

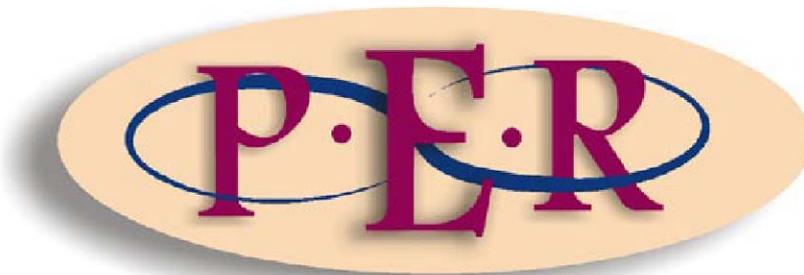
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**CULTURAL PRACTICES AND HIV IN SOUTH AFRICA: A LEGAL PERSPECTIVE**

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## CULTURAL PRACTICES AND HIV IN SOUTH AFRICA: A LEGAL PERSPECTIVE

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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.<sup>1</sup>

### 1 Introduction

The HIV/AIDS pandemic has taken a grave toll on sub-Saharan-Africa, where AIDS is now the prime cause of death<sup>2</sup> despite a range of prevention strategies. HIV/AIDS has turned out to be an uncontrollable humanitarian and human security issue constituting one of the most startling challenges to human security and survival in many parts of the world.<sup>3</sup> 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 but is beginning to have much wider social, economic and political ramifications.<sup>4</sup>

The burden of HIV/AIDS does not fall evenly or equally. The overwhelming majority of those currently living with HIV/AIDS are young African women in developing countries.<sup>5</sup> The epidemic continues to have a disproportionate impact on women, with a number of premature deaths in South Africa being attributed to HIV/AIDS.<sup>6</sup>

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1 MacKinnon *Feminism* 117.

2 Elbe 2002 *International Security* 159. For a clinical explanation of what HIV and AIDS are, see par 1.8.3. For statistics regarding the prevalence of HIV in certain sub-Saharan countries, including South Africa, see Nienaber 2008 *SAJHR* 140-141.

3 Elbe (n 2) 159.

4 Elbe (n 2) 159.

5 Gilbert and Walker 2002 *Science Direct* 2.

6 Hassim *et al Health* 353. 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. Dunkle 2004 *Lancet* 1415. The results of the 17th national

Gender-based violence and gender inequality are repeatedly cited as key determinants of women's risk of contracting HIV, yet empirical research on the probable connections remains insufficient.<sup>7</sup> Dunkle<sup>8</sup> 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, and 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 violence and the vulnerability of women to HIV/AIDS comes from the United States of America.<sup>9</sup>

The purpose of this article is to examine – from a legal perspective - specific cultural factors which increase women's vulnerability and exposure to HIV/AIDS. Related to this topic is the debate between cultural relativism and universalism which encapsulates among other things a historical analysis of human rights and culture; the relationship between human rights and culture; whether or not universalism should trump cultural relativism; and balancing human rights and culture and attitudes on human rights on the one hand and culture on the other. Due to the limited scope of this article, however, the discussion that follows is limited to the interplay between gender inequality, gender violence and HIV/AIDS in the present South African context. The focus will also be on women specifically, as women have traditionally suffered the most in relation to gender inequality and violence.

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HIV and syphilis antenatal sero-prevalence survey indicate an HIV prevalence rate of 28.0% among pregnant women in the age group fifteen to forty-nine years who attend antenatal clinics. Bonthuys and Albertyn *Gender, law and justice* 296. Bonthuys and Albertyn refer to statistics from the Department of Health. See DoH *Survey*. Cameron points out that reliable statistics on the prevalence of the pandemic in South Africa are not easy to find. See Cameron 2006 *Stell LR* 47 at n 1. See also the Department of Health 2006 [www.doh.gov.za/](http://www.doh.gov.za/) Figures indicate that almost one in every three pregnant women in SA 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%.

7 Dunkle 2004 *Lancet* 1416.

8 Dunkle 2004 *Lancet* 1416.

9 Dunkle 2004 *Lancet* 1416.

## 2 The pattern of HIV/AIDS in South Africa

The HIV/AIDS epidemic in South Africa is mainly regarded as a heterosexual type of epidemic.<sup>10</sup> An additional distinctive feature of the pattern of the epidemic is the young age of onset of the infection of women.<sup>11</sup> Young black women are particularly disproportionately affected by the disease.<sup>12</sup> There is a strong link between factors such as low income, high unemployment, violence and poor education with HIV infection.<sup>13</sup> In all of these correlations women emerge as those who are the worst affected.<sup>14</sup> There are of course a number of pre-disposing factors, besides violence that put women at increased risk of becoming infected with HIV. These include a range of biological, psychological, economic 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.

Gilbert and Walker<sup>15</sup> have identified a number of factors that affect the pattern of HIV/AIDS in South Africa. 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 traditional 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, the existence of a settled transport infrastructure allowing for the high mobility of persons and therefore the rapid movement of the virus into new communities.

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10 Gilbert and Walker (n 5) 14. Also see Karim *HIV/AIDS* 35. Also see Epprecht *Heterosexual Africa?* 111, for an extensive discussion on HIV/AIDS as a heterosexual type of epidemic.

11 Gilbert and Walker (n 5) 14.

12 Gilbert and Walker (n 5) 2.

13 Beck *et al HIV Pandemic* 50. Also see Gilbert and Walker (n 5) 14.

14 Gilbert and Walker (n 5) 14.

15 Gilbert and Walker (n 5) 14.

Specific customary practices and habits facilitate the spreading of the virus in South 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; the bride price; wife inheritance (levirate), the prevalence of superstition, and adherence to the culture of silence.

Although the relationship between HIV/AIDS and human rights is not easily understandable, the social and legal status of women in many societies points to the relation between HIV/AIDS and human rights.<sup>16</sup> Some traditions, customs, practices and religions entrench the subordinate position and exploitation of women in marriages and relationships, thereby increasing their vulnerability to HIV infection.<sup>17</sup> The protection of human rights is therefore of the utmost importance in protecting women's interests, in preventing them from becoming infected. and also in eradicating all forms of discrimination and intolerance practised against those living with HIV, their relatives and acquaintances.<sup>18</sup>

### **3 Cultural practices that make women vulnerable to HIV/AIDS**

Traditional practices fulfil a purpose for those who practice them.<sup>19</sup> Although traditional practices may have a positive impact on reproductive health, they may also be harmful.<sup>20</sup> A harmful traditional practice may be so deeply rooted

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16 Gostin and Lazzarini *Human rights* vii-viii.

17 Gostin and Lazzarini (n 16) vii-viii.

18 Gostin and Lazzarini (n 16) vii-viii.

19 Grant 2006 *JAL* 22.

20 Brems *Human Rights* 512. Female genital mutilation is an example of a traditional practice which can be harmful. 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. Additional complications are an increased threat of sterility and infant mortality. Death may result as a direct effect of female genital mutilation. These consequences clearly prevent people from

in a societal group that such a practice can be changed only when the people who practise it understand the danger, risk and indignity of the practice.<sup>21</sup> 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 common in many parts of China.<sup>22</sup> This practice was abolished within one generation.<sup>23</sup>

Curran and Bonthuys<sup>24</sup> argue that there are many cultural practices that enhance women's vulnerability to HIV which have not yet effectively been studied. However, in order to contextualise these practices in the framework of a Western, liberal model, a brief examination of the right to culture is first necessary.

#### 4 The right to culture

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.<sup>25</sup> Van der Vyver<sup>26</sup> emphasises that the provisions in the

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taking pride in their culture. 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-informed, independent, mature, free and real" their assent to FGM is. Yet some cultures persist in defending the practice.

21 Heyns and Viljoen *Impact* 537.

22 Marshall and Keough *Mind, heart, and soul* 160.

23 *Ibid.*

24 Curran and Bonthuys 2005 *SAJHR* 608-609.

25 S 30 and 31 of the *Constitution of the Republic of South Africa* 1996 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, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society." S 31(2): "The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

South African Constitution<sup>27</sup> 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).<sup>28</sup>

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, practise their religion and use their language, thus making the right an individual as well as a community entitlement.<sup>29</sup>

The right to culture articulated in section 30 is expressed in a clause of choice.<sup>30</sup> 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 in the activities of this community.<sup>31</sup> The related duty which falls on the group is to allow access to any person joining.<sup>32</sup> The issue of 'choice' appears to be extremely challenging when applied to the legal and social affairs of a specific cultural community.<sup>33</sup> Importantly, choice does not, however, apply to children, who are individually vulnerable and defenceless.<sup>34</sup> It is during the

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26 Art 27 of the International Covenant on Cultural and Peoples' Rights of 3 January 1986. See also Van der Vyver 2003 *Stell LR* 52.

27 *Constitution of the Republic of South Africa* 1996 (hereafter the Constitution).

28 Art 27 of the International Covenant on Cultural and Peoples' Rights of 23 March 1976 reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

29 Bennett *Customary Law* 87. The aim of protecting and upholding cultural exercise is given additional force by s 185 of the Constitution, which authorises the establishment of a commission for the support and protection of the rights to culture, religion and language. Grant (n 19) 6. Grant further stipulates that the object of the commission is the support of reverence for 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*.

30 Irving *Gender* 238.

31 Bennett (n 29) 87.

32 Bennett (n 29) 87.

33 Irving (n 30) 238.

34 Irving (n 30) 238.

period of childhood that these cultural connections are mostly formed.<sup>35</sup> As women in patriarchal societies have traditionally been accorded the same status as children, they too are vulnerable in respect of certain harmful cultural practices.

Sections 30 and 31 of the Constitution include an explicit reference to other rights by means of a so-called internal limitation clause.<sup>36</sup> It was anticipated that this internal limitation section, which provides that the right to culture cannot be implemented in a way incompatible with any provision of the Bill of Rights, would prevent communities from engaging in harmful practices and would curb the oppressive characteristics of some cultural traditions.<sup>37</sup> The equality clause contained in section 9 of the Constitution poses the greatest challenge to the right to culture generally and hence to the African legal tradition.<sup>38</sup>

The broad extent of the right to culture brings it inevitably in conflict with some laws and other fundamental human rights.<sup>39</sup> Universalist versus cultural relativist questions arise in this context, as well as the issue of global standards versus local values. This topic is controversial predominantly in several African countries where arguments based on resistance to westernisation, as well as the desire to protect cultural standards, are raised time and again in opposition to universalism.<sup>40</sup> In South Africa, the universalist versus culturally relativist argument has been rendered marginal by the Constitution, which is founded on a universalist human rights structure.<sup>41</sup> Hence, the drafters of the Children's Act were faced with the complex assignment of dealing with a very contentious issue in a way that values and promotes the rights and dignity of girl children

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35 Irving (n 30) 238.

36 Bennett (n 29) 89.

37 Bennett (n 29) 89. For a further discussion on s 30 and 31 of the Constitution, see Henard *Minority protection* 115 and Hitchcock and Vinding *Indigenous peoples' rights* 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 it ever anticipated that culture would take precedence over equality. See Bainham *International Survey* 272.

38 Bennett (n 29) 90.

39 Bennett (n 29) 95.

40 Grant (n 19) 2.

41 Grant (n 19) 2.

and young women, including the girl child's right not to be circumcised, while at the same time respecting traditional cultural customs and practices.<sup>42</sup>

The constitutional obligation of courts with regard to customary law is to be found in 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.<sup>43</sup> It is necessary at this point to make it clear that some of the customary practices that this article examines derive from living customary law and not from 'official' (and often distorted) customary law, as it is contained in legislation and legal precedents.<sup>44</sup>

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42 The Act prohibits virginity testing, as well as genital mutilation of female children. S 12(3) of the of the *Children's Act* 38 of 2005 prohibits female genital mutilation and circumcision.

43 This has been affirmed by the courts. See, eg, *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) at par 51. See also Wieland 2005 SAJHR 241-277 under par II. The right to culture has been interpreted by our courts in a number of cases, such as the case of *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051(CC), *Prince v The President of the Law Society Of the Cape of Good Hope & Others* 2) SA 794 (CC); 2002 (3) BCLR 231 (CC), and *Mabena v Letsoalo Mabena v Letsoalo* 1998 (2) SA 1068. The last case 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 the validity of the marriage between their late son and the respondent. The judge 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 fall under the guardianship of their male relatives. 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 as having the capacity officially to contract for and be given *lobolo*. 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 the successors of either of them. Despite acknowledging authors who support the aforementioned position on women, Judge Du Plessis 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 *lobolo* and to give assent to the marriages of their daughters. 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 the 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.

44 Wieland 2005 SAJHR 246 at note 24, explains that the official customary law contained in legislation has over time been influenced and distorted by colonialism and apartheid.

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

## 5 Polygamy, levirate, early marriage and virginity testing

### 5.1 Polygamy<sup>45</sup>

Despite the various advantages associated with polygamy,<sup>46</sup> the practice is often fraught with difficulty within the family circle, not only amid wives, but between the wives and the husband too.<sup>47</sup> Over-protectiveness and jealousy amongst co-wives is one such feature, resulting most likely from fear that the husband does not share his affection and possessions evenly among them.<sup>48</sup>

The major concern resulting from polygamous marriages in South Africa is the problem of HIV/AIDS.<sup>49</sup> It would be wrong to conclude that polygamy is a primarily harmful practice which leads directly to the spreading of HIV/AIDS.

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45 Polygamy has two forms, viz polygyny and polyandry. The first form is actually practiced in South Africa and refers to one husband and more than one wife. The latter form is not practiced in South Africa and refers to one wife and more than one husband.

46 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. Polygamy also contributed to the continued existence of the community, particularly the black community, through a high fertility rate. 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. In this system a man could be guaranteed an heir and the permanence of the lineage without resorting to a divorce. It is also argued that polygamy is practised for the purpose of sexual necessity. 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. The argument that men practice polygamy for the reason that they have a high sex drive must be rejected. Not only is there no biological evidence supporting this theory, but it also ignores the reality that in most traditions and cultural practices the husband may have many sexual relationships out of wedlock. A lengthy post-partum sex taboo is cited as one of the reasons for the practice of polygamy. This argument is theoretically and empirically more sound than the sex-drive thesis. The post-partum sex taboo is 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. Polygamy also enables females to marry where females outnumber marriageable males. See Nkosi 2007 *IJARS* 206. See also Cook 2007 *JBS* 236-239, Moller and Welch *Polygamy* 5-7, 14; Zeitzen *Polygamy* 61 and Wesley *et al Culture* 226-229.

47 Al-krenawi 1998 *Family Process* 68.

48 *Ibid.*

49 Zeitzen (n 46) 176. This same issue is also raised by Viljoen and Stefiszyn *Human rights protected* 252.

The manner, however, in which persons in polygamous marriages conduct themselves may facilitate the spreading of HIV. There are more potential victims of HIV/AIDS in a polygamous family circle than in a monogamous union.

Infidelity within a polygamous marriage is a clear divergence from what is traditionally required by the official customary values of polygamous marriages.<sup>50</sup> The recently emerged "affluent polygamy"<sup>51</sup> is practised not in accordance with the norms of the original African tradition but in a rebellious way, by flouting the original values of polygamy. Nwoye<sup>52</sup> submits that this type of polygamy is becoming more popular in most African cities in Southern Africa. Infidelity is a characteristic feature of affluent polygamy. This type of polygamy places the women involved in these relationships at a high risk of contracting HIV/AIDS.

The manners in which HIV may be spread by members in polygamous unions are manifold. The husband in a polygamous marriage may be the source of the virus.<sup>53</sup> This usually happens when the family or the men migrate to urban areas in search for employment.<sup>54</sup> 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 on to all of their wives at home upon their return. The women in the polygamous marriage may in turn also have extra-marital sexual encounters which would expose all of them 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.<sup>55</sup> The 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

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50 Nwoye 2007 *Dialectical Anthropology* 383-384.

51 *Ibid.*

52 *Ibid.*

53 Zeitzen (n 46) 176.

54 *Ibid.*

55 *Ibid.*

families.<sup>56</sup> The extent of infection among these children is much higher than otherwise, 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 behaviour of other members within their family circle.<sup>57</sup> The fear of being infected has led some women to oppose polygamy on the basis that it places them at a high risk not only of contracting HIV, but also of contracting a variety of other sexually transmitted diseases. Women across Africa have begun asking if a man really has a right to have more than one wife in the context of the HIV/AIDS pandemic.<sup>58</sup> In Swaziland, where almost forty percent of the population is HIV-positive, protest against polygamy is at its peak.<sup>59</sup> The king of Swaziland has more than nine wives and traditionally chooses a new bride each year.<sup>60</sup>

Customary marriages, and by implication polygamy, are now regulated by the *Recognition of Customary Marriages Act*.<sup>61</sup> 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*.<sup>62</sup> Although the transfer of the bride as one of the requirements is not specifically regulated by the *Recognition of Customary Marriages Act*, it can be regarded as a custom in terms of section 3(6) of the same 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*,<sup>63</sup> where the court was asked to consider if this custom (*ukumekeza*) was a legal

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56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 Patterson *African State* 109.

61 *Recognition of Customary Marriages Act* 120 of 1998, s 2(3) and 2(4). S 2(3) recognises all polygamous marriages concluded before the commencement of the *Recognition of Customary Marriages Act*, whereas s 2(4) provides for the conclusion of polygamous marriages after the commencement of the Act. However, these marriages must comply with the requirements of this Act.

62 For a discussion of these requirements, see Herbst and Du Plessis 2008 *EJCL* 5-8.

63 2003 (4) SA 218 (KH).

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. However, as the constitutionality of the custom was not in dispute (but rather whether the parties were married or not and if a divorce decree could be granted), the question of the constitutionality was never answered.<sup>64</sup>

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,<sup>65</sup> 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,<sup>66</sup> 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.<sup>67</sup>

## 5.2 *Levirate*

*Unkungena* or the levirate union is a custom that is practised 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 to preserve the relationship between the families

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64 *Mabuza v Mbata* at 226 [C]-[E].

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

66 S 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.

67 See in general, Mothokoa 2004 *SAJHR* 616-641.

that was initiated in the original marriage.<sup>68</sup> In the Zulu culture, the practice allows a male relative to marry his sister-in-law or the widow of his brother.<sup>69</sup> The custom is also referred to as "marriage by inheritance".<sup>70</sup>

The fundamental nature of a customary marriage involves not only the union between two spouses but includes 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.<sup>71</sup> Since a male relative may marry the divorced and widowed wife of his brother,<sup>72</sup> the chances are that a brother who inherits a wife from his brother whose cause of death was AIDS may pass the virus on 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 support. This practice could also force women into unwanted marriages and 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.

### **5.3 Early marriage and virginity testing**

In a so-called gerontocratic society, wives may inadvertently become the principal source of the carrying and spreading of HIV.<sup>73</sup> In a gerontocratic

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68 Curran and Bonthuys (n 24) 628-629.

69 Nkosi (n 46) 210.

70 Werner 1928 *JIAI* 416.

71 *Ibid.*

72 Nkosi (n 46) 210.

73 Zeitzen (n 46) 176.

society, older men marry young girls.<sup>74</sup> In most African societies this practice is known as early marriage. Some of these young women often have young lovers of their own age.<sup>75</sup> These old bachelors may, in turn, be involved with commercial sex workers or they may have affairs with a number of married women,<sup>76</sup> which places them at high risk of contracting HIV. The virus may consequently be passed on to both of the other sex partners, who themselves may be in polygamous relationships,<sup>77</sup> or those young girls, if they are not already infected. The young bride herself may perhaps be the source of the virus herself, and may then transmit 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.<sup>78</sup> There are also reports of increasing activity in schools in the Eastern Cape and in Mpumalanga.<sup>79</sup> A higher value is traditionally placed on virgin brides, as 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.<sup>80</sup> It is submitted that the opposite is in fact true: as the process heavily stigmatises those children found to be impure as a result of sexual abuse.<sup>81</sup> 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.<sup>82</sup>

The reality of the existence of the practice of virginity testing in South Africa is evidenced by the responses to this practice by human rights and women's

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74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 Leclerc-Madlala 2003 *Agenda* 17-18.

79 Richter *Sexual abuse* 136.

80 Leclerc-Madlala (n 78) 20.

81 See Curran and Bonthuys (n 24) 624; Participating in Public Policy 2009 [www.cplo.co.za/](http://www.cplo.co.za/)

82 Curran and Bonthuys (n 24) 624.

advocacy groups, with the Commission on Gender Equality, for example, describing the testing as discriminatory, invasive of privacy, unfair, impinging on the dignity of young girls, and unconstitutional.<sup>83</sup> Parliamentary and public hearings responding to the draft Children's Bill were extremely critical of female genital mutilation and virginity testing as examples of harmful cultural practices.<sup>84</sup>

#### 5.4 *Primogeniture*

The process of an inheritance going to a specific male heir instead of to a wife is known as primogeniture. The principle of primogeniture places women and extra-marital children under the guardianship of an heir.<sup>85</sup> In terms of this principle, women are not entitled to share in the intestate succession of a deceased estate.<sup>86</sup> The heir, however, has a duty to discharge support of the widow.<sup>87</sup> The elimination of women from heirship and subsequently from being able to inherit property was in observance with a patriarchal structure which subjected women to a position of "subservience and subordination."<sup>88</sup> Within such a system women were looked upon as perpetual minors under the guardianship of their fathers, their spouses, or the head of the extended family.<sup>89</sup> Extra-marital children were not permitted to inherit their father's estate under customary law.<sup>90</sup> They were nevertheless competent to inherit in their mother's family unit, subject to the principle of primogeniture.<sup>91</sup>

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83 Richter (n 79) 136.

84 See Participating in Public Policy 2009 [www.cplo.co.za/](http://www.cplo.co.za/)

85 Van Niekerk 2005 *Obiter* 476. Before the operation of the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*, s 23 of the *Black Administration Act* endorsed the principle of primogeniture. In the cases of *Bhe v The Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA 2005 (1) BCLR 1 (CC)* the practice of primogeniture was under scrutiny. The practical consequence of this customary practice works to the detriment of women when a family's communal estate is entrusted to a remote family member of a deceased, and this heir does not carry out his customary law responsibility of maintenance in terms of the practice.

86 *Bhe v The Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA 2005 (1) BCLR 1 (CC)* at 28 par [77] [C] (hereafter the *Bhe* case).

87 Bradshaw and Ndegwa *Uncertain promise* 289.

88 *Bhe* case at 28 par [78] [E].

89 *Bhe* case at 28 par [78] [E].

90 *Bhe* case at 28 par [79] [F].

91 *Bhe* case at 28 par [79] [F].

The outcome of this judgement is highly significant for the reason that it regarded the customary law rule of primogeniture as unconstitutional, invalid, and discriminatory against women and extra-marital children. The *Bhe* case verdict resulted in the ending of an unfair customary practice which embedded unfairness and which fossilised indigenous law.<sup>92</sup> It is also a significant step in doing away with legal pluralism founded on unfairness.<sup>93</sup> The outcome of the decision in the *Bhe* case has been welcomed by most legal scholars.<sup>94</sup>

In his minority judgement in *Bhe v The Magistrate, Khayelitsha and Others*,<sup>95</sup> Ngcobo J described the concept of succession, in particular the rule of primogeniture, in 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, originated and functioned.<sup>96</sup> The duty to care for the family is imperative and is an essential role in the African social system.<sup>97</sup>

The promulgation of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*<sup>98</sup> introduces a shift from the succession principle of primogeniture to the devolution of intestate estates, which takes all children and spouses into account.<sup>99</sup> This fundamental change is in line with

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92 Van Niekerk (n 85) 475.

93 *Ibid.*

94 *Bhe* case. See Van Niekerk (n 85), Schoeman-Malan 2007 *PER* 1-33.

95 *Bhe* case at 28 par [162] [E].

96 *Bhe* case at 28 par [164] [E].

97 *Bhe* case at 28 par [164] [F].

98 *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009, published in GG 32147 of 21 April 2009.

99 S 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."

the Constitution since its provisions are consistent with the notions of equality and human dignity.<sup>100</sup>

Despite the above legal developments, however, primogeniture is still practised. 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 practice whose 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.

### **5.5 Female genital mutilation**

Female circumcision or excisions are terms used interchangeably with female genital mutilation (hereafter referred to as FGM).<sup>101</sup> FGM is also known as genital cutting.<sup>102</sup> FGM is a collective name relating to a number of diverse traditional rituals that involve the physical disfigurement connected with this exercise.<sup>103</sup> FGM is predominantly practised in sub-Saharan countries and in Egypt.<sup>104</sup> Of the forty-three African countries, twenty-six practise FGM.<sup>105</sup> It is also said to be practised among certain communities in the Middle East and Asia, including parts of the United Arab Emirates, Yemen, India, Indonesia, and Malaysia.<sup>106</sup> In 2004 it was reported that eighty-nine percent of the total population of women in Sudan were circumcised.<sup>107</sup> FGM is practiced by

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100 S 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.

101 Richmond and Gestrin *Into Africa* 46.

102 McMichael *Development* 265.

103 See AAP 1998 [aappolicy.aappublications.org/](http://aappolicy.aappublications.org/)

104 Richmond and Gestrin (n 101) 46.

105 See RHO 2008 [www.rho.org/](http://www.rho.org/)

106 *Ibid.*

107 McMichael (n 102) 265

Muslims, Christians and one Jewish sector, the Falasha of Ethiopia.<sup>108</sup> It is also practised in some communities in North and South America.<sup>109</sup>

Some non-governmental organisations (such as *No Peace without Justice*, an Italian non-governmental agency) aim to have FGM abolished.<sup>110</sup> According to this organisation, approximately 120 to 130 million women worldwide have undergone FGM.<sup>111</sup> Contrary to the popular belief that female genital mutilation is not widely practiced in South Africa, evidence suggests the opposite.<sup>112</sup> Experts report that almost all of the 120 million women who were subjected to FGM come from twenty-eight countries, including South Africa.<sup>113</sup>

Women presenting with symptoms of complications arising as a result of female genital mutilation are seen with increasing frequency in South Africa.<sup>114</sup> During a seminar on harmful traditional practice, in March 2009, the then Minister of Health, Tshabalala-Msimang, remarked that female genital mutilation has been introduced into South Africa from the rest of Africa through the migration of refugees. Some scholars submit that female circumcision is practised as an initiation process among most Xhosa groups.<sup>115</sup>

Female circumcision is symbolically analogous to male circumcision.<sup>116</sup> The difference between male and female circumcision is that female circumcision is far more extensive and its consequences are physical, psychosomatic, violent and long-lasting.<sup>117</sup>

FGM involves a procedure in which parts of girls' external genitals are expurgated without anaesthesia. The girls subjected to this procedure experience pain and trauma, and regularly experience severe physical

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108 Richmond and Gestrin (n 101) 46.

109 See Businge 2007 [www.ugpulse.com/](http://www.ugpulse.com/)

110 *Ibid.*

111 *Ibid.*

112 See Teyise 2004 [www.health-e.org.za/](http://www.health-e.org.za/)

113 Gutto *Equality* 86.

114 Teyise 2004 [www.health-e.org.za/](http://www.health-e.org.za/)

115 SAHO 2008 [www.sahistory.org.za/](http://www.sahistory.org.za/)

116 Richmond and Gestrin (n 101) 46.

117 Richmond and Gestrin (n 101) 46.

problems such as blood loss, infections or even death.<sup>118</sup> The age at which this ritual takes place differs from place to place.<sup>119</sup> In Ethiopia the required age for the ritual to be performed is seven days after birth,<sup>120</sup> whereas in Somalia the ritual is performed between the ages of six and seven years.<sup>121</sup>

Among Africans the procedure is said to be requested by a child's parents or conservative grandparents.<sup>122</sup> Such parents and grandparents see this procedure as a rite of passage which transforms a girl into a woman.<sup>123</sup> 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.<sup>124</sup>

Normally a village expert, lay person, or midwife performs 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.<sup>125</sup> In developed countries doctors may be required to carry out FGM in sterilised conditions and making use of anaesthesia.<sup>126</sup>

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.<sup>127</sup> The legislation also mandated the 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

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118 Richmond and Gestrin (n 101) 47.

119 Denniston and Mibs *Sexual mutilations* 140.

120 *Ibid.*

121 *Ibid.*

122 Richmond and Gestrin (n 101) 47.

123 *Ibid.*

124 *Ibid.*

125 See AAP 1998 [aappolicy.aappublications.org/](http://aappolicy.aappublications.org/)

126 *Ibid.*

127 Richmond and Gestrin (n 101).

fact that the practice presents a risk to the spread of the HIV.<sup>128</sup> Researchers in Ethiopia who studied the probable connection between FGM and HIV/AIDS<sup>129</sup> established that there is a crystal clear risk, especially in cases where FGM is practised as an initiation rite in conditions where the same unwashed and unsterilised knives are used in the process of operating on all of the victims.<sup>130</sup> The health risks associated with the use of the crude equipment that circumcisers use to deform girls should be widely communicated.<sup>131</sup> If the utilisation of these tools is not stopped, they become instruments causing death and serious physical and psychological harm to innocent young girls in the name of culture and tradition.<sup>132</sup>

From a human rights perspective, FGM constitutes an abuse of women's rights, including an impairment of women's sexual pleasure, physical health and physiological health that is extremely invasive and uncalled for.<sup>133</sup> It places them at risk of contracting HIV/AIDS.

### **5.6 The practice of dry sex**

Dry sex is also known as vaginal drying.<sup>134</sup> Literature on dry sex suggests that dry sex is widely practised by women<sup>135</sup> for hygienic purposes.<sup>136</sup> This practice entails the artificial drying of the vagina for the sexual gratification of males.<sup>137</sup> The purpose of vaginal drying is to make sure that the vagina is "hot, tight and dry."<sup>138</sup>

Despite the dangers associated with this practice for HIV transmission, people continue to practise dry sex. In an interview conducted amongst sex workers who practice dry sex, thirty-three percent of the sex workers remarked that dry

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128 Denniston and Mibs (n 119) 140.

129 *Ibid.*

130 *Ibid.*

131 Karanja *Female genital mutilation* 65.

132 *Ibid.*

133 McMichael (n 102) 265.

134 Kitts *et al Health gap* 73.

135 Davis and Tschunin *Nursing ethics* 295.

136 Karim (n 10) 291.

137 *Ibid.*

138 Baleka 1998 *Lancet* 1292.

sex is a painful customary practice.<sup>139</sup> In spite of the painful process, it is continued in an attempt to attract male clients<sup>140</sup> who in turn pay higher prices for sex offered by sex workers who engage in this practice.<sup>141</sup> Eighty-six percent of women in Tanzania who were randomly interviewed in relation to dry sex admitted to practising dry sex.<sup>142</sup> In South Africa, KwaZulu-Natal is the province in South Africa where dry sex is mostly practised. It is incidentally also the area with the highest prevalence of HIV/AIDS in South Africa.<sup>143</sup>

Despite the fact that dry sex is practised to please male sex partners and clients, dry sex is also reported to be practised to remove the wetness in the vagina caused by *depo provera*, a contraceptive injection, which leads to increased vaginal wetness.<sup>144</sup> Some men are said to complain about this excessive wetness.<sup>145</sup> Certain women hence remove the excess wetness through the practice of vaginal drying<sup>146</sup> or alternatively by failing to continue with the contraceptive injection. Both of these actions have dire consequences for their exposure to HIV. The danger inherent in the practice can be summarised as follows:

- Dry sex generates conditions where friction of the genital area is highly probable.<sup>147</sup> The substance used by women may cause disturbances in the membrane lining the vagina and the uterine wall.<sup>148</sup>
- Friction in the genital organs correlates with irritation of the white cells causing optimum exposure to HIV.<sup>149</sup>

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139 Karim (n 10) 291.

140 *Ibid.*

141 Segal *Banyan tree* 188. See also Baleka (n 138) 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.

142 Baleka (n 138) 1292.

143 *Ibid.*

144 Davis and Tschunin (n 135) 295.

145 *Ibid.*

146 *Ibid.*

147 Davis and Tschunin (n 135) 295.

148 Baleka (n 138) 1292.

149 Davis and Tschunin (n 135) 295.

- Dry sex is linked with the failure or reluctance to use condoms, while condom usage is linked with a decrease in HIV transmission.<sup>150</sup>
- Dry sex wipes out the bacteria which assist in fighting infection.<sup>151</sup>
- The practice also increases the likelihood that a condom may be torn.<sup>152</sup>

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.

## 6 Human rights implications

The legal impact of the Constitution on practices that increase women's vulnerability to HIV is threefold: First, the Constitution is considered to be the supreme law in South Africa, and any legislation that is irreconcilable with it is invalid to the extent of the conflict.<sup>153</sup> Second, according to section 39 of the Constitution, the Bill of Rights applies to all law and binds the executive, legislature, judiciary and all organs of state. Every court, tribunal or forum must promote the spirit and objects contained in the Bill of Rights in the interpretation of legislation and the development of the common law.<sup>154</sup> Third, the Bill of Rights instructs the state to use the power that the Constitution provides for in ways that do not violate fundamental rights.

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150 *Ibid.*

151 Alcamo *AIDS* 136.

152 *Ibid.*

153 S 2 of the Constitution 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."

154 S 39 of the Constitution reads as follows: "39(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 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."

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 cultural practices 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 raise serious questions regarding the conformity of these cultural practices with human rights instruments, and specifically the South African Constitution.

Turning first to the right to equality, the discussion above clearly indicates 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 prohibits discrimination by the state or any other person on *inter alia* the grounds of gender, age and race.<sup>155</sup> Equality is said to be at the centre and heart of the Constitution as well as its organising principle.<sup>156</sup> The Constitution is irreconcilable with any laws and practices that support the subordination of disadvantaged groups and undermine their worth.<sup>157</sup> It follows that any law, practice or rule which is founded on the notion of the inferiority of women should be condemned.<sup>158</sup> The cultural practices discussed above

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155 S 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."

156 Kommers *American constitutional law* 995.

157 O'Sullivan "Reproductive Rights" 37-12.

158 In *Harksen v Lane* 1997 (11) BCLR 1489 (CC) the criteria in determining if the equality clause may in fact be invoked, requires an inquiry into the fact of whether there is differentiation between people or categories of people. If such differentiation exists, it must be determined if there is a rational connection to a legitimate government purpose. The court went on to say that even if there is such a rational connection it might nevertheless still amount to discrimination. The second step is to distinguish if the differentiation amounts to unfair discrimination, which requires a three-stage analysis: Firstly, it must be established if the differentiation amounts to discrimination. The court was of the opinion that, if the allegation of unfair discrimination is not based on a listed ground, it must be

clearly point to the family as a unit of male dominance, the location of severe disadvantage for women and the main site of women's oppression. Of the two sexes, women remain severely disadvantaged in these contexts.

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".<sup>159</sup> In *Carmichele v Minister of Safety and Security*<sup>160</sup> it was said that human dignity is a central value of the objective, normative value system. 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 on their right to human dignity. 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 legal position of a large number of rural women is exacerbated by their socio-economic position, which is characterised by poverty and the lack of basic resources.

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resolved objectively whether the ground is based on "attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably adverse manner". Secondly, it must be found that if it amounts to discrimination, such discrimination is unfair. If it is found to be on a listed ground (in this case disability), then the court will presume unfairness (s 9(3)). However, if on an unspecified ground the test of unfairness primarily focuses on the impact of the discrimination on the complainant and other people in the same situation. Thirdly, if the discrimination is found to be unfair, it must be determined if it can be justified under the limitation clause (s 36 of the Constitution).

159 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 Oak* (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 Morgenthaler* (1998 31 CCR 1 at 82) that all other rights and freedom guaranteed in the Canadian Charter find expression in the right to dignity.

160 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

Section 12 of the Constitution provides for the right to freedom and security of the person.<sup>161</sup> This right safeguards the physical and psychological integrity of human 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)). For the purpose of this article, section 12(2)(b) of the Constitution is very important. This section creates a subject of "individual inviolability with two components": "security in" and "control over" one's body. "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.<sup>162</sup>

Femicide and rape have become crucial global problems.<sup>163</sup> The high rate of rape, sexual exploitation, compelled sex, sexual threats and marital violence in South Africa indicates that marital exploitation and family violence is a persistent and commonly concealed act. Violent behaviour within the family is organised, persistent and predominantly gender-oriented.<sup>164</sup> Some 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 their partners against their will.<sup>165</sup> In some instances, women are reluctant to request

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161 S 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 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."

162 In the case of *S v Xaba* 2003 (2) SA 703 at 708, par [H], 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 to make choices that are in their personal interest and to function as 'responsible moral agents'. It is significant that s 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. See Bishop "Baedeker" 40-88.

163 Kramarae and Spender *Encyclopaedia* 703.

164 O'Sullivan (n 157) 37-16.

165 O' Sullivan (n 157) 37-17.

that partners wear condoms out of fear of a violent reaction or of being accused of promiscuity.

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, as opposed to women in peaceful affiliations.<sup>166</sup> 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") makes it clear that decisions regarding one's body relate to both a physical and psychological dimension.<sup>167</sup>

The history of reproductive rights in South Africa shows a "pervasive, highly invasive regulation" of women's reproductive capacity.<sup>168</sup> Women were under the patrimonial control of their spouses and downgraded to the position of perpetual minors.<sup>169</sup> They were given the same rank as guardian of their own offspring's up until 1993.<sup>170</sup> In terms of racist guidelines under the apartheid administration, the reproductive rights of some black women were severely undermined by the use of an injection which controlled and suppressed fertility, the latter an additional grave invasion of their bodily integrity, dignity and equality.<sup>171</sup> As recently as 1996, abortion could be performed only under very limited circumstances.<sup>172</sup> Women carried foetuses against their will and as a

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166 *Ibid.*

167 Eg, 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 to unwanted pregnancy. Both of these results have serious physical and mental consequences.

168 O'Sullivan (n 157) 37-17.

169 See Sinclair "Family rights" 566-570. One such example is the repealed s 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.

170 O' Sullivan (n 157) 37-17.

171 *Ibid.* Many rural women (wives or partners of farm workers or farm workers themselves) were often transported by their employers to local clinics where they received monthly injections to prevent them from falling pregnant.

172 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 Sterilisation Act* 2 of 1975. Before the enactment of the *Abortion and Sterilisation Act*, abortion law in SA was regulated by the common law which allowed the performance of abortion only when the

result had to resort to unsafe abortions.<sup>173</sup> 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 inflicts severe potential hardship on them in the form of either unwanted pregnancies or the 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 of these effects arise from women's inequality in the private sphere.

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. Section 27 of the Constitution protects the right to access to health care services, which include reproductive health care.<sup>174</sup> This right is, however, limited internally by section 27(2), which says that the state must take reasonable and legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.<sup>175</sup> 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.<sup>176</sup> The

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mother's life would be endangered by the continued pregnancy. The limited circumstances under which abortion was allowed made it practically impossible for black women to obtain lawful abortions. For a detailed study on these circumstances, see Slabbert *Human embryo and foetus* 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 woman during the first twelve weeks of pregnancy. For a critical analysis of this Act, see Slabbert *Human embryo and foetus* 139-153. Slabbert argues that the insertion of s 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 article 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 women carrying unwanted pregnancies to terminate such pregnancies within a prescribed time.

173 It is estimated that 200 000 women worldwide die each year as a result of illegal and unsafe abortions. See WHO *Coverage of maternity care* 12.

174 S 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."

175 S 27(1)(a) and s 27(2) of the Constitution.

176 Cameron (n 6) 82. See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) All SA 268 (CC); *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC), and *Minister of Health v TAC* (1) 2002 (10) BCLR 1033 (CC).

decision in the case of the *Treatment Action Campaign* demonstrates that the Constitution operates as an influential tool in the hands of civil society to guarantee that the government pays appropriate attention to the essential needs of the poor, the vulnerable and the marginalised.<sup>177</sup> The justification of the right to have access to health care services in the *TAC* judgment to a great extent also confirmed public responsibility to lessen the burden of HIV/AIDS.<sup>178</sup> 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.<sup>179</sup>

There are many illiterate women 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. Having their HIV-status disclosed is another dilemma, as this puts 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.<sup>180</sup> Although the *TAC* judgment has led to a great improvement in the position of HIV-positive women, many women 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 take either nevirapine or anti-retroviral drugs upon the disclosure of their status to their partners and husbands. Pieterse<sup>181</sup> points out that the health status of a person

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177 Cameron (n 6) 87.

178 Pieterse 2008 *SALJ* 570.

179 *Ibid.*

180 Cameron (n 6) 81.

181 Pieterse (n 178) 555.

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.<sup>182</sup>

In addition, 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.<sup>183</sup> It is important to note in this regard that the Children's Act explicitly prohibits early marriage.<sup>184</sup> No child below the minimum age set for marriage (which is twelve years for girls and fourteen years for boys) may be given away in marriage or engagement.

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.<sup>185</sup> 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.<sup>186</sup> This is due to the young girl's unripe cervix and the low vaginal mucus production.<sup>187</sup> There appears to be 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.<sup>188</sup> Beliefs like these add to the phenomenon of men selecting brides significantly younger than ten and eleven years old. Sadly, being labelled a virgin may also increase the young girl's vulnerability to sexual assault or rape. To exacerbate this situation the young bride is expected to take on her new duties as wife immediately after the marriage.<sup>189</sup> Her schooling thus comes to an abrupt end.

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182 *Ibid.*

183 Packer *Change tradition* 25.

184 S 12 of the *Children's Act* 38 of 2005 reads as follows: "(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. (2) A child - (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement."

185 Packer (n 183) 25.

186 Packer (n 183) 27.

187 *Ibid.*

188 Leclerc-Madlala (n 78) 17-18.

189 Packer (n 183) 77.

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. Such a practice obstructs the girl child's right to education, which is imperative for the acquisition of the knowledge of important facts, the advance of the ability of independent consideration, and the formulation of opinion. The infringement of the right to education is closely related to other violations of rights.

## **7 Conclusion**

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 ingrained social and cultural roles, stereotypes, superstition, ignorance, fear, and poverty.

Customary law, like any other law, is open to change and resistance and needs to adapt to keep up with social and other developments. It is ironic that the purpose of a specific custom may initially indeed have been to provide financial security or stability for women and children, but that the effect of the practice may have changed over time to the opposite, resulting in discrimination against vulnerable and marginalised groups in society. Although this is outside the scope of this article, 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.

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 of 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, and the levirate, also increase women's vulnerability to HIV. 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 interrelated 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 the 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. The brief reference to the rights to equality, dignity, education, access to health care services and freedom and the security of the person sketches a clear picture of how absent the realisation of these rights is from the lives of some women. The right to education is often neglected in a discussion of this nature. The right to education is one of the most important instruments through which not only HIV/AIDS may be addressed, but also the problem of gender violence. Young girls are the most affected by the lack of education: they are the ones who stay 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;<sup>190</sup> they are often

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190 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, thereby becoming infected. Thus, they pay many times over the

forced into marriages at an early age; they are more vulnerable to contracting HIV as a result of "dry sex" or female genital mutilation.

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 (via the mass media, peer education, and counselling) that focuses on factors that may reduce the risks of HIV-infection (including information on customary practices that contribute towards women's exposure to HIV and women's inequality).

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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 of the locks that are keeping girls out of school – from poverty to inequality to conflict – lies in basic education for all. See UN 2000 [www.un.org/](http://www.un.org/)

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### **List of abbreviations**

AIDS	Acquired Immune Deficiency Syndrome
ch	chapter(s)
FGM	female genital mutilation
FGM	Female Genital Mutilation
HIV/ADS	human immunodeficiency virus
ICCPR	International Covenant on Cultural and Peoples' Rights
par	paragraph(s)
reg	regulation(s)
s	section(s)
TAC	Treatment Action Campaign