODICAL PUBLICATIONS

Albertyn C “Defending and securing rights through Law: Feminism, law and the courts in South Africa” (2005) 32(2) *Politikon* 217

Al-krenawi A “A family therapy with a multiparental/multispousal family” (1998) 37 (1) *Family Process* 65

Alston P “The best interest principle: Towards a reconciliation of culture and human rights” (1994) 8 *International Journal of Law and the Family* 1

Axam H S “If the interest of justice permits: Individual liberty, the limitation clause and the qualified constitutional right to bail” (2001) 17 *South African Journal on Human Rights*

Baleta A “Concern voiced over “dry sex” practices in South Africa” *Lancet* vol 352 (issue 9136) 1292

Bentley K “Women’s human rights & the feminisation of poverty in South Africa” (2004) 31(100) *Review of African political economy* 247

Bonthuys E “Women’s sexuality in the South African Constitutional court” (2006) 14 *Feminist Legal Studies* 391

Brennan K “The influence of cultural relativism on international human rights law: Female circumcision as a case study” (1989) 7 *Law & Inequality* 367

Bunch C “The intolerable status quo: Violence against women and girls” *Women’s Commentary* (1997) 40, compiled by UNICEF, in: *The progress of the nation* (1997), Popline document number 133031

Bunch C “Women’s rights as human rights: Toward a re-vision of human rights” (1990) 12 *Human Rights Quarterly* 486

Cameron E "Legal and human rights responses to the HIV/AIDS epidemic" (2006) 17 *Stellenbosch Law Review* 47

Cameron E & Swasson "Public health and human rights - The AIDS crisis in South Africa" (1992) 8 *South African Journal on Human Rights* 232

Campbel C & Mzaidume Z "Grassroots participation, peer education, and HIV prevention by sex workers in South Africa" (2001) 91 (12) *American Journal of Public Health* 1

Castle J & Kiggundu E "Are rural women powerless when it comes to HIV & AIDS risk? Implications for adult education programmes in South Africa" (2007) 1 *Perspectives in Education* 45

Chaskalson A "Human dignity as a foundational value of our constitutional order" (2000) 16 *South African Journal on Human Rights* 193

Civic D & Wilson D "Dry sex in Zimbabwe and implications for condom use" (1996) 42 *Social Science and Medicine Journal* 91

Connell R O "The role of dignity in equality law: Lessons from Canada and South Africa" (2008) 6(2) *International Journal of Constitutional Law* 267

Cook CT "Polygamy: Did the Africans get it right?" (2007) 38 *Journal of Black Studies* 232

Cowen S "Can 'dignity' guide South Africa's equality system?" (2001) 17(1) *South African Journal on Human Rights* 17

Curran E & Bonthuys E "Customary law and domestic violence in rural South African communities" (2005) 21 *South African Journal on Human Rights* 607

Dunkle D L "Gender based violence, relationship power, and risk of HIV infection in women attending antenatal clinics in South Africa" (2004) vol 363 (issue 9419) *The Lancet*

Elbe S "International security: HIV/AIDS and changing Landscape of war in Africa" (2002) 27 *Fall* 159

Fishbayn L "Litigating the right to culture: Family Law in the new South Africa" (1999) 13(2) *International Journal of Law, Policy and the Family* 147

Funder A "De minimus non curat lex: The clitoris, culture and law" (1993) 3 *Transnational law and contemporary problems* 437

Gilbert L and Walker L "Treading the path of least resistance: HIV/AIDS and social inequalities-a South African case study" (2002) 54 7 *Science Direct* 1

Grant E "Human Rights, Cultural Diversity and Customary Law in South Africa" (2006) 50(1) *Journal of African Law* 2

Gruskin S "Negotiating the relationship of HIV/AIDS to reproductive health and reproductive rights" (1995) 44 *American University Law Review* 1191

Herbst M & Du Plessis W "Customary law v common law marriages: A hybrid approach in South Africa" (2008) 12(1) *Electronic Journal of Comparative Law*

Himonga C & Bosch C "The application of African customary law under the Constitution of South Africa: Problem solved or just beginning?" (2000) 117 *South African Law Journal* 306

Ibwawoh B "Between culture and Constitution: Evaluating the cultural legitimacy of human rights in the African State" (2000) 22(3) *Human Rights Quarterly* 838

James S A "Reconciling international human rights and cultural relativism: The case of female circumcision" (1994) 8 (1) *Bioethics* 1

Jagwanth S "South Africa: The inequality challenge" (2000) 15(3) *South African Report Archive* 3

Jewkes R "Intimate partner violence: causes and prevention" (2002) 359 *The Lancet* 1423

Justice Mokgoro Y "Constitutional claims for gender equality: A judicial response (2003) 67 *Albany Law Review* 565

Kaganas F & Murray C "The contest between culture and gender equality under South Africa's Interim Constitution" (1994) 21(4) *Journal of Law and Society* 409

Kirby M "AIDS and the law" (1993) 9 *South African Journal on Human Rights* 121

Knoetze E & Olivier M "To develop or not to develop the customary law: That is the question in *Bhe*" (2005) *Obiter* 126

Leclerc-Madlala S "Protecting girlhood? Virginity revivals in the era of AIDS" (2003) 56 *Agenda* 16

Meintjes S "The women's struggle for equality during South Africa's transition to democracy" (1996) 30 *Transformation* 47

Moller V & Welch G R "Polygamy, economic security and well-being of retired Zulu migrant workers" (1990) 5 (3) *Journal of cross-cultural gerontology* 205

Mothokoa M "New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) *South African Journal on Human Rights* 616

Nienaber A G "The protection of participants in clinical research in Africa" (2008) 8 *South African Journal on Human Rights* 138

Nkosi G "Indigenous African marriage and same sex partnerships: Conflicts and controversies" (2007) 2 *International Journal of African Renaissance Studies: Multi-, inter- and transdisciplinarity* 200

Nwoye A "The practice of interventive polygamy in two regions of Africa: Background, theory and techniques" (2007) 31(4) *Dialectical Anthropology* 383

Oosterveld, V L "Refugee status for female circumcision fugitives: Building a Canadian precedent" (1993) 51 *University of Toronto Faculty Law Review* 277

Parry C D H *et al* "Rapid assessment of HIV risk behaviour in drug using sex workers in three cities in South Africa" (2008) 1 *AIDS and Behaviour* 1

Pieterse M "The interdependence of rights to health and autonomy in South Africa" (2008) 125(3) *The South African Law Journal* 553

Slabbert MN "Till death do us part" (2006) 47 (1) *Codicillus* 1

Slack A T "Female circumcision: A critical appraisal" (1988) 10 *Human Rights Quarterly* 473

Uko E J "Legal rights of people vulnerable to HIV/AIDS in Africa" (2004) 45(1) *Codicillus* 32

Van der Vyver J D "Cultural identity as a constitutional right in South Africa" (2003) 14(1) *Stellenbosch Law Review* 51

Van Niekerk A "Moral and social complexities of AIDS in Africa" (2001) 27(2) *Journal of Medicine and Philosophy* 143

Van Niekerk G "Indigenous Law and narrative: Rethinking methodology" (1999) 32 *Comparative and International Law Journal of Southern Africa* 208

Van Niekerk GJ "Succession, living indigenous law and *Ubuntu* in the constitutional court" (2005) 6(3) *Obiter* 474

Van Reenen TP "Equality, discrimination and affirmative action: An analysis of section 9 of the Constitution of the Republic of South Africa" (1997) 12 *SA Public Law* 151

Werner E "Preferential marriage correlation of the various modes among the Bantu tribes of the Union South Africa (1928) 1(4) *Journal of the International African Institute* 413

Wieland L "The role of the courts in the conflict between African customary law and human rights" (2005) 21 *South African Journal on Human Rights* 241

Woolman S "Out of order? Out of balance? The limitation clause of the final Constitution" (1997) 13 *South African Journal on Human Rights* 102

Worth D "Sexual decision-making and AIDS: Why condom promotion among vulnerable women is likely to fail" (1989) 20(6) *Studies in Family Planning* 297

NATIONAL CONSTITUTIONS

Constitution of the Federal Republic of German, promulgated by the Parliamentary Council on 23 May 1949 (as amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990)

Constitution of the Republic of South Africa, 1996

TABLE OF CASES

CANADA

In re Morgenthaler (1998 31 CCR 1)

R v Oaks (1986 19 CRR 308)

SOUTH AFRICA

Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC)

August v Electoral Commission 1999 (4) BCLR 363 (CC)

Bernstein v Bester NO 1996 (2) SA 751 (CC)

Bhe v Magistrate Khayelithsa 2004 (1) BCLR 27 (CC)

Bhe v Magistrate Khayelitsha 2004 (2) SA 544 (CC)

Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC)

Brink v Kitshoff NO 1996 (6) BCLR 752 (CC)

C v Minister of Correctional Services 1996 4 SA 292 (T)

Carmichele v Minister of Safety and Security and Another 2002 (10) BCLR 1100 (CC)

Christian Education South Africa V Minister of Education 2000 (10) BCLR 1051(CC)

City Council of Pretoria v Walker 1998 (2) SA 363 (CC)

Clarke v Hurst 1992 (4) SA 630 (D)

Dawood v Minister of Home Affairs 2000 (1) SA 997 (CC)

Du Plessis and Others v De Klerk and Another 1996 (5) BCLR 658 (CC)

Fraser v Children's Court Pretoria North and Others 1997 (2) BCLR 153 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)

Harksen v Lane NO & Others 1997 (11) BCLR 1489 (CC)

Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC)

Hoffmann v South African Airways 2001 (1) SA 1 (CC)

Hugo v State President of the Republic of South Africa and another 1996 (6) BCLR 876 (D)

In re Certification of the Constitution of the Republic Of South Africa 1996 (10) BCLR 1253 (CC)

In re Education Bill of 1995 (Gauteng) 1996 4 BCLR

Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)

Jordan and Others v S and Others 2002 (11) BCLR 1117 (CC)

Klein v Attorney-General WLD 1995 3 SA 848 (W)

Larbi-Odam v MEC for Education (North West Province) 1998 (1) SA 745 (CC)

M v R 1989 1 SA 416 (O)

Mabaso v Law Society of the Northern Provinces and Another 2005 (2) BCLR 129 (CC)

Mabena v Letsoalo 1998 (2) SA 1068

Mabuza v Mbata 2003 (4) SA 218 (KH)

Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

Mthembu v Letsela 1997 2 (SA) 936

Moseneke and Others v Master of the High Court 2001 BCLR 103 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, 2000 (2) SA 1 (CC) [NCGLE 2000]

NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curaie) 2007 (5) SA 250 (CC)

Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708

Prince v President of the Law Society of the Cape of Good Hope and Others at 220 (2) SA 794(CC); 2002 (3) BCLR 231 (CC)

Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC)

Robinson and Others 2005 (5) BCLR 446 (CC)

S v Baloyi (Minister of Justice & Another Intervening) 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC)

S v Jordan and Others 2001 (10) BCLR

Jordan and Others v S and Others 2002 (11) BCLR

S v Makwanyane and Another 1995 (6) BCLR 665 (CC)

S v Manamela 2000 (3) SA (CC)

S v Mvamvu Unreported Supreme Court of Appeal judgment, case no 350/2003, delivered 29 September 2004.

S v Orrie 2004 3 SA 584 (C)

S v Xaba 2003 (2) SA 703

S v Williams and Others 1995 (7) BCLR 861 (CC)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) All SA 268 (CC)

Thibela v Minister van Wet en Orde 1995 (3) SA 147 (T)

Treatment Action Campaign and Others v Minister of Health and Others 2002 (4) BCLR 356 (T)

Volks NO v. Robinson, 2005 (5) BCLR 446 (CC)

Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)

ZIMBABWE

Chihowa v Mangwende 1987 (1) ZLR 228 (SC)

TABLE OF STATUTES

SOUTH AFRICA

Abortion and Sterilization Act 2 of 1975

Admission of Persons to the Republic Regulation Act 59 of 1972

Black Administration Act 38 of 1927

Choice on the Termination of Pregnancy Act 92 of 1996

Dangerous Weapons Act 71 of 1968

Domestic Violence Act 116 of 1998

Electorate Act 73 of 1998

Employment Equity Act 55 of 1998

Insolvency Act 24 of 1936

Insurance Act 37 of 1923

Intestate Succession Act 81 of 1987

Law of Evidence Amendment Act 45 of 1988

Magistrates' Court Act 32 of 1944

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Recognition of Customary Marriages Act 120 of 1998

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 published in GG No 32147 of 21 April 2009

Sea Fishery Act 12 of 1988

Sexual Offences Act 23 of 1957

Transkei Marriage Act 21 of 1978

REGULATIONS

SOUTH AFRICA

Communicable Diseases and the Notification of Notifiable Medical Conditions 1987, GN R2438, in Government Gazette 11014 of 30 October 1987, promulgated in terms of sections 32, 33 and 34 of the Health Act 63 of 1977

HUMAN RIGHTS RELATED-INSTRUMENTS

African Charter on Human and Peoples' Rights, adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity on 27 June 1981

Charter of the Organisation of African Unity Adopted at Addis Ababa on 25 May 1963

The International Covenant on Civil and Political Rights of 3 March 1976

The International Covenant on Economic, Social and Cultural Rights of 3 January 1976

Organisation of African Unity Protocol to the African Charter on Human and Peoples Rights on the Rights of Women, 2nd Ordinary Session of the Assembly of the Union 11 July 2003

The Convention on the Elimination of All forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 of 21 December 1996

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 25 November 2005

The United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA res 44/25 of 20 November 1989

The United Nations Declaration on the Elimination of Violence against Women (DEVW), proclaimed by the UN General Assembly in its resolution 48/104 of 20 December 1993

The Universal Declaration of Human Rights, adopted and proclaimed by GA Res 217A (III) of 10 December 1948

Vienna Declaration and Programme of Action United Nations General Assembly, UN Doc.A/CONF.157/23, 12 July, 1993

DIVERSE

UNAIDS *gender analysis: Fiscal 2004-2010 strategic plan 2003*

Albertyn C & Goldblatt B "Section 9 -The right to equality", paper presented at the Constitutional Law of South Africa Conference, 29 March 2006, at Constitutional Hill

Drimie S "The impact of HIV/AIDS on rural households and land issues in Southern and Eastern Africa" A background paper prepared for the food and Agriculture Organisation, Sub-regional office for Southern and Eastern Africa (2002)

Kroeze I "The open society: from Plato to Popper and *Bhe*" (2007) (unpublished document on file with author)

Slabbert M N *The human embryo and foetus: Constitutional and other legal issues* (unpublished doctoral thesis) (2000, Unisa)

Swanepoel M *Embryonic stem cell research and cloning: A proposed legislative framework in context of legal status and personhood* (unpublished LLM thesis, UP, 2006)

Nienaber A G *Ethics and human rights in HIV-related clinical trials in Africa with specific reference to informed consent in preventative HIV vaccine efficacy trials in South Africa* (unpublished LLD thesis, UP, 2007)

Ntlama N "Equality: A tool for social change in promoting gender equality" Presentation at the Law Conference of the Law Society of the Northern Province entitled: *The improvement of the quality of life, status, justice and constitutional development of women* (1-2 August 2002)

World Health Organization *Coverage of maternity care: A tabulation of available information* WHO/FHE/MSM/93.7 (3rd ed 1993)

INTERNET SOURCES

<http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153>
(visited 16 September 2008)

<http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153>
(visited 16 September 2008)

See <http://www.avert.org/aidssouthafrica.htm> (visited 21 May 2008)

See <http://www.distel.ca/womlist/countries/southafrica.html> (visited 06 August 2008)

The results of the 17th national HIV and syphilis survey
See <http://www.doh.gov.za/docs/antenatal-f.html> (visited 20 November 2008)

<http://www.ejcl.org>, visited 12 May 2009)

http://www.hrea.org/index.php?base_id=157(visited 14 September 2008)

<http://www.iol.co.za> (visited 9 April 2008)

Coomb C & Kelly M J "Education as a vehicle for combating HIV/AIDS"
See http://lobby.la.psu.edu/_107th/127_Basic_Education/Organizational_Statements/Basic%20Education%20Coalition/BEC_Educ_combating_AIDS.pdf (visited 31 March 2009)

<http://www.nostatusquo.com/ACLU/mackinnon/mackin1.html> (visited 7 February 2008)

Department of Education, "Pandor: Education Dept Budget Vote 2006/07 NCOP", document accessed at
http://us-cdn.creamermedia.co.za/assets/articles/attachments/02735_pandor23-05-06.pdf (visited on 2 March 2009)

http://uscdn.creamermedia.co.za/assets/articles/attachments/02735_pandor23-05-06.pdf (visited on 2 March 2009)

http://www.rho.org/html/hthps_overview.htm#drysex (visited 13 August 2008)

http://www.rho.org/html/hthps_overview.htm (visited 13 September 2008)

<http://www.roylaw.co.za/index.cfm?fuseaction=home.article&pageID=8922777&ArticleID=8843366> (visited 12 September 2008)

Hyena H "Dry sex' worsens AIDS numbers in southern Africa" (1999), accessed at <http://www.salon.com/health/sex/urge/world/1999/12/10/drysex/index.html> (visited 20 January 2009)

<http://www.sardc.net/editorial/sadctoday/v3-1-06-1999/v3-1-06-1999-11.htm> (visited 14 April 2008)

<http://www.unaavictoria.org.au/media/RMIT%20MUNC/South%20Africa%20Position%20Paper%20-%20Steph%20Bolas.pdf> (visited 14 April 2009)

<http://www.ugpulse.com/articles/daily/Health.asp?id=587> (visited 12 October 2008)

Commentary on the CEDAW

See <http://un.org/womenwatch/daw/cedaw/> (visited 10 February 2009)

<http://www.un.org/News/Press/docs/2000/20000426.sgsm7369.doc.html> (visited 5 April 2009)

<http://www.un.org/rights/dpi1627e.htm> (visited 14 September 2008)

ICCPR

See <http://www.worldcoalition.org/modules/wfdownloads/visit.php?cid=34&lid=162> (visited 14 April 2009)

<http://41.208.61.234/uhtbin/cgiisirsi/20090119060100/SIRSI/0/520/S-CCT49-03> (visited 28 January 2008)