

Regional Issue Brief:

WOMEN, HIV AND THE LAW

For the Africa Regional Dialogue
of the Global Commission on HIV and the Law

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Regional Issue Briefs and video of the Africa Regional Dialogue are available on the Commission's website at www.hivlawcommission.org.

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Abbreviations

ACHPR	African Commission on Human and People's Rights
AIDS	Acquired Immune Deficiency Syndrome
ARASA	AIDS and Rights Alliance of Southern Africa
ART	Anti-retroviral Treatment
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
DRC	Democratic Republic of Congo
ESA	East and Southern Africa
FGM	Female genital mutilation
HEARD	Health Economics and HIV/AIDS Research Division
HIV	Human Immunodeficiency Virus
HRI	Her Rights Initiative
NGO	Non-governmental organisation
NSP	National Strategic Plan on HIV/AIDS
PEP	Post-exposure prophylaxis
PMTCT	Prevention of mother-to-child transmission of HIV
SADC	Southern African Development Community
STI	Sexually Transmitted Infection
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV and AIDS
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
WCA	West and Central Africa
WHO	World Health Organisation



1. Introduction

The feminisation of the Human Immunodeficiency Virus (HIV) epidemic is attributed to women's greater physiological vulnerability to HIV as well as to structural drivers such as gender inequities, poverty, cultural, sexual and gender norms, limited access to services, a lack of education, and violence against women. Gender inequality plays a key role in increasing women's risk of HIV exposure, exacerbates the negative influence of HIV on women, and undermines national responses to protect women from HIV infection.¹ Discrimination, exclusion and social marginalisation feeds into and is further aggravated by the HIV epidemic. In addition, the HIV epidemic makes worse gender inequalities, increasing the vulnerability of affected women and young girls, to violations of their basic human rights.

Women and girls in Africa experience daily discrimination, inequality, exclusion and injustice in their families, communities and societies. Of particular concern are the ongoing high levels of physical and sexual violence against women.² A World Health Organisation (WHO) study found that many women have traumatic first experiences of sexual intercourse, with the prevalence of forced first sex among adolescent girls younger than 15 years ranging between 11% and 45% globally.³ In Swaziland, which has one of the highest levels of HIV prevalence, a 2007 study showed that 33% of females 13–24 years old reported experiencing some form of sexual violence before reaching 18 years of age.⁴

Women may be subject to violence or harmful practices such as widow cleansing, female genital mutilation (FGM), and early marriage, increasing their risk of HIV transmission. Women living with HIV may be refused services, or may avoid using existing health care services due to discriminatory practices (such as forced sterilisation) or due to fear of violence and abandonment if their HIV status becomes known. They may fear disclosing their HIV status, losing the potential support of families and communities in the process.⁵

This is particularly so for marginalised women, such as sex workers, women and girls from racial and ethnic minorities, indigenous women and girls, domestic and migrant workers, women in conflict settings, women and girls living with HIV, lesbians, transgender women, women in prison, women with disabilities, and women who use drugs, amongst others.⁶ According to the Global Coalition on Women and AIDS, sex workers risk harassment, violence or sexual abuse, often at the hands of law enforcement officials. In Namibia, more than half of sex workers report having been beaten or raped. People who use drugs are frequently harassed and abused, often by police officers with research showing that female drug users being at the greatest risk for violence.⁷ Women with disabilities have even lower access to health care services, including HIV prevention and face multiple levels of discrimination in daily life.

In this context, law and policy has a crucial role to play in the national response to HIV. A protective legal and regulatory environment that respects, protects, promotes and fulfils the rights of all women, particularly those of marginalised women's rights to equality, freedom and security in their private and public rights, as well as access to basic services such as education, reproductive health, social assistance and fair labour, arguably reduce women's risk of HIV exposure.⁸ This requires countries to take steps such as abolishing all discriminatory laws, promoting young girls' access to education, ensuring women's legal rights to access to land, property and inheritance rights and providing employment and workplace protections. It furthermore requires protection from violence and sexual abuse and the prohibition of customary laws and practices that are harmful to women. Without protection of their human rights, including reproductive health rights, women's ability to protect themselves from HIV infection is limited - they may not have access to adequate and accessible information or HIV prevention measures (such as male and female condoms), and other important health services.

1 UNAIDS (2010), *Report on the Global AIDS Epidemic 2010* available at http://www.unaids.org/documents/20101123_GlobalReport_em.pdf

2 UNDP (2011), *Technical Paper for High Level Meeting on Gender, Namibia*.

3 UNAIDS (2010), *Report on the Global AIDS Epidemic 2010* available at http://www.unaids.org/documents/20101123_GlobalReport_em.pdf

4 Ibid.

5 Health Economics and HIV/AIDS Research Division (HEARD), 2010.

6 UNDP (2011), *Technical Paper for High Level Meeting on Gender, Namibia*.

7 UNAIDS (2011), *AIDS at 30*, available at <http://www.unaids.org/en/resources/unaidspublications/2011>

8 UNAIDS (2011), *Getting to Zero*, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/JC2034_UNAIDS_Strategy_en.pdf

HIV-related and health laws can furthermore help to ensure that women with HIV are not discriminated against, that they have access to appropriate sexual and reproductive health services, and that national responses include the participation of, and prioritise the specific needs of women and young girls in the context of HIV and the Acquired Immune Deficiency Syndrome (AIDS).⁹ Finally, national frameworks that exclude punitive and coercive laws in the context of HIV and AIDS help to create an enabling framework that reduces discrimination and promote access to services for women.¹⁰ A protective national legal framework needs to promote all women's access to justice, so that they may access and enforce their various rights.¹¹

9 UNAIDS (2006), *International Guidelines on HIV/AIDS and Human Rights*, available at http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf

10 UNAIDS (2011), *Getting to Zero*, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/JC2034_UNAIDS_Strategy_en.pdf

11 UNDP (2011), *Technical Paper for High Level Meeting on Gender, Namibia*.

2. Structure, methodology and limitations

This paper explores positive and negative legal and policy environments in the context of women and HIV by analysing gender equality legislation and policies, and by providing a brief gender-conscious overview of specific HIV-related health legislation and policies in sub-Saharan Africa. The paper covers the regions of the continent most affected by HIV and AIDS, and is divided into several parts, each determined by the main challenges related to women in Africa. *Chapters 3 and 4* provide brief background information on the HIV situation among women in Africa, and give a very short review of international and regional standards related to gender equality and responses to HIV among women. *Chapter 5* is dedicated to exploring constitutional and statutory guarantees of gender equality, their implementation, and the way in which general public health laws protect women's rights to equitable access to health care services, including HIV prevention, treatment and care. It also briefly explores the situation of women who face multiple vulnerabilities, such as sex workers, women who use drugs, minorities, etc. The following parts are dedicated to specific areas where women experience inequalities affecting their HIV vulnerability. *Chapter 6* provides an overview of legislation and practices that may reinforce discrimination against women in the context of personal laws, such as marriage and family laws, inheritance laws and property laws. *Chapter 7* explores laws, policies and implementing practices governing sexual and reproductive health rights of women and girls, and *chapter 8* provides an analysis of laws and policies protecting women from violence, including sexual violence. The paper examines positive and negative examples of relevant laws and policies and provides a brief analysis of their possible influence on women in the context of HIV. Some chapters are divided into several sub-sections, which aim to provide a picture of the laws, law enforcement practices, and positive and negative aspects of the legislative framework on the topic. Legislation, policies and implementing practices, which raise potential problems are discussed in the 'areas of concern' section. A short explanation of why certain policies may be harmful for individual human rights and public health goals is provided, as well as links to international standards.

The study is based on a desk review of literature, United Nations (UN) and other international organisations' policy briefs, reports and analytical papers, analyses of selected statutes, judicial precedents and law enforcement practices. The study does not aim to provide a comprehensive overview of the legislation, policies and enforcement practices in all countries of the region. Rather, the aim of the report is to provide examples of positive and negative legal regulations, policies and enforcement practices, which serve as illustrations of supportive or punitive legal environments, and point out challenges faced by the countries in the region in relation to HIV, the law and human rights.

3. Background information

The HIV epidemics in sub-Saharan Africa vary considerably, with southern Africa being the most severely affected. In 2009, globally, 34% of people living with HIV resided in the 10 countries of southern Africa; 31% of new HIV infections in the same year occurred in these 10 countries, as did 34% of all AIDS-related deaths. About 40% of all adult women with HIV live in southern Africa.¹² South Africa has the largest epidemic in the world, with an estimated 5.6 million people living with HIV in 2009.¹³ The encouraging news is that HIV incidence appears to be falling in 22 countries in sub-Saharan Africa after having peaked in the mid-1990s. The HIV prevalence in West and Central Africa (WCA) remains comparatively low, with the adult HIV prevalence estimated at 2% or under, in 12 countries in 2009. The epidemics in East Africa have declined since 2000 but are stabilising in many countries.¹⁴

More than half of all people living with HIV are women and girls. No other region in the world approaches its HIV prevalence rates or displays such a disproportionate impact on women and girls as in sub-Saharan Africa: 77% of all HIV-positive women live in sub-Saharan Africa. Of particular concern are the dramatic increases in HIV infection among young women, who now make up over 60% of 15 – 24 year-olds living with HIV/AIDS.¹⁵ In nearly all countries in sub-Saharan Africa the majority of people living with HIV are women, especially girls and young women aged 15–24 years.¹⁶ In sub-Saharan Africa, young women aged 15–24 years are as much as eight times more likely than men to be HIV-positive.¹⁷ South Africa is one of the few countries in the world where child and maternal mortality has risen since the 1990s, and AIDS is considered to be the largest cause of it. AIDS also accounts for 35% of deaths in children younger than five years in South Africa.¹⁸

The vast majority of people newly infected with HIV in sub-Saharan Africa are infected during unprotected heterosexual intercourse (including paid sex) and onward transmission of HIV to newborns and breastfed babies. Having unprotected sex with multiple partners remains the greatest risk factor for HIV in this region.¹⁹ However, new indications show a shift towards safer sex among young people. The annual HIV incidence among 18 year-olds declined sharply from 1.8% in 2005 to 0.8% in 2008, and among women 15–24 years old, it dropped from 5.5% in 2003–2005 to 2.2% in 2005–2008.²⁰

Large proportions of people living with HIV are in long-term relationships — for example 62% in Kenya and 78% in Malawi. Specifically, research shows that in sub-Saharan Africa, many women's greatest risk of contracting HIV is through sexual intercourse with their husbands. In sub-Saharan Africa, an estimated 60–80% of HIV-positive women have been infected by their husbands. Studies in Africa indicate that young married women are at higher risk of infection than their unmarried counterparts.²¹ Research in 12 countries in eastern and southern Africa shows that prevalence of discordant couples is high, ranging between 36% and 85%. Urban data in Zambia suggests that 60% of the people newly infected through heterosexual transmission are infected within marriage or cohabitation, compared with more than half (50% – 65%) in Swaziland, 35% – 62% in Lesotho and an estimated 44% in Kenya. Prevention strategies, however, often do not adequately address the patterns of HIV transmission. Couples testing and other prevention services for sero-discordant couples receive inadequate support.²²

12 UNAIDS (2011), *AIDS at 30*, available at <http://www.unaids.org/en/resources/unaidspublications/2011>

13 Ibid.

14 Ibid.

15 UNFPA (2004), *Women and HIV/AIDS: Confronting the Crisis*, available at <http://www.unfpa.org/hiv/women/report/chapter1.html>

16 Ibid.

17 Ibid.

18 UNAIDS (2011), *AIDS at 30*, available at <http://www.unaids.org/en/resources/unaidspublications/2011>

19 Ibid.

20 Ibid.

21 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

22 UNAIDS (2010), *Report on the Global AIDS Epidemic 2010* available at http://www.unaids.org/documents/20101123_GlobalReport_em.pdf

4. International & regional standards related to gender equality

There are a number of declarations as well as legally binding conventions and treaties that are applicable to African countries in terms of their obligations to respect, protect and promote women's rights. The Preamble to the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of People with Disabilities, all pay attention to equality between men and women and promote protection from discrimination on the ground of sex.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) specifically focus on equality and protection, and the promotion and respect of women's rights. A large number of countries have signed and ratified these key international and regional human rights instruments.^{23 24}

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), adopted in 2003, and entered into force in 2005 offers a deep protection to women's rights in Africa, specifically linking HIV to reproductive rights, and providing a clear understanding of state obligations in the context of women's health and HIV. Articles 14(1) and (2) of the Protocol oblige states to protect:

- The right to reproductive and sexual decision making, including the number and spacing of children, contraceptive choice and the right to self-protection from HIV;
- The right to access to information about HIV and AIDS and reproductive health; and
- Access to reproductive health services, including ante-natal services.²⁵

The Continental Policy on Sexual and Reproductive Health and Rights, adopted by the African Union (AU) in 2005 and the Maputo Plan of Action, 2006 express grave concern about a range of reproductive health issues, including the high rate of maternal mortality, the prevalence of unsafe abortion, the low contraceptive prevalence rate, the high prevalence of HIV and AIDS, and the increasing rate of mother-to-child transmission of HIV and AIDS. The policy outlined a framework to address the challenge of meeting the goal of universal access to health care by 2015.

Furthermore, a number of international and regional non-binding documents emphasise the importance of gender equality in response to HIV:

- The UN General Assembly Special Session Declaration of Commitment on HIV and AIDS 2001 recognises the links between gender equality and the ability of women and girls to protect themselves from HIV infection.
- The Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases 2001, recognises the biological vulnerability of women and the fact that their social and economic inequality increases their vulnerability to HIV infection.
- The Southern African Development Community (SADC) Protocol on Gender and Development 2008, addresses gender-based violence, health and HIV, and includes specific, time-bound commitments.²⁶

The African Commission on Human and People's Rights (ACHPR) HIV Resolution 2011, calls on the ACHPR to "engage all AU parties to repeal laws that facilitate gross human rights violation in the context of HIV and AIDS, such as

23 Countries that have not ratified the International Covenant on Economic, Social and Cultural Rights are Botswana, Mozambique and South Africa. Countries that have not ratified the African Women's Protocol are Angola, Botswana, Democratic Republic of Congo, Kenya, Lesotho, Madagascar, Mauritius, Swaziland, Uganda and Zimbabwe. See also Gerntholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

24 A number of African countries adhere to the monist approach to domestication of international treaties, where treaties and conventions become directly applicable once they are ratified by the state, and no specific legislation is required (e.g. Namibia, Madagascar, Mozambique, Rwanda). However, the most countries require specific national legislation to be enacted incorporating international provisions into domestic law. See also Gerntholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

25 See also HEARD (2010), *The African Women's Protocol: Act now to support women's reproductive rights and roll back HIV*, Issue Brief for Parliamentarians.

26 See Gerntholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

the sterilisation without consent of positive women and the denial of quality and reproductive health services to women living with HIV". The Resolution further recommends the removal of punitive laws and discriminatory legislative and policy provisions that promote human rights abuses in the context of HIV, including in relation to the criminalisation of HIV exposures and transmission, mandatory and/or forced HIV testing, mandatory and/or forced HIV disclosure and restrictions of access to HIV information and services, due to age, sex, gender, sexual orientation and gender identity and/or HIV status.²⁷

Despite the high number of international and regional binding and non-binding documents related to women's equality, health and HIV, African countries are often lax in their implementation. For example, a 2009 report by the Health Economics and HIV/AIDS Research Division (HEARD) describing the extent to which countries in East and Southern Africa (ESA) have domesticated international and regional obligations to secure women's sexual and reproductive health rights in the context of HIV, found that countries had not fully domesticated international conventions such as CEDAW.²⁸ In many cases, countries failed to comply with regular reporting requirements on treaties. However a review of domestic legislation showed some evidence of law review or reform to protect women's rights, particularly with respect to domestic violence and sexual offence laws, as well as examples of laws promoting women's equality within marriage. The report however found that "many legislative and policy gaps remain". Of particular interest is the fact that, despite a large number of new HIV-specific statutes in WCA and ESA, very few HIV laws provide any recognition of women as a vulnerable population deserving of special protection.²⁹

27 Ibid.

28 HEARD, 2009.

29 ARASA, 2009; Eba, 2009.

5. Gender Equality & anti-discrimination protection

5.1 The Law

Constitutions: Many African countries have constitutions that guarantee the right to equality and non-discrimination for all people, including in some cases specific protection from discrimination on the basis of gender or sex.³⁰ For example, the constitutions of Angola, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland, Uganda and Zambia all have clauses proclaiming gender equality or prohibiting discrimination on the ground of sex.³¹ The South African Constitution prohibits discrimination on the grounds of sex, gender, sexual orientation, and pregnancy.³² There are a number of other legislative acts, plans and strategies that postulate gender equality, such as the *Married Persons Equality Act* of Lesotho.³³

However, despite recognising women's right to equality within regional human rights treaties and national constitutions, many countries have failed to enact relevant domestic legislation to respect, protect, promote or fulfill women's rights or to successfully implement these provisions in reality.

Impact of Customary (and Religious) Law: Alongside protection of the right to equality, African Constitutions tend to also provide formal recognition of customary laws, rules and traditions.³⁴ In many countries constitutions provide that customary laws may not conflict with constitutional and statutory rights.³⁵ For example, Article 66(1) of the Constitution of Namibia states that both the customary law and the common law of Namibia are valid to the extent that they do not conflict with the constitution or any other statutory law. Section 39(3) of the Constitution of the Republic of South Africa recognises the existence of rights and freedoms in common law, customary law and legislation to the extent that they are consistent with the Bill of Rights. The *Customary Law Act* (as amended), and the *Customary Courts Act*, in Botswana formally recognise customary law, but state that it is "subject to other sources of law in the country" such as common law and constitutional law, and that it excludes rules that are "contrary to morality, humanity and natural justice," and rules that are "injurious to the welfare of members or repugnant to the constitution". In Malawi, section 24 of the Constitution protects women's right to equality and prohibits laws, customs or practices that discriminate against women on the basis of gender or marital status. Section 24 requires the state to pass legislation to eliminate discriminatory customs and practices, particularly sexual abuse, harassment and violence, workplace-related discrimination, and deprivation of property and inheritance rights. However, it should be noted that the Botswana and Malawi constitutions make specific exceptions for all matters of personal law, both customary and statutory, under the sections that provide for freedom from discrimination against women. This can be one of the major obstacles to ensuring that laws do not discriminate against women.

In other countries the relationship between customary and other laws is less clear and in some cases, customary law may even supercede guarantees of equality. For example, section 23 of the Zimbabwe constitution prohibits discrimination on the grounds of sex. However, section 89 also formally recognises the operation of customary law within Zimbabwe's legal system, and expressly provides that customary law is excluded from the non-discrimination clause in the constitution in certain circumstances (such as in the application of family law). Likewise, in Zambia Article 23(4) of the constitution allows discrimination against women in terms of personal law governing issues such as marriage, divorce and devolution of property on death.

Many customary rules or practices based on customary or religious laws in fact violate basic principles of equality reflected in international, regional and domestic human rights laws described above.³⁶ For example, in northern

30 International HIV/AIDS Alliance (2010), *Enabling Legal Environments for Effective HIV Responses*, available at www.aidsalliance.org

31 The constitutions of Angola, Madagascar, and Mozambique also provide that all citizens have access to health and medical care, with the Constitution of Angola specifically mentioning access to including maternity care. See also Gertholtz, L and Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

32 Ibid.

33 Ibid.

34 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa

35 Customary marriage and inheritance rights are covered in detail in chapter 6 below.

36 See also Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

Nigeria, the personal law code of the Sharia applies, under which male heirs inherit twice as much as female heirs. A widow receives one-quarter of the estate if there are no heirs and one-eighth of the estate if there are heirs. In polygamous unions, one-eighth of the estate is shared among all wives, which is often not sufficient for the women's continued survival. Tanzanian customary law stipulates that a husband's adultery is never considered grounds for divorce, while an act of adultery by a wife is sufficient.³⁷

When African courts are required to strike a balance between formal law and customary practices, it has been noted that they have usually been reluctant to overturn customary law even where it contradicts constitutional guarantees of protection from sex discrimination, particularly in relation to inheritance matters. It is suggested that an unambiguous constitutional guarantee should be able to ensure that discriminatory customary practices do not prevail over principles of equality and non-discrimination.³⁸ This principle is specifically defined in the South African constitution, which states that when developing customary law, a court must promote the spirit, purport and objects of the Bill of Rights (which guarantees gender equality), and that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law, to the extent that they are consistent with the Bill of Rights.³⁹

While in certain contexts customary practices could be reconciled with and/ or adapted to international standards and requirements, in other cases, prohibitions of certain customary practices are necessary, specifically when they violate women's human rights. In some cases, prohibitions may also be a requirement of international law, for example, in the case of forced marriage. However, it should be recognised that if a legal regime departs too radically from the accustomed practice, there is a possibility that the law will be ignored, circumvented or result in greater rights violations for the communities it is intended to protect. A comprehensive guide on Women and HIV prepared by the Canadian HIV/AIDS Legal Network offers the view that a correct response is to "ensure, wherever possible, that statutory reforms take into account customary norms and structures and, in the process, strengthen women's rights within those systems, while ensuring that rules and practices that perpetuate gender inequalities are eliminated. This may involve, for example, empowering customary courts to preside over issues formerly limited to civil courts, or requiring customary leaders to oversee the fulfillment of minimum statutory protections for women".⁴⁰

National Strategic Plans on HIV/AIDS and HIV laws: National Strategic Plans (NSP) are important in discussion of legislation and policy related to HIV – they guide the national response and set the allocation of funding, resources and human capacity for the various strategies outlined in the national response. The assessment of some 20 African countries' current NSPs dealing with women's rights showed that the majority of them did not pay adequate attention to prevention, treatment and care of HIV among women.⁴¹ Only four out of 20 countries had comprehensive plans – South Africa, Tanzania, Mozambique and Rwanda, with substantive focus on women, girls and gender equality.⁴²

To give one example, Lesotho's National HIV/AIDS Strategic Plan for 2006-2011 recognises that women and girls are disproportionately vulnerable to HIV infection due to their "lower socio-economic position in both traditional and legal settings." It however is not strong around the utilisation of a sexual and reproductive health and rights approach, increasing access to and uptake of treatment, strengthening care and support, and accountability.⁴³ The analysis determined that NSPs in Africa frequently include the 'headlines' for women, girls, and gender equality, but fail to follow through with women or gender-specific interventions or to include women or gender-specific indicators in monitoring and evaluation framework. It has been noted that most NSPs (a) centre their response to women, girls, and gender equality largely around prevention of mother-to-child transmission (PMTCT) which underpins HIV prevention and treatment strategies, and (b) include 'technical' solutions to women, girls, and

37 Ibid.

38 International HIV/AIDS Alliance (2010), *Enabling Legal Environments for Effective HIV Responses* available at www.aidsalliance.org [accessed on 16 May 2011].

39 Ibid.

40 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

41 The analysis carried out by the ATHENA Network and HEARD in 2011, assessed the extent to which the NSPs meet the recommendations of the Framework for Women, Girls, and Gender Equality in National Strategic Plans for HIV in ESA. The Framework identifies key priorities and proposes interventions for addressing women, girls, and gender equality in the development of NSPs in ESA.

42 The study showed that a further five countries – Zimbabwe, Swaziland, Kenya, Uganda and Zambia have developed fairly good frameworks, with sufficient basic responses to women, girls and gender equality, but also with some room for improvement. The majority of the assessed countries – Angola, Lesotho, Namibia, Malawi, Seychelles, Mauritius, Eritrea, Botswana, Madagascar, Ethiopia and Comoros had weak frameworks with not enough attention to gender aspects of the epidemic. See also HEARD and ATHENA Network (2011), *Review of Women, Girls, and Gender Equality in NSP in Southern and Eastern Africa, Lesotho Country Report* available at <http://www.heard.org.za/gender/nsp>

43 HEARD and ATHENA Network (2011), *Review of Women, Girls, and Gender Equality in NSP in Southern and Eastern Africa, Lesotho Country Report*, available at <http://www.heard.org.za/gender/nsp>

gender inequality, specifically post-exposure prophylaxis (PEP), anti-retroviral treatment (ART), and PMTCT.⁴⁴ Major gaps in the NSPs across the region according to the assessment include (a) a lack of meaningful involvement of women living with and affected by HIV, (b) a failure to specifically affirm the sexual and reproductive health and rights of women living with HIV or to identify and advance the linkage of sexual and reproductive health and HIV services; and (c) an absence of attention to gender expertise, of costed and budgeted interventions, and of sex disaggregated data or sex specific targets.⁴⁵

HIV laws: A predominant majority of African countries have adopted omnibus HIV laws, many of which are based on several Model HIV laws promoted in the region by international organisations and non-governmental organizations (NGO). These comprehensive HIV laws have become popular as an approach to encourage legislators to address a range of issues through a single act of parliament. A comprehensive HIV-specific law can address public health and human rights priorities. However, caution is needed in advocating any form of HIV-specific legislation, as it can sometimes lead to punitive outcomes and incorporate punitive provisions, such as broadly drafted offences for HIV transmission.⁴⁶ Additionally, despite a large number of HIV-specific laws in countries in WCA and ESA, very few mention the specific vulnerabilities of women or provide specific health care services targeted to the different needs of women, men, girls and boys.⁴⁷

5.2 Implementing practices

Entrenched traditions and beliefs regarding the subordinate position of women often prevail even where women live under protective formal legal frameworks. Women struggle to enforce their rights through law enforcement agents (such as the police), and within the formal and customary courts and tribunals. For example, in Namibia the *Community Court Act* recognises and establishes customary courts to provide for the fair application of customary law in harmony with constitutional guarantees. However local NGOs report that the attitudes of traditional leaders towards women's rights may well negatively impact on the way in which customary laws are applied.⁴⁸ Similar findings have been made across Africa in relation to property-grabbing, where research shows that even where protective laws relating to inheritance and property exist, many communities still prefer to adjudicate disputes according to rules of customary law,⁴⁹ and widows report police indifference to property grabbing complaints.⁵⁰ Similarly, the practice of forced or coerced sterilisation of women in Namibia and in South Africa takes place despite clear legal provision for the consent of women to sterilisation procedures in the legal frameworks of these countries.⁵¹

Harmful traditional practices: As mentioned above, many customary laws and practices perpetuate gender inequality, and continue existing despite being banned by law, partly due to deeply engrained customs and lack of political will to uproot them. Some cultural practices are specifically harmful to women in the context of sexual and reproductive health, increasing the risk of HIV exposure. Although customary practices differ widely in their particularities, the following common traditions are potentially harmful in the context of HIV and AIDS:

- *Polygyny:* Polygyny allows for a man to have multiple wives, and is a recognised form of customary marriage in many countries. It not only increases the risk of HIV exposure amongst wives, but also impacts a woman's

44 Crone, ET et al (2011), *From Talk to Action: Review of Women, Girls, and Gender Equality in NSPs in Southern and Eastern Africa*, HEARD and ATHENA Network, Durban, South Africa available at <http://www.heard.org.za/gender/nsp>

45 Ibid.

46 Positive examples include the SADC model HIV law, which is strong on human rights and equality provisions, includes anti-discrimination and privacy protections, and a requirement for the state to ensure that women and girls are protected against all forms of violence and traditional practices that may negatively affect their health. This model law is human rights-based and does not include punitive measures such as criminalisation of HIV transmission or compulsory testing. See International HIV/AIDS Alliance (2010), *Enabling Legal Environments for Effective HIV Responses*, available at www.aidsalliance.org. Negative examples include the N'Djamena model legislation on HIV/AIDS of 2004. See more in Canadian HIV/AIDS Legal Network (2007), *A human rights analysis of the N'Djamena model legislation on AIDS and HIV-specific legislation in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=967>

47 Eba, P (2007), *Pandora's Box: The Criminalisation of HIV Transmission or Exposure in SADC Countries*, in Viljoen F., Precious S., Human Rights Under Threat: Four Perspectives on HIV, AIDS and the Law in Southern Africa, Pretoria University Law Press, 2007. Available at: http://www.chr.up.ac.za/undp/other_docs/Human%20rights%20under%20threat.pdf.

48 Ubink J., *Towards Customary Legal Empowerment in Namibia, Enhancing Gender Equality in Customary Justice Systems*, IDLO, Available at: <http://www.idlo.int/DOCCalendar/Customary%20Legal%20Empowerment%20in%20Namibia%20-%20final%20report.pdf>.

49 McPherson D., *Property Grabbing and Africa's Orphaned Generation: A Legal Analysis of the Implications of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi*, (2004) available at https://www.law.utoronto.ca/documents/ihrp/HIV_mcpherson.doc

50 Human Rights Watch, (2003), *Double Standards: Women's Property Rights Violations in Kenya*, New York. Available at: <http://www.hrw.org/sites/default/files/reports/kenya0303.pdf>.

51 HRI (2011) *Draft research paper*. See also Open Society Foundations, (2011), *Against Her Will, Forced and Coerced Sterilization of Women Worldwide*. Available at: <http://www.soros.org/sites/default/files/against-her-will-20111003.pdf>

property rights within the union.⁵²

- *Wife Inheritance*: Wife inheritance occurs where a widow and her family are 'inherited' by a relative of her deceased husband.
- *Widow Cleansing*: This refers to the practice of requiring a widow to have sexual intercourse with a relative of her deceased husband. This may involve unprotected sexual intercourse where the intention is to produce an heir.
- *Early marriages*: In some countries, customary practices allow for young girls to be betrothed to men by their parents in arranged marriages.
- *Female genital mutilation*: FGM is still practiced in a number of countries, increasing the risks of HIV exposure for women and girl children.⁵³

In some countries (such as South Africa and Zimbabwe), there are disturbing and pervasive myths regarding having sex with young virgins as a cure for HIV.⁵⁴

5.3 Discrimination and stigma against women with multiple levels of vulnerability: *women living with HIV, women drug users, sex workers and women with disability*

Stigma and discrimination against women persists in Africa, increasing their vulnerability to HIV. Additionally, discrimination is often targeted at, and disproportionately impacts women who are already more stigmatised, such as those belonging to marginalised groups - sex workers, displaced women, women living with disabilities, women who use drugs, etc. Women living with HIV are discriminated against and stigmatised further and may face a greater negative impact of HIV and AIDS.⁵⁵

Often laws and policies reinforce this stigma and discrimination. For example, research shows that women living with HIV may experience forced or coerced sterilisation in South Africa. Even if these practices are not specifically mandated by the law, they are rooted in pervasive stigma and discrimination that these women "should not reproduce."⁵⁶ Research in Uganda, Kenya, Zambia and Malawi shows that HIV-related stigma and discrimination increases the likelihood of 'property-grabbing' for affected widows.⁵⁷ NGOs in a number of African countries report that women experience violence at the hands of sexual partners when they disclose their HIV status to their partner.⁵⁸

Where the legal framework is not protective of women's rights – for example, in the case of sex work, which is criminalised in most African countries,⁵⁹ negative experiences at the hands of law enforcement officials may be even more severe. The South African Law Reform Commission's review of sex work⁶⁰ argues that the criminalisation of sex work leads to increased violence and harassment against sex workers, including by law enforcement officials, and furthermore hampers their ability to report human rights abuses to the relevant officials.⁶¹

Examples of problematic punitive or coercive laws include laws that require mandatory HIV testing of pregnant women, laws that force disclosures of a person's HIV status, laws that limit access to HIV information or services based on characteristics such as gender, age and sexual orientation, criminal laws that criminalise sex work, injecting drug use and same-sex practices, as well as laws that criminalise HIV transmission.

Areas of concern

- 1) Co-existence of traditional customary law along with modern legal systems may create legal ambiguity and hinder successful implementation of measures aimed at reaching gender equality. Where these systems exist

52 Polygyny is defined as practice of having two or more wives, and is used here as opposed to polygamy which is defined by the Webster's New World Dictionary as "the practice of having two or more wives or husbands at the same time."

53 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

54 Ibid.

55 See, for example, HRI (2011).

56 Ibid.

57 McPherson (2004).

58 ARASA (2009).

59 UNAIDS (2010), *Making the Law Work for the HIV Response - A snapshot of selected laws that support or block universal access to HIV prevention, treatment, care and support*, available at http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en-1.pdf

60 SALRC (2009).

61 Ibid.

there should be clear rules on their co-existence.

- 2) Gender equality provisions on statutory laws are frequently not enforced. Practices that violate gender equality and negatively impact women persist.
- 3) Traditional practices (such as widow cleansing, wife inheritance and polygyny and FGM) are harmful because of infringement of gender equality and human rights of women, but also due to the exacerbated risk of HIV transmission. These practices continue happening, despite legal prohibition.
- 4) HIV laws and NSPs pay insufficient attention to gender aspects of HIV. Even when HIV programming for women is mentioned it often has no implementation plan or is not enforceable.

6. Personal laws affecting women's status and property rights

Despite constitutional guarantees of equality between men and women, personal laws of many African countries entrench the inequality of women. As set out above, this may be due to the failure of statutory instruments to provide adequate protection, or due to the existence of discriminatory customary laws and rules operating alongside statutory laws within a country.

Marriage Laws: In African countries, several types of marriages exist, such as religious and customary marriages according to the traditional practices of various communities, alongside civil law ceremonies. Observers note that the recognition of all forms of marriage protects nations' religious and cultural pluralism, individuals' right to religious freedom and the correlative right to be married in the manner they wish, and the right to non-discrimination and equal protection of the law:

*"The recognition of all forms of marriage facilitates the protection of vulnerable parties to marriage through the oversight and regulation of potentially harmful practices. In countries where only civil law marriages are regulated, women who marry according to custom may not enjoy the protections that a legally sanctioned marriage may offer."*⁶²

However, sometimes these various practices offer different protection to men and women. For example, the age of consent could be different for men than for women, with women having a lower age of consent and with customary and religious marriages being exempt from the minimum age requirement. There is an emerging consensus in international law that 18 is the appropriate age of consent for marriage⁶³ as early marriages may have negative consequences for girls: they are less likely to receive an education, they are more likely to have health problems arising from early pregnancies, and they are particularly vulnerable to abuse and social isolation. Additionally, in some settings early marriage has been linked to increased rates of HIV among women and girls.⁶⁴

In sub-Saharan Africa, 35% of women live in polygamous unions.⁶⁵ Polygamous marriage contravenes women's right to equality with men and may increase women's risk of HIV infection. While prohibiting marriage may not lead to the enhanced protection for women⁶⁶, and may deprive women in polygamous marriages of any protections, it is necessary to recognise their vulnerability and at least regulate these unions (so that women in polygamous marriages are not denied legal protection within marriage and upon divorce).⁶⁷

In many countries, marriage laws limit women's rights and decision-making powers within their marriages.⁶⁸ Even where new protective legislation exists, in many countries such legislation does not apply to women married in terms of customary law, and customary marriages are not given formal legal recognition. For instance, in Botswana, the *Abolition of Marital Power Act* gives women equal powers of administration over the joint estate of a marriage. However, the Act does not apply to customary unions, which limit women's inheritance and property rights and their access to land.⁶⁹ The CEDAW Committee expressed concerns that in Zambia provisions in the new *Marriage Act* continued to discriminate against women⁷⁰ as the law provides non-discriminatory rules for property division

62 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>.

63 The Convention on the Rights of the Child defines a child as a person under the age of 18, while the African Charter on the Rights and Welfare of the Child provides that child betrothal and child marriage shall be prohibited and that action shall be taken by states parties to ensure that the minimum age of marriage is 18. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) considers that the minimum age for marriage should be 18 years for both a man and a woman. The International Guidelines on HIV/AIDS and Human Rights call for the elimination of "early marriage." See also Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>.

64 As mentioned above, it has been noted that in developing countries, sexually active adolescent girls who are married have higher rates of HIV infection than sexually active girls who are not married. See *Ibid.*

65 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

66 There are total bans on polygamy in Madagascar and Cote d'Ivoire, but despite this the practice continues to increase and goes unpunished. See also *Ibid.*

67 *Ibid.*

68 McPherson (2004).

69 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

70 *Ibid.*

between husband and wife for civil law marriages, the majority of Zambian women are married in terms of customary law.⁷¹

Divorce: Several jurisdictions under review in this paper discriminate against or disadvantage women in divorce proceedings. Some countries' laws stipulate grounds for divorce for women that are different from those for men, others establish lengthier or more complicated procedures for women than men to divorce, thus hindering women's ability to end the marriage.⁷² For example, a husband's adultery may never be considered a ground for divorce, while an act of adultery by a wife is sometimes sufficient grounds. Women's ability to end their marriage may also be hindered if there is a risk of losing access to their children where divorce regimes discriminate against women in terms of child custody.⁷³

Under customary law divorce may be considered a private matter that can be arranged by the spouses and their families on the terms they choose. Questions such as maintenance, distribution of the matrimonial estate and rights to children are not commonly disputed, since customary law divorce is often based on an assumption that women will return to their own families and their children will either remain with their fathers or move to their maternal families. This may lead to violation of women's rights with respect to property, maintenance or child custody. Where divorce regimes discriminate against women in terms of child custody, the risk of losing access to their children may hinder some women's ability to end their marriage. According to international standards, child custody should not depend on the individual preferences of judges, but the child's wishes, preferences and needs, and each parent's capabilities to take care of the child.⁷⁴ Gender equality requires that the procedures governing divorce should also apply equally to men and women. The lack of access to divorce on fair terms, and subsequent economic difficulties may prevent women from negotiating safe sex and other equalities within marriage. For women living with HIV, their inability to seek HIV information or to start and continue using ART may be impeded by violence and the fear of violence by intimate partners; or by the fear of abandonment and divorce, in an environment where women suffer insecure property rights and property grabbing upon the death of a spouse.⁷⁵

There are, however, some examples of law reform initiatives in a number of countries in relation to marriage laws. Of particular importance are those examples of statutory laws that amend discriminatory customary rules. The Lesotho *Legal Capacity of Married Persons Act 9* removes most of the discriminatory practices against married women in customary and common law. Previously, women married in terms of the common law were under their husband's marital power, and were considered minors in terms of the law, unable to own property or to conclude basic contracts without her husband's consent. This 2006 law gave married women the right to make decisions relating to the marriage and marriage property, enter into contracts and institute legal proceedings without their husband's consent.⁷⁶ In Namibia, the *Married Persons Equality Act* abolishes the marital power of a husband over his wife and her property, and gives equal powers to spouses married in community of property. The South African *Recognition of Customary Marriages Act*, and the repeal of the *Black Administration Act*, has improved the status of women married in terms of customary law. In Mozambique, the *Family Law 10/2004* provides legal recognition for customary marriages, and protects the rights of women to property and inheritance within such marriages.

Inheritance Rights: Customary laws of succession tend to favour men over women, in many cases devolving property upon male heirs in terms of rules of primogeniture. Patrilineal systems of inheritance tend to pass land to the eldest son, granting limited rights to surviving widows.⁷⁷ In many parts of sub-Saharan Africa, the only way for a widow to retain household property is if she has no sons,⁷⁸ or if she is 'inherited' by one of her husband's male relatives.⁷⁹

71 McPherson (2004).

72 There are different grounds for divorce between men and women in Tanzania pursuant to *Local Customary Law (Declaration) Order*, Government Notice No. 279 of 1963. In Djibouti, Article 39 of Code de la Famille (2001) permits the court to pronounce a divorce at the request of the husband, at the request of the wife because of the injuries she has sustained, or at the request of the wife by deposition. See also Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

73 Section 104 of Tanzania's *Local Customary Law* states, "Children belong to the father, and he shall have the right to insist that they reside with him or with his relatives." Cited from Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

74 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

75 Ibid.

76 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

77 Human Rights Watch, (2003), *Double Standards: Women's Property Rights Violations in Kenya*, New York. Available at: <http://www.hrw.org/sites/default/files/reports/kenya0303.pdf>.

78 International HIV/AIDS Alliance.

79 McPherson (2004).

Statutory laws dealing with succession in African countries may provide further legal recognition for discriminatory rules of customary law. For example, in Malawi the *Will and Inheritance Act* recognises customary rules of succession. Section 16 of the Act entitles women married under matrilineal customary laws to a lesser share of customary property than women married under patrilineal customary laws, and section 16(5) provides further that a wife loses her inheritance if she remarries. The recent *Deceased Estates (Will, Inheritance and Protection) Act* has introduced many reforms, including providing uniform rules for intestate succession, customary practices notwithstanding, providing increased protection for a spouse to retain household property and criminalising “property-grabbing”. The Law Commission, in its report on the proposed amendments to legislation, recommended awareness and education campaigns for the population at large, as well as for police recruits and cadets.⁸⁰

Courts of African countries have shown a reluctance to overturn customary law even where it contradicts constitutional guarantees of equality and non-discrimination in terms of sex or gender, particularly in relation to succession.⁸¹ In the Zimbabwean case of *Magaya v Magaya* the court ruled that women are legal minors, unable to inherit property from their fathers or husbands.⁸² In the South African High Court of Appeal case of *Mthembu v Letsela and Another*, the court found that the rule of primogeniture in intestate succession did not amount to unfair discrimination on the grounds of sex or gender.⁸³

Subsequently, there have been positive examples of judicial reform in South Africa. In the Constitutional Court case of *Bhe and Others v the Magistrate, Khayelitsha and Others* (and the subsequent cases of *Shibit v Sithole and Others* and *South African Human Rights Commission and Another v President of the Republic of South Africa*) the court held that the rule of male primogeniture set out in section 23 of the Black Administration Act (an Act regulating inheritance amongst black South Africans) was unconstitutional. As a result, all deceased estates are devolved in terms of the principles set out in the *Intestate Succession Act*, which provides for the fair distribution of the deceased estate amongst the spouse and children of the deceased. *The Customary Succession Bill* furthermore proposes that people who marry under customary laws, including members of polygamous marriages, be allowed to have their property divided up under the rules of the Intestate Succession Act in the event of death of one of the spouses.⁸⁴

Areas of concern

- 1) Analyses show that customary and religious marriages often offer unequal protection to men and women, and are exempt from equality guarantees.⁸⁵ Statutory marriage laws also do not offer equal protection to men and women. This concerns the absence of equal rights to manage property within marriage, equal rights to divorce, equal division of property in case of divorce, and child custody rights.
- 2) Unequal inheritance rights exist in legislation of some countries. These exacerbate the negative influence of HIV on women, cements their inequality in social and economic life, emphasises their dependence on men, and lowers their ability to claim their rights, including sexual and reproductive rights.
- 3) Polygyny and early marriage are among traditional practices, which may increase women’s vulnerability to HIV.

80 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

81 International HIV/AIDS Alliance (2010), *Enabling Legal Environments for Effective HIV Responses*, available at www.aidsalliance.org

82 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

83 2000 (3) SA 867 (SCA). See SALRC (2007) Discussion Paper.

84 AIDS and Human Rights Research Unit, (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

85 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women’s Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

7. Sexual and reproductive health

Reproductive and sexual rights and HIV are closely linked, particularly in Africa where HIV is transmitted largely through heterosexual sex, and also during pregnancy and breastfeeding. Without protection of their human rights, including their reproductive rights, the ability of women to protect themselves from HIV infection is reduced and impaired: they may not have access to adequate and accessible information; prevention measures such as male and female condoms may be unavailable; access to health care to prevent and treat sexually transmitted infections (STI) may be limited and they may be subject to practices such as widow cleansing, FGM and early marriage that increase their risk of transmission. If infected, violations of their reproductive rights may prevent them from seeking out treatment and care. Women may be afraid to access HIV testing and treatment because of fears of violence and abandonment if their HIV status becomes known and they may not disclose their HIV status for similar reasons. Their subordinate status in families, communities and society may also prevent them from accessing and adhering to ART and accessing programmes to reduce the risk of mother-to-child transmission.⁸⁶

Researchers in the region point to several aspects that undermine women's sexual and reproductive rights in Africa:

- a) Criminalisation of HIV transmission, which may impede a person from disclosing their HIV status to sexual partners for fear of violence and abandonment. Criminalisation also reduces access to reproductive health services, especially for vulnerable groups of women such as sex workers and adolescents.
- b) Anti-abortion legislation, which exists in many African countries limits women's ability to determine whether and when to have children.
- c) High levels of violence against women, often in contexts of weak or limited legislative frameworks to support women's rights. Violence against women limits their autonomy and ability to make decisions about their body and sex. Furthermore, violence places women at greater risk of acquiring HIV, and may make them weary of accessing reproductive health services and HIV testing. The failure to criminalise marital rape in many African countries has increased the risk of HIV transmission for married women and undermines their access to PEP.
- d) Limited rights to comprehensive sexuality education and access to male and female condoms, particularly for young people. The failure to provide comprehensive sexuality education and access to male and female condoms undermines women's abilities to make fully informed reproductive choices and act on these decisions.
- e) Failure in many national policies to realise the reproductive rights of people living with HIV, seen most explicitly in the emergence of coerced or forced sterilisation of women living with HIV.⁸⁷

Articles 14 (1 and 2) of the African Women's Protocol set out three major components of women and girls' reproductive health care:

- Reproductive and sexual decision making, including the number and spacing of children, contraceptive choice and the right to self-protection from HIV.
- Access to information about HIV and AIDS and reproductive health.
- Access to reproductive health services, including ante-natal services.

A 2010 review of legal obligations towards women's reproductive health rights in countries in ESA found that one of the key gaps in legislative and policy protection for women in countries in ESA was the failure to provide for women's sexual and reproductive health generally, particularly in the context of HIV. Constitutional laws and health laws generally fail to comprehensively provide for the sexual and reproductive health rights of women.⁸⁸

There are good examples of provision for women's sexual and reproductive health rights. Several countries have

86 Gertholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

87 Gertholtz, L et al (2011), *The African Women's Protocol: Bringing Attention to reproductive Rights and the MDGs*, PLOS Medicine, Volume 8, Issue 4, available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.1000429>

88 Gertholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

Reproductive Health Strategies (for example Kenya, Lesotho, Namibia). Rare examples such as Lesotho and Namibia provide PEP to survivors of sexual assault, where National AIDS policies make provision for PEP.⁸⁹ A recent good example is found in the *Rwanda Reproductive Health Bill*, which recognises women's right to self-determination, in terms of deciding the timing and spacing of having children.

However, countries in Africa have been slow to develop and implement programmes for the PMTCT⁹⁰, although recently gains have been made in this respect.⁹¹ Many African countries have anti-abortion legislation. Usually abortions are permitted only after rape and incest, to save the life of a woman, where her physical and mental health is endangered, in cases of fetal abnormality, or to save the life of a woman. Additionally, the needs of especially vulnerable women (e.g. women with disabilities, sex workers, migrant, and refugee women) are generally not identified and met. Other legal and policy issues of specific concern that impact on women's access to their sexual and reproductive health rights are set out below.

Female Genital Mutilation: Not all countries criminalise FGM, although in those places where it is criminalised, the co-existence of secular and religious legal systems lead to complications.⁹² In Ethiopia, the 2004 federal law criminalises FGM, but the law has different applications in different regions of the country; no noticeable progress in eliminating it has been achieved. Kenyan law prohibits it in girls younger than 18, on the basis that 18 year olds can decide for themselves. This however does not take into account the pressure a girl could be subjected to from the family. There is no law prohibiting it in Sudan, as the old British law prohibiting it was overturned in the 1980s.⁹³

Forced or Coerced Sterilisation: Forced sterilisation occurs when a woman is sterilised without her knowledge or is not given an opportunity to provide consent. Coerced sterilisation also occurs when financial or other incentives, misinformation or intimidation tactics are used to compel an individual to undergo a sterilisation.⁹⁴

In Rwanda, Article 22 of the proposed *Reproductive Health Bill* provides that "the government shall have the obligation to suspend fertility for mentally handicapped people and any other sickness as confirmed by a committee of at least three recognised doctors as long as those persons still have the sickness". If adopted, this provision would allow for forced sterilisation of women living with HIV. In other countries, such as South Africa and Namibia, there is evidence of a number of women having been subjected to forced or coerced sterilisation, despite the existence of laws that protect women from sterilisation without consent.⁹⁵ There are also anecdotal reports of coerced sterilisation in the Democratic Republic of Congo (DRC) and Zambia.⁹⁶

In Namibia, fifteen cases of coerced sterilisation of women living with HIV have been documented by the International Community of Women Living with HIV and other organisations.⁹⁷ Women reported being unaware of and not providing consent to the sterilisation procedure,⁹⁸ or being coerced into providing consent in order to access health care services such as caesarean sections or abortions.⁹⁹ Three of the women are currently challenging the matter before the Namibian High Court.¹⁰⁰ In South Africa, research by Her Rights Initiative (HRI) and HEARD, documented the experiences of women living with HIV who experienced forced or coerced sterilisation. As with Namibia, the research shows that the women were not provided with the opportunity to provide voluntary and informed consent to sterilisation, and in some cases only learned about the procedure years later, when seeking health care for problems relating to infertility. Many women reported signing under duress in difficult circumstances (such as while in labour).¹⁰¹ This is despite section 4 of the *Sterilisation Act*, which requires health care workers to obtain a women's consent to sterilisation.

HRI and HEARD's research reports severe discrimination (such as verbal abuse, humiliation and bullying) against these women at the hands of health care workers. Forced or coerced sterilisation impacts women with HIV in

89 IAA (2011).

90 Ibid.

91 UNAIDS (2010).

92 In all countries FGM can be prosecuted under criminal laws causing injury or under international treaties, but it is rarely or never done. See Womankind Worldwide (2006), *Female Genital Mutilation: Religious and Legal Perspectives*, Conference Report, Cairo, Egypt.

93 Ibid.

94 HRI (2011) *Draft research report*.

95 Strode (2010); HRI (2011).

96 Kardas-Nelson, Mail and Guardian in HRI (2009).

97 HRI (2011).

98 Gatsi-Mallet (2008).

99 HRI (2011), Patel (2008).

100 Kalimbi (2008) in HRI (2011).

101 HRI (2011).

profound ways, leading to emotional distress, physical health problems and increased medical costs. Women who have been sterilised, experience 'double-discrimination' (on the basis of HIV as well as due to the inability to bear children) from their partners – in the form of abandonment, withholding of financial resources, violence, and divorce, as well as from broader society. They may lose social security and access to public resources available to women with children.

Mandatory HIV Testing and Disclosure Laws: Some HIV laws in Africa contain mandatory HIV testing provisions, many of which are directed at women (e.g. mandatory HIV testing of pregnant women), or disproportionately impact women (e.g. mandatory HIV testing of sex workers, victims of sexual offences and people entering into marriage).

Section 13(c) of the *Uganda HIV and AIDS Prevention and Control Bill* provides for the compulsory HIV testing of a person convicted of an offence involving prostitution. Section 14 of the Bill further provides for "routine HIV testing" (undefined) of "the victim of a sexual offence," as well as of pregnant women. The HIV law in Guinea provides for mandatory HIV testing before marriage, as does the proposed HIV Bill in Malawi and the *Rwanda Reproductive Health Bill*. The *Mozambique HIV Act*, as well as the *Malawi HIV Bill*, provide for compulsory HIV testing for people with signs of opportunistic infections.

Additionally, a number of HIV laws require disclosure of a person's HIV status to others, particularly sexual partners, by the person him or herself, or by a health care worker. For example, many laws in WCA provide disclosure requirements for people living with HIV to their spouses and sexual partners, or place a 'duty to warn' on health care providers.¹⁰² In addition, the law in Cape Verde requires disclosure to a spouse or sexual partner as soon as possible (within six weeks of diagnosis) and gives health care professionals a broad power to disclose that person's HIV status¹⁰³. The DRC HIV law provides for people living with HIV to "immediately inform" their spouse and sexual partners of their HIV status, while the law of Burkina Faso provides for disclosure "without delay" and requires disclosure by a healthcare professional in the absence of disclosure by the patient¹⁰⁴. Many laws in ESA also require disclosure of a person's HIV status, and in some cases specifically criminalises non-disclosure of HIV status. For example, Articles 2 and 3 of the *Lesotho Sexual Offences Act* makes it an unlawful sexual act when a person "knowing or having reasonable grounds to believe that he or she is infected with a sexually transmissible disease, HIV or other life-threatening disease does not, before committing the sexual act, disclose to the complainant that he/she is so infected"¹⁰⁵.

If not by law, often mandatory HIV testing is imposed by societal rules. It is reported that faith-based organisations in Ghana, Nigeria, Burundi, Kenya and the DRC instituted mandatory premarital HIV testing among their congregations. The Nigerian government publicly endorses the practice, although there is no national legislation regarding premarital HIV testing. Mandatory premarital HIV testing violates individuals' rights to privacy, to marry, and to have a family; reinforces discrimination against, and stigmatisation of, people living with HIV; and is ultimately counterproductive to the aims of HIV prevention.¹⁰⁶

The impact of mandatory HIV testing and forced disclosure of HIV status may be particularly onerous for women. Mandatory HIV testing of women not only violates a women's right to freedom, security and privacy, it also places women in a dangerous position, at risk of potential violence and abandonment by sexual partners. Additionally, even where laws do not directly target women (such as mandatory marriage testing laws, which target both men and women), they may still disproportionately impact women, due to the increased potential for discrimination, stigmatisation and harm. Likewise, laws that require disclosure of a person's HIV status to others, such as sexual partners, place women at further risk of violence, rejection, abandonment and eviction, impacting their physical and mental well-being and increasing their economic vulnerability.

Criminalisation of HIV Transmission: A large number of countries across Africa criminalise HIV transmission in their HIV laws or in penal codes. For example, since 2005 14 countries in WCA have passed HIV laws, which include provisions to criminalise HIV transmission, in accordance with the guidance provided by the Nd'jamena Model Law

102 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

103 Patrick Eba, *One Size Punishes all... A Critical Appraisal of the Criminalization of HIV Transmission*, Publication of the AIDS Legal Network, Setp./Nov. 2009, available at http://www.icw.org/files/ALQ_Double_Edition_08_--_Criminalisation.pdf

104 Canadian HIV/AIDS Legal Network (2008), *Legislation Contagion: Building Resistance*, Vol. 13, No. 2/3, available at <http://library.catie.ca/PDF/ATI-10000s/18695V13N2-3e.pdf>

105 *Sexual Offences Act*, 2003. Available at <http://sgdatabse.unwomen.org/uploads/Lesotho%20-%20Sexual%20Violence%20Act%202003.pdf>

106 Canadian HIV/AIDS Legal Network (2009), *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property issues*, available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=973>

for that region.¹⁰⁷ Although criminalisation of HIV transmission and other criminal law issues, such as sex work, are dealt with in more detail in the Issue Brief on 'Criminal Law & HIV', it is nevertheless worth noting that, as with forced disclosures, criminalisation has the potential to disproportionately impact women for various reasons, amongst others:¹⁰⁸

- Women are more likely to be blamed and prosecuted for HIV transmission, since they are often the first to know their HIV status during pre-natal care.
- Women are at greater risk of HIV-related violence or abuse, leading to fears of disclosing their HIV status to partners, which puts them at risk of falling foul of criminalisation provisions.
- There is a danger that women may be prosecuted for vertical transmission of HIV.

Article 21 of Sierra Leone's *Prevention and Control of HIV and AIDS Act* explicitly criminalises vertical transmission from mother to child. It provides that a person living with HIV who is aware of his or her infection must take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant woman, the foetus. In Zimbabwe, the criminalisation of HIV transmission provision is broad and ambiguously worded; section 15 of the *Sexual Offences Act* states that:

"(1) Any person who, having actual knowledge that he is infected with HIV, intentionally does anything which he knows or ought reasonably to know —

(a) will infect another person with HIV; or

(b) is likely to lead to another person becoming infected with HIV;

shall be guilty of an offence, whether or not he is married to that other person, and shall be liable to imprisonment for a period not exceeding 20 years."

Zimbabwe Lawyers for Human Rights reports that criminalisation provisions have been used to harass women¹⁰⁹. Recently a Harare magistrate's court denied bail to a woman alleged to have deliberately transmitted HIV to her husband on the grounds that if released, she would continue to infect others (the decision was later overturned by the High Court in 2006)¹¹⁰.

Areas of concern

- 1) Non-implementation of existing laws and strategies on sexual and reproductive health. Little attention is paid to links between women's sexual and reproductive health, and HIV.
- 2) Anti-abortion legislation impedes the realisation of sexual and reproductive rights of women in many countries of the region.
- 3) Lack of sex education policies for young girls; sexual violence and failure to prosecute it are rampant.
- 4) Criminalisation of HIV that may be applied to vertical transmission and used to criminalise and punish women.
- 5) Forced and compulsory HIV and STI testing; and forced and compulsory sterilisation of women living with HIV is an egregious violation of their rights.

¹⁰⁷ Article 1 of the Nd'jamena Model law defines "willful transmission" as the transmission of HIV "through any means by a person with full knowledge of his/her HIV/AIDS status to another person". Read with the definition of HIV transmission in the Model Law, the provision could be extended to criminalise vertical transmission of HIV during labour or delivery.

¹⁰⁸ ATHENA Network and ARASA (2010).

¹⁰⁹ Zimbabwe Lawyers for Human Rights, *Criminalization puts HIV positive mothers under spotlight*, HIV/AIDS, Human Rights and Law Project Zimbabwe. Available at: http://www.aidslaw.co.zw/index.php?option=com_content&view=article&id=91:criminalisationmothers&catid=1:latest-news.

¹¹⁰ AIDS and Human Rights Research Unit *Are Human Rights Protected? Nine southern African Country Reports on HIV, AIDS, and the Law* (2007) 370.

8. Protection from gender-based violence

Gender-based violence is one of the most pervasive threats to the mental and physical well-being of women in Africa. In some countries, more than 60% of women have experienced physical or sexual violence from their most recent spouse or domestic partner.¹¹¹ Women living in conditions of vulnerability and marginalisation are at particular risk of violence. Sex workers experience sexual and physical violence at the hands of clients and law enforcement officials.¹¹² Recent research in South Africa, documents the harrowing experiences of African lesbians subjected to assault, 'corrective rape' and murder.¹¹³ Widespread rape and assault of women in conflict situations has been documented in countries such as the DRC and the Sudan. NGOs in various countries have documented violence against women on the basis of their HIV status; in particular women appear to be at heightened risk where they are living publicly with HIV, or when they disclose their HIV status to a partner.¹¹⁴

Besides the multiple impacts of gender-based violence on the health, welfare and basic human rights of all women, recent research increasingly shows clear links between violence and the risk of HIV. According to a 2010 study in the *Lancet*, research in South Africa showed that domestic violence increases the odds of becoming infected with HIV by 11.9%, while gender inequality within a relationship increases the risk by 13.9%.¹¹⁵

Research shows that a number of countries have adopted increasingly protective sexual assault and domestic violence laws which broaden the definition of violence and sexual offences, and recognise a range of relationships within which domestic violence occurs.¹¹⁶ National Plans, Strategies/Programmes or statutes against domestic violence/ gender-based violence exist in Angola, Botswana and Madagascar.¹¹⁷ The *Protection against (Prevention of) Domestic Violence Act* in Malawi has a broad scope and applies to relationships between spouses as well as family members or financially dependent relations. As with South African and Zimbabwean law,¹¹⁸ it defines violence broadly. In the Malawian Act, domestic violence includes "physical, sexual, emotional or psychological or financial abuse committed by a person against a spouse, child, any other person who is a member of the household, dependent or parent of a child of that household."¹¹⁹

Additionally, there is also evidence of the creation of supportive structures and processes to enhance the implementation of these laws. For instance, Part IV of the *Domestic Violence Act* of Zimbabwe creates an anti-domestic violence council, and counselors, to support the implementation of the provisions.¹²⁰ In South Africa, section 3 of the *Domestic Violence Act* provides for the arrest, without a warrant, of anyone suspected of having committed an act of domestic violence. It also enables an applicant to apply for an interim and (final) protection order.¹²¹

Sexual offence legislation in Kenya, Namibia, South Africa and Tanzania broadens the definition of sexual assault to include a range of acts, and provides penalties for perpetrators and compensation for survivors.¹²² The Constitution of the DRC states that sexual violence is a crime against humanity and must be eradicated. The *Sexual Offences Act* of Lesotho recognises and punishes various offences not previously recognised as offences by law.¹²³ Additionally,

111 UNAIDS (2011), *AIDS at 30*, available at http://www.unaids.org/unaids_resources/aidsat30/aids-at-30.pdf

112 South African Law Reform Commission (2009), *Discussion paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*, available at http://www.procon.org/sourcefiles/south_africa_gov.pdf

113 HSRC (2011).

114 IDS, *The Link Between Violence Against Women and HIV and AIDS*. Available at: <http://www.eldis.org/UserFiles/File/VAW-1.pdf>.

115 UNAIDS (2011), *AIDS at 30*, available at http://www.unaids.org/unaids_resources/aidsat30/aids-at-30.pdf

116 HEARD (2010); IAA (2011).

117 For example the Strategy and Programme of Action for Male Involvement in Sexual and Reproductive Health and Rights of 2007-2012 (Botswana) includes prevention of gender-based violence. See also Gertholtz, L & Grant, C (2010), *International, African and country legal obligations on women's equality in relation to sexual and reproductive health, including HIV and AIDS*, HEARD and ARASA, Durban, South Africa.

118 *The Domestic Violence Act* (1998, South Africa) and the *Domestic Violence Act* (2006, Zimbabwe)

119 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

120 Ibid.

121 Sections 4 and 5, *Domestic Violence Act* (1998, South Africa).

122 IAA (2011).

123 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

sexual offence legislation protects young girls from sexual assault in many countries. Various recent laws now recognise marital rape as a sexual offence. Article 2(3) of the *Combating of Rape Act* in Namibia recognises marital rape as an offence, as does section 8(1) of the *Sexual Offences Act* in Zimbabwe. Article 3(3) of the *Sexual Offences Act* in Lesotho provides that marriage is not a defence to a charge of rape, as does the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* in South Africa.¹²⁴ The *South African Prevention of Family Violence Act* furthermore declares marital rape a crime and empowers a woman who has been assaulted by her husband to lay a criminal charge or to obtain an interdict against him.

However, much still needs to be done to eradicate violence against women in Africa. A number of countries still have inadequate laws to protect women from domestic violence and sexual assault, and where there are laws, they are often poorly implemented due to a lack of police and health workers' training to address reports of violence. For instance, Swaziland, where gender inequality is considered a major concern, has yet to finalise the draft *Sexual Offences and Domestic Violence Bill*, and currently has no statutory protection against domestic violence. Many countries fail to recognise marital rape as an offence. In Botswana, the law considers that a woman gives her consent to sex when she marries, and therefore fails to recognise marital rape as a crime.¹²⁵ In Malawi, neither the Penal Code nor the more recent amendments to the code recognise marital rape. During discussions regarding the amendment to the code, the Law Commission argued that the recognition of marital rape would "have the effect of opening up to the general public the private relations of husband and wife which, for valid social and family reasons, need to be strongly protected." This position was upheld during the later development of the *Prevention of Domestic Violence Act*, which also excludes marital rape as an offence.¹²⁶ Furthermore, even where protective legislation exists, it is often poorly implemented, with little programmatic linkages created between services provided to survivors of sexual assault and domestic violence, and HIV services. Finally, in many countries, there are also strong cultural views and customary practices condoning violence against women. In Botswana under customary law and practice, men are seen as having powers of 'chastisement' over their wives.¹²⁷ In Namibia, NGOs argue that traditional authorities do not recognise marital rape as a crime, given that a man has marital power over a woman.¹²⁸

Areas of concern

- 1) Marital rape continues to remain outside the purview of criminal law in some jurisdictions.
- 2) There is a continued failure to eliminate domestic and sexual violence, despite criminalisation of these offences in statutory and programmatic documents.

124 UNDP (2007). See also AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

125 AIDS and Human Rights Research Unit (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

126 Ibid.

127 AIDS and Human Rights Research Unit, (2007), *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, Pretoria University Press, Pretoria, South Africa.

128 Ngavatene and Mwilima (2011).



9. Conclusion

This overview of regional and national legal responses to HIV in relation to women, provides a clear picture of what needs to be done to provide women with more supportive legal environment, based on human rights and a evidence-based public health approach.

In conclusion, certain fundamental measures need to be taken to concretely and address these issues in a concerted manner, including:

- Constitutions in African countries need to specifically provide for the right to equality on the basis of sex and gender.
- Legal frameworks need to give precedence to the right to gender equality over customary laws and practices that violate this right.
- States should enact and enforce domestic legislation to respect, protect, promote and fulfil women's rights to equality, non-discrimination and other basic human rights such as education, health care and property.
- States should enact domestic legislation to protect women and female children from sexual and physical violence, and harmful practices that increase the risk of violence and HIV exposure, including laws on protection from domestic violence and sexual violence. Experience from other countries show that law enforcement sensitised and trained in implementing this legislation can contribute to the curbing such violence to the benefit of women.
- States with HIV-specific laws should review and reform such laws to the extent that they punish or coercively target, or disproportionately impact women in the context of HIV.
- Protection of sexual and reproductive rights, and abolition of anti-abortion legislation is required, including the clear prohibition of harmful traditional practices and provisions for effective enforcement.
- Equality in marriage, sex education and equal inheritance rights are necessary in order to advance gender equality and sexual and reproductive rights of women. This is also necessary in order to diminish and ultimately eliminate the disproportionately negative effect of HIV and AIDS on women.
- States should take measures to improve access to justice for women in the context of HIV.

