

WORKING PAPER

Traditional Cultural Practices & HIV: Reconciling Culture and Human Rights

Emma Day¹ and Allan Maleche²

These papers were written to inform the work of the Global Commission on HIV and the Law, which is convened by UNDP on behalf of UNAIDS. The content, analysis, opinions and recommendations in the papers do not necessarily reflect the views of the Commission, UNDP or UNAIDS. While the Commission's Technical Advisory group provided review and commentary, the authors accept responsibility for any errors and omissions.

Citation: Maleche, A., and Day, E., (2011), *Traditional Cultural Practices and HIV: Reconciling Culture and Human Rights*. Working Paper for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July 2011.

Introduction

This paper examines the diversity of traditional and cultural practices that affect Human immunodeficiency virus (HIV) responses on a global scale, and through an exploration of the interface between culture and human rights, offers frameworks, interpretations and solutions to create enabling environments whereby the adverse impact of these practices can be removed or mitigated.

Section One of the paper examines traditional and cultural practices that affect HIV responses in different regions across the globe. Those practices include cleansing rituals, 'dry sex', unprotected sex, female genital mutilation, wife inheritance, land inheritance, virginity testing, and male circumcision. These examples were chosen to illustrate a particular approach to traditional cultural practices that aims to engage with the 'custodians of culture' within communities, involving them in the creation of solutions that are in line with their own culture, while respecting and promoting human rights, and reducing the risk of HIV. This is not meant to be an exhaustive list, or a country by country analysis, but seeks to present a broadly even geographical sample.

Section Two of the paper explores the interface between culture and human rights in relation to key populations that have been identified as being particularly vulnerable to HIV, including sex workers, men who have sex with men (MSM) and transgender people, injecting drug users, and women.³ Examples are given of projects that have managed to harness more positive underlying cultural values as a tool to address the enabling environments that exacerbate the vulnerability of these groups.

Methodology

This paper is based on a desk review of available literature on culture, human rights, and HIV. The analysis presented here reflects the available research into interventions that have effectively incorporated human rights norms into a diversity of cultural contexts⁴. The submissions to each of the Global Commission on HIV and the Law's Regional Dialogues

1 Emma Day is a British freelance human rights lawyer and a Volunteer Lawyer at KELIN.

2 Allan Maleche is a Kenyan human rights lawyer and Coordinator of KELIN.

3 Joint Action for Results UNAIDS Outcome Framework 2009-11, p.9. Also included in the focus are prisoners, refugees and migrants, but these populations are not analysed here as the complexity of the 'cultures' involved goes beyond the scope of this paper.

4 There is a wealth of available research on the harmful effects of traditional cultural practices, but most of this is not in the context of HIV, and few

were also reviewed and incorporated where relevant. There is a need for more empirical evidence in this area as much of the evidence regarding cultural practices is anecdotal, and lacks the rigour of research grounded in recognised methodology. There is a tendency for only the negative and harmful practices to be the subject of empirical research studies, whereas few reports on practices that may have a positive impact on reducing the risks of HIV are available.

Culture

The relationship between culture and human rights is complex. Both Article 22 of the Universal Declaration of Human Rights (UDHR), and Article 15 of the International Convention on Economic and Social Rights (ICESR) recognise the right to culture. According to UNESCO, "culture must be understood broadly to mean the shared way of living of a group of people, including their accumulated knowledge and understandings, skills and values, and which is perceived by them to be unique and meaningful."⁵ The right to a cultural identity is also part of the right to self-determination set out at Article 1 of the International Covenant on Civil and Political Rights (ICCPR). Peoples thus have a right under international law to their traditional cultural practices which to them are unique and meaningful, and they have a right to determine how their culture is developed.

However, this right is limited because all States also have a duty to promote and protect all human rights and fundamental freedoms regardless of their political, economic or cultural systems.⁶ Human rights are universal under international law, having been agreed by 'international consensus' by nearly every state in the international community, and they apply to all peoples in all places.⁷ Cultural diversity may not be invoked to infringe upon or limit the scope of human rights guaranteed by international law.⁸ In the context of HIV, State failure to protect against practices that increase the risk of HIV violate the right to the highest attainable standard of health, in addition to a range of other rights.⁹ The Committee on Economic, Social and Cultural Rights defines 'participation' in cultural life, as being the right to freely choose to participate in aspects of society and to freely choose his or her own identity.¹⁰ Therefore it follows that where practices are imposed upon people in the name of 'culture', the individual's right to freely choose not to participate in cultural practices is violated. In addition, key populations such as sex workers, women, MSM and transgender people, and people who use drugs have the right to their own shared way of living. They have the right to also contribute to and participate in their society's culture, and cultural norms that are harmful and discriminatory to these groups cannot be defended in the name of culture.

Seeking to influence cultural norms and practices to reduce people's risk of HIV will inevitably result in some kind of cultural adaptation. The Committee on Economic, Social and Cultural Rights views culture as a "... a living process, historical, dynamic and evolving, with a past, a present and a future."¹¹ Rites and ceremonies, customs and traditions, are included in this definition by the Committee.¹² In a paper commissioned by the UN Economic and Social Commission for Asia and the Pacific, Goonesekere argues that human rights norms can have a transformative effect on culture, helping to reinforce positive aspects of tradition and culture, and undermining harmful elements. Given that all cultures change over time, the introduction of new human rights norms into a culture can have a positive and transformative effect, so that the human rights norms eventually become internalised into refined traditional cultural practices.¹³ Further, new human rights norms can contribute to a positive change in attitudes towards key populations whose marginalisation has previously increased their vulnerability to HIV.

Culture and the law

This paper makes reference to a panoply of laws that condone harmful cultural practices and some which support those traditional practices that contribute to enhanced protection from HIV. However, international legal rights can often seem

studies offer solutions that acknowledge the importance of culture and incorporate human rights norms into existing cultural structures.

5 UNESCO (2011), available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/poverty-eradication/cultural-identity/> [accessed 09.06.2011].

6 Vienna Declaration and Programme of Action, para. 5.

7 Ayton-Shenker, D., United Nations background note: *The Challenge of Human Rights and Cultural Diversity*, available at: <http://www.un.org/rights/dpi1627e.htm> [accessed 09.06.2011].

8 Universal Declaration on Cultural Diversity, Article 4, and Committee on Economic, Social and Cultural Rights, General Comment No. 21, p.6 at 18.

9 International Covenant on Economic and Social Rights, Article 12. See further Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000).

10 *Ibid* p4 at 15(a).

11 Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), p.3.

12 *Ibid*, pp 3 & 4.

13 Goonesekere, S., *Harmful Traditional Practices in three Countries of South Asia: culture, human rights and violence against women*, UN Economic and Social Commission for Asia and the Pacific, Gender and Development Discussion Paper Series No. 21, (2009) p.6.

far from the lives of people in communities most affected by HIV. The traditional cultural practices reviewed here touch on people's most intimate relationships and their private family lives, and there is often resistance to regulation of this sphere. States' obligations are not just to take legislative measures, but to take other measures as well to respect, protect and fulfil human rights, as is outlined at Article 2 of the ICESCR. State Parties have a duty to implement international laws that protect people from human rights abuses, even within their families. Those laws need to be implemented through domestic legislation, and equally as important, all people need to be aware of their contents and the protections afforded to them under these laws. It is beyond the scope of this paper to review the various different national legal systems across the globe that address traditional cultural practices and norms that impact HIV.

The countries in which harmful traditional and cultural practices and HIV are the most prevalent are some of the world's poorest countries, where access to justice is extremely limited. In his report, 'Legal empowerment of the poor and eradication of poverty',¹⁴ the UN Secretary General recognised that in many developing countries a large section of the population comprising mostly of the poor, minorities, women, and other disadvantaged groups, do not have equal access to the laws, institutions and policies which govern economic and social interactions.¹⁵ Due to the cost and complexity of the formal legal system for many of these people their lives are instead governed by informal norms, practices and institutions: "In a system that works against them, the poor survive by mixing customary practice with ingenuity, creating informal structures that can at times be more effective than their formal counterparts."¹⁶ It is necessary to engage with these informal structures as part of the process of implementing laws that protect people from harmful traditional cultural practices, and consequently reduce their risk of HIV. Sometimes cultural norms appear to have no structure and no local institution to which they belong. In those cases there is a need to work with communities to examine behaviours in the light of HIV, and look to them to propose realistic solutions.

1. Traditional cultural practices that affect HIV responses

1.1 Cleansing Rituals

Cleansing rituals involve a sexual act which is believed to purify the recipient through the semen entering the woman's body. The practice is common for widows after the death of their husband when the widow has sex with a man identified by the elders of the community. Such cleansing rituals stem from the belief that a widow becomes unclean after burial ceremonies of her late husband.¹⁷

This practice therefore makes women and at times men more vulnerable to HIV infection and re-infection, since the cleansers have had many sexual partners in the process of cleansing others. This is further aggravated by the fact that sexual cleansing calls for unprotected sex. Culturally, it is strongly believed that condoms cannot be used to effectively cleanse a person because it is semen that does the cleansing.¹⁸

This practice is documented in a number of African countries such as Kenya,¹⁹ Malawi,²⁰ Zambia²¹ and Botswana.²² In Malawi, sexual cleansers are hired to have sex with widows before they return to their home. This practice is also used in many other contexts in Malawi, such as: after the baby's birth when the mother of the baby, irrespective of her marital status, has unprotected sex with a man in the belief that the sexual act will cleanse the baby and enable it to grow with healthy and strong bones; after miscarriage, when a hired man sexually cleanses the mother by having unprotected sex with her; and where a man has bought or made a boat to be used for fishing or sailing in the river, a woman has sex with the person who will use the boat – whether his wife or not – to cleanse away evil spirits which may potentially capsize the boat. In most cases the sexual cleansers are men, but in some cases women are also used. Some cultures have people who have now become professionals in this area; sexual cleansers hence perform sexual cleansing exercises with many unidentified women.²³

14 UN General Assembly 64th Session, item 58 of the preliminary list, Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary General, 13 July, 2009.

15 *Ibid* p. 3.

16 *Ibid* p.4.

17 Malawi HIV and AIDS, *Monitoring and Evaluation Report: 2008-2009*, UNGASS Country Progress Report, Reporting Period: January 2008-December 2009, Submission Date: 31 March 2010 available at http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportssubmittedbycountries/malawi_2010_country_progress_report_en.pdf [accessed 15.06.2011].

18 UNAIDS, UNFPA, UNIFEM, *Women and HIV/AIDS Confronting the Crisis* available at <http://www.unfpa.org/hiv/women/report/chapter7.html> [accessed on 15-06-2011].

19 Shisanya C.R.A., *Widowhood in the Area of HIV & AIDS; A case study of Siaya District* (2007) *Journal of Social Aspects of HIV* 4:2.

20 Loosli B.C., *Traditional Practices and HIV Prevention in Sub-Saharan Africa* (2004) pp.11 and 12.

21 Malungo J.R.S, *Challenges to Sexual Behaviour Changes in the Era of AIDS: Sexual cleansing and levirate marriages in Zambia* (1999) pp.41- 57.

22 Ntseane P.G. *Cultural Dimensions of Sexuality: Empowerment challenge for HIV & AIDS prevention in Botswana* (2004), p. 12.

23 WLSA Malawi; *Women and HIV AND AIDS in Six Districts in Malawi: Balancing the Equation Between Women's Grounded Realities and the Appropriateness of the Response*, draft paper to be published, see <http://wlsamw.wordpress.com>; Mwenda K.K., *African Customary Law and Customs: Changes in the*

Sexual cleansing is also alarmingly used to 'cleans' people living with HIV and acquired immunodeficiency syndrome (AIDS). In Isiolo in North-western Kenya it is believed that sex with a virgin can cure the disease. Nassir, a man living with HIV interviewed by Reuters said, "I was given a girl of nine years to sleep with for a week ... I took pity on her but if it wasn't for this disease I wouldn't have slept with her... I had to do what the elders had said."²⁴ After the ceremony, the community reportedly engages in an orgy to complete the cleansing process.²⁵ A local charity called Tumaini is working to stop the customs and report the abuse of young girls in this process, as well as offering alternative purifying rituals for men with HIV.²⁶

Belief in the so called 'virgin cure' has been found to exist in numerous countries with a high prevalence of HIV, including in South Africa, India,²⁷ and Thailand.²⁸ Interestingly, the phenomenon has been traced back to Victorian Scotland when virgin sex was believed to cure syphilis and gonorrhoea.²⁹

In light of the evident risks associated with the spread of HIV involved in sexual cleansing, efforts are being made by the National AIDS Commission in Malawi in partnership with community leaders³⁰ to encourage sex cleansers to use condoms while carrying out such rituals. Sexual cleansers in Malawi are now required to wear a condom or otherwise be subject to punishment from the elders. This includes being disallowed to practice as a cleanser by the other cleansers in the community. This is one of the attempts to respect the tradition without causing harm to women,³¹ while reducing the risk of spreading HIV by using alternatives that do not involve sexual intercourse.³²

In 2005, the government of Zambia amended their penal code to make it illegal to engage in harmful cultural practices such as widow cleansing³³ or to encourage another person to participate in the practice.³⁴ The Zambia Integrated Health Programme has undertaken countrywide campaigns focused on the chiefs and their representatives, because they have substantial rural influence. More than one hundred chiefs and three hundred *indunas* (representatives) are involved in a campaign to induce behavioural change with respect to such matters as sexual cleansing.³⁵ Results have so far been witnessed in the Kingdom of Mwata Kazembe in Luapula Province, where actual sexual cleansing has been replaced with the symbolic gesture of wearing white beads on the right hand of the widowed spouse. In the Copperbelt Province of Zambia, cleansing is now performed by smearing corn mash over the widowed spouse's body. These practices still preserve the original value of the traditional custom, while eliminating the sexual aspects and the risks of HIV.

The provisions related to freedom from cruel, inhuman or degrading treatment in the ICCPR (Article 7) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), apply to non-State actors with the "acquiescence" or inaction of the State. The Committee Against Torture therefore recognises as torture acts of violence towards women, including domestic violence, caused by private actors when there is evidence of State inaction, complicity or acquiescence.³⁶ This applies to cleansing rituals where the practice involves forced sex. Article 18 of the African Charter on Human and People's Rights (ACHPR) which provides that the State must ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions, is also applicable here.

Culture of Sexual Cleansing of Widows and the Marrying of a Deceased Brother's Widow, Gonzaga Journal of International Law, (undated), available at: <http://www.gonzagajil.org/content/view/168/26/>, [accessed 16.06.2011]; New York Times, *AIDS Now Compels Africa to Challenge Widows' 'Cleansing'*, May 11, 2005, available at: <http://www.nytimes.com/2005/05/11/international/africa/11malawi.html?pagewanted=print> [accessed 16.06.2011].

24 Nyumbura H., *Kenya: Permissive African Sexual Traditions Spread Aids* (2004), available at: <http://www.thebody.com/content/art26974.html?ts=pf> [accessed 07.05.2011], originally from Reuters.

25 *Ibid.*

26 *Ibid.*

27 Meel, BL, *The Myth of Child Rape as a Cure for HIV/AIDS in Transkei*, (2003) Med Sci Law Vol 43, no.1 pp85-88; Zola D, *The Virgin Myth, A global and Historical Perspective* available at <http://13gm.wordpress.com/2010/06/20/virgin-myth-a-global-and-historical-perspective/> [accessed 15.06.2011].

28 Heather M., *Buying Innocence: child-sex tourists in Thailand*, Third World Quarterly, Vol. 29, No. 5, 2008, pp 903 – 917, available at: http://pdfserve.informaworld.com/333168_793875925.pdf [accessed 15.06.2011].

29 Davidson, R. *This Pernicious Delusion: Law, Medicine, and Child Sexual Abuse in Early-Twentieth-Century Scotland*; Journal of the History of Sexuality - Volume 10, Number 1, January 2001, pp. 62-77; Earl-Taylor M., 'HIV/AIDS, The Stats, The Virgin Cure and Infant Rape' (2002), available at: <http://www.scienceinfrica.co.za/2002/april/virgin.htm> [accessed 07.05.2011].

30 Banda C., *Health Workers Blame Cultural Practices* (2004), available at: <http://africa.peacelink.org/tools/print.php?id=8669> [accessed 05.05.2011].

31 UN General Assembly 64th Session, item 58 of the preliminary list, Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary General, 13 July, 2009, p3.

32 ³⁰ *Ibid.*

33 *Securing Our Future*, Report of Commission on HIV & AIDS and Governance in Africa, Economic Commission for Africa (2008) p.18.

34 Gabel L., *Legal Aspects of HIV & AIDS: A Guide for Policy Law Reform*, (2007) World Bank, Global HIV Programme p. 147.

35 *Traditional Leaders in Zambia; A weapon Against AIDS* available at <http://www.abtassociates.com> [accessed 05.05.2011].

36 Nowak, M., *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, (2010) A/HRC/13/39/Add.5, para 196.

The Protocol to the ACHPR on the rights of women in Africa requires State Parties to prohibit and condemn all forms of harmful cultural practices which negatively affect the human rights of women (Article 5), and further protects the right to security of the person which includes protection from forced sex (Article 4). The provisions of Article 24(3) of the Convention on the Rights of the Child (CRC) and Article 21 of the African Charter on the Rights and Welfare of the Child obligate state parties to eliminate traditional practices prejudicial to the health of children. This provision is relevant in cases where young girls are subject to cleansing practices.

1.2 Dry Sex

Dry sex involves vaginal penetrative sex with reduced lubrication, natural or otherwise, and usually without the use of a condom. Women will often insert drying agents into their vagina, such as dry cloth, herbs, and even chemicals including bleach, toothpaste, and antiseptics, to create the required tight, dry and hot vagina.³⁷ Dry sex is associated with heightened sexual pleasure for the male during intercourse.³⁸

For women, dry sex causes friction and sometimes tearing of delicate membranes and micro-lacerations. The chemicals used to dry out the vagina cause inflammation and lesions and alter the natural pH level, increasing the risk of numerous infections, including HIV. In addition, the fact that dry sex also usually involves having unprotected sex increases the vulnerability of the woman to HIV infection.³⁹

The practice of 'dry sex' is common throughout Sub-Saharan Africa,⁴⁰ Latin America,⁴¹ the Caribbean⁴² and South Asia.⁴³ In one study, eighty six per cent of women in Zambia and 93% of women in Zimbabwe reported having practiced dry sex, and similar practices have been described in Malawi, Botswana, and South Africa.⁴⁴ In the Caribbean the practice of dry sex has been found to be widespread in the Dominican Republic, Haiti and Hispaniola.⁴⁵ In South Africa a wet vagina is associated with infidelity, sexually transmitted diseases and dirtiness.⁴⁶

Loosli recommends challenging cultural practices such as dry sex by targeting the 'tradition keepers' in society through education programmes, and using their knowledge and position within the community to promote change of practice, whilst still respecting the existing culture.⁴⁷ In combating dry sex, women's vulnerability to HIV is reduced, and condom use can be encouraged as part of the solution. In addition, women will no longer be required to suffer pain during and after intercourse, and may find empowerment through gaining back some of their bodily integrity.

The practice of dry sex is painful and causes bodily harm to women, which constitutes inhuman and degrading treatment in violation of the Convention Against Torture, and Article 18 of the ACHPR. Dry sex also violates the right to liberty and security of the person under the UDHR (Article 3). Article 5 of the American Convention on Human Rights makes provision for the right to humane treatment for both men and women, and dry sex is clearly not humane. By failing to protect women from this practice, State Parties are in violation of Article 5(a) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), and CEDAW Committee's Recommendation 19 regarding gender-based violence. The practice also violates the Declaration on the Elimination of Violence against Women.

1.3 Unprotected Sex Amongst Married Couples

Condoms, both male and female, are the single most effective available technology to reduce the sexual transmission of HIV.⁴⁸ The Joint Action for Results UNAIDS Outcome Framework 2009-11, includes reducing sexual transmission of HIV as the first of its ten priority areas and cross-cutting strategies, and states that "we can reduce sexual transmission of HIV

37 Loosli B.C., *Traditional Practices and HIV Prevention in Sub-Saharan Africa* (2004) pp.11 and 12.

38 Beksinska M.E., Rees H.V., Kleinschmidt I., and McIntyre J., *The practice and prevalence of dry sex among men and women in South Africa: a risk factor for sexually transmitted infections?* Sex. Transm. Inf. 1999; 75; 178-180.

39 *Ibid.*

40 Reddy, P. et al, *Preference for dry sex, condom use and risk of STI among HIV-negative black women in the Western Cape province, South Africa*, S. Afr. j. sci. vol.105 no.1-2 Pretoria Jan./Feb. 2009.

41 Halperin D., Feature: *Dry Sex: Increasing The Risk Of HIV Infection?* AIDSLink: Issue 60,15 March 2000.

42 Andel T., et al, *Dry Sex in Suriname*, J Ethnopharmacol 2008 Feb 28;116(1):84-8. Epub 2007 Nov 9, p1.

43 Hull T., & Budiharsana M., *Male Circumcision and Penis Enhancement in Southeast Asia: Matters of Pain and Pleasure, Reproductive Health Matters*, Vol 9, No. 18 (2001) p1; Terence, H,H, Meiwita B, *Putting Men in the Picture: Problems of Male Reproductive Health in Southeast Asia*, p.8 available at http://212.95.240.146/Brazil2001/s20/S22_02_Hull.pdf [accessed on 15.06.2011].

44 Beksinska M.E., Rees H.V., Kleinschmidt I., and McIntyre J., *The practice and prevalence of dry sex among men and women in South Africa: a risk factor for sexually transmitted infections?* Sex. Transm. Inf. 1999; 75; 178-180.

45 *Ibid.*; Halperin DT. *Dry sex practices and HIV infection in the Dominican Republic and Haiti*. Sex Transm Infect. 1999;75:445-446.

46 *Traditional Leaders in Zambia; A weapon Against AIDS* available at <http://www.abtassociates.com> [accessed 05.05.2011], pp 32-33.

47 *Ibid.*, p35.

48 UNAIDS, UNFPA, WHO (2004) *Position Statement on Condoms and HIV Prevention*; UNFPA, PATH (2006) *Female Condom: A Powerful Tool for Protection*, also cited in UNAIDS Guidance Note on HIV and Sex Work (2009), p.14.

by promoting social norms and individual behaviours that result in sexual health.⁴⁹ There is perhaps a worldwide resistance across cultures to condom use amongst heterosexual couples, however, throughout Asia and Africa there appears to be a particularly strong cultural resistance to condom use amongst heterosexual couples, particularly within marriage.⁵⁰ Unprotected sex between married couples is such a strong traditional practice throughout these regions, that many people do not see condom use as an option.⁵¹ A report by UNAIDS explains that condom use amongst the general population is very difficult to measure.⁵²

In India, if women suggest condom use within their marriage and appear to have knowledge about HIV transmission, they are often assumed to have engaged in premarital sex,⁵³ or to be suspecting their husband of intercourse with sex workers. Condom use is also associated with contraception, rather than HIV protection, and conflicts with the strong cultural importance attached to procreation, and in particular the pressure to bear sons.⁵⁴ The resistance to condom use also goes deeper than this, and touches on more complex cultural beliefs about health. According to Bhattacharya⁵⁵, the use of condoms is believed to interrupt the natural flow of body fluids, and to prevent the necessary transmission of semen from the man to the woman. Bhattacharya states that throughout India, semen is seen as belonging to the natural element of metal, and its blockage through condom use is seen to cause an unnatural rise in body temperature for the man and burns for the woman, causing sickness. For this reason women will often undergo sterilisation after they have completed their families rather than use condoms as contraception.⁵⁶ For many women, this belief is so strong that they would prefer their husbands to use sex workers whilst away for long periods of time, rather than risk getting sick by storing too much semen in their bodies without the release involved through sex.⁵⁷ Bhattacharya notes that sex is a completely taboo subject throughout India, and any HIV intervention must work within this cultural constraint. However, she suggests drawing on the strong family network which is so core to Indian culture, to promote HIV awareness through the involvement of HIV-positive family members. Although challenging in the context of extreme stigma around HIV, the use of elders in the family who have strong influence and control over the younger generation, could be a powerful tool to disseminate the necessary health messages.⁵⁸

The Society for Education, Welfare, and Action – Rural used a project called *Swaasthya* ('Good Health'), to promote and improve communication between married couples about sex. The *Swaasthya* project involved the in-laws in its activities, in order to address the pressure traditionally exerted on couples by their parents to produce multiple male offspring. They also used the *Nav Dampati Mela*, which is a traditional community event for newlywed couples, to promote health issues. Condoms were given as part of the gift to the couple, and small support groups from the community were formed to discuss marital issues, including sexual health.⁵⁹ As well as addressing HIV, projects that involve the extended family and community in discussions around health issues may help to reduce the taboo around sexual health, and create a safe forum for discussion of other culturally sensitive issues, such as gender roles and sexuality. However, as Bhattacharya stresses, such changes in culture will not happen over night.

In many countries in Africa, the resistance to condom use amongst married couples is similar to those in India, but for slightly different reasons. The same suspicions about the suggestion of condom use being a sign of infidelity are prevalent in many countries of Africa, and there is also a strong desire to have multiple offspring, as there is in Asia. Loosli⁶⁰ suggests that semen is also valued in many African countries, and that a woman's desire to use a condom is taken as rejection of the man's semen,⁶¹ although not on the same 'health' basis as in India.

As is the case all over the world including North America and Europe, in many parts of Africa, Asia, and the Middle East, traditional cultural practices are intertwined with religious beliefs, and often efforts to promote condom use are

49 Joint Action for Results UNAIDS Outcome Framework 2009-11, p.8.

50 UNAIDS, *Making Condoms Work for HIV Prevention*, UNAIDS/04.32E (English original, June 2004), p.18.

51 Bhattacharya G., *Program Sociocultural and Behavioural Contexts of Condom Use in Heterosexual Married Couples in India: Challenges to the HIV Prevention Program*, (2004) *Health Educ Behav* 31; Loosli B.C., *Traditional Practices and HIV Prevention in Sub-Saharan Africa* (2004), Discussion Group for HIV Governance Group for the Secretariat to Assist Red Cross National Societies, Geneva.

52 UNAIDS, UNFPA, WHO (2004) *Position Statement on Condoms and HIV Prevention*; UNFPA, PATH (2006) *Female Condom: A Powerful Tool for Protection*, also cited in UNAIDS Guidance Note on HIV and Sex Work (2009), p18.

53 Joint Action for Results UNAIDS Outcome Framework 2009-11, p. 106.

54 *Ibid.* p.107.

55 *Ibid.*

56 *Ibid* pp. 108-109.

57 *Ibid* p109.

58 *Ibid* p112.

59 *Ibid* p.114.

60 Traditional Leaders in Zambia; *A weapon Against AIDS* available at <http://www.abtassociaties.com> [accessed 05.05.2011].

61 *Ibid.* p. 16.

met with objections on religious grounds.⁶² In Uganda and Indonesia, religious scholars are reportedly taking a more tolerant stance towards condom use, instead of presenting abstinence as the only solution.⁶³ Hasnain emphasises the need to include religious leaders in HIV education programmes, as was done successfully in Senegal and Uganda.⁶⁴ The Islamic Medical Association of Uganda educated over 3,000 religious leaders and their assistants, who went back to their communities to provide accurate information regarding HIV and AIDS during religious gatherings. The result was a decrease in the numbers of self-reported sexual partners, and an increase in the numbers of self-reported condom use. In Senegal, 260 religious leaders were engaged in a conference on AIDS prevention, and consequently included discussions on HIV in their regular Friday prayers. These discussions may have been a contributory factor to Senegal's success in HIV programming in that it now has one of the lowest rates of HIV in the region at 1.2% (2004).⁶⁵

Throughout Africa, the Christian evangelist message on HIV and AIDS stresses abstinence in place of condom use. In addition, in many parts of Africa people with HIV are encouraged by religious 'healers' to pray for their recovery,⁶⁶ and in many cases this has involved ceasing taking their prescribed anti-retrovirals as a demonstration of their faith. At one evangelical church in Nairobi, Kenya, the Salvation Healing Ministry, the prophetess and leader of the church was charging people the equivalent of USD\$3,000 - 4,000 to perform prayers which would cure them of HIV.⁶⁷ After the ceremony a church elder took the patients for an 'independent test' which would always come back negative, indicating that the patient had been cured. However, on getting a second opinion, the patients were always still infected.⁶⁸ This has obvious implications for the spread of HIV, where people believe themselves to be cured by God and hence free to engage in unprotected sex. Although this particular faith healer was discredited in the media including on public radio by the First Lady of Kenya⁶⁹, there are many more faith healers offering similar services to people living with HIV, and belief in their healing powers is widespread. Interventions that are most likely to change people's views on faith healing must involve religious leaders who encourage condom use and emphasise the need to continue with prescribed medication, but also offer faith healing as part of a more holistic approach to people's health. Pamelah Oloo, a pastor from Kenya, recommends that churches re-examine Christian ideologies that hinder the use of condoms. She quotes from *With Passion & Compassion*⁷⁰: "*Spirituality can be a chief source of resistance to cultural violence. It draws on all that is just and life giving in people's tradition, and critiques those parts of the tradition that are death-dealing in the lives of their communities and their lands.*"⁷¹ Oloo also recommends that the church should sensitise women about their human rights through biblical verses that promote equality between the spouses.⁷²

The examples above, of interventions aimed at changing cultural norms related to condom use illustrate that by providing people with information about HIV and condoms from a rights based perspective, and in a culturally appropriate context, cultural norms can be influenced. Clearly, promoting condom use also involves making condoms readily available and affordable for everybody in the population, which also remains a challenge. Government backing of condom promotion campaigns, and the involvement of media, helps to add legitimacy to the message, and increases the chance that the practice of condom use will be absorbed over time as a cultural norm.

1.4 Female Genital Mutilation

Female Genital Mutilation (FGM) is defined by the World Health Organisation (WHO) as "*all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.*"⁷³ The practice of FGM has no health benefits, causes severe pain and has several immediate and long-term health consequences.⁷⁴ FGM may also contribute to the risk of HIV infection among women and girls. This is because of the unsterilised instruments such as kitchen knives, razor blades, and pieces of glass, or even sharp fingernails, which are

62 Afrol News, *Tanzanian church still opposes condoms, sex education* (2011), available at: <http://www.afrol.com/articles/19596>, [accessed 07.05.2011].

63 Hasnain, M., *Cultural Approach to HIV/AIDS Harm Reduction in Muslim Countries* (2004), Harm Reduction Journal, 2005 2.23, p.5.

64 *Ibid*, p.6.

65 *Ibid*, p.6.

66 AIDS MAP, *Faith* available at: <http://www.aidsmap.com/print/Faith/page/1693440/> [accessed 07.05.2011].

67 Mugwanga M., *The Nation Newspaper*, Kenya, May 21, 2006.

68 *Ibid*.

69 CapitalFM Kenya May 27, 2006.

70 Fabella, Virginia & Oduyoye, eds., *With Passion and Compassion: Third World Women Doing Theology: Reflections from the Women's Commission of the Ecumenical Association of Third World Theologians* (1988), Maryknoll: Orbis.

71 Oloo P., *The Church's Mission: Gender and HIV / AIDS among the Luos of East Africa* (2004), *Transformation: An International Journal of Holistic Mission Studies*, SAGE p.77.

72 *Ibid*, p.76. Examples of verses referred to include Gen. 1:27, and Matt 12:11.

73 WHO, *An update on WHO's work on female genital mutilation (FGM) Progress report* (2011), p.1.

74 *Ibid*, pp 2-3, and Fact Sheet No 23 of the Office of the High Commissioner for Human Rights, p.5.

often used to perform such procedures, sometimes on several people with the same instrument.⁷⁵ A submission from Nigeria to the Africa Regional Dialogue of the Global Commission on HIV and the Law shared the case study of a mother, whose daughter was taken to be circumcised following pressure from the woman's husband. The girl contracted HIV during the circumcision, following which the woman's husband abandoned her, and due to the stigma associated with HIV in Nigerian culture, the woman did not feel able to disclose her daughter's status and therefore did not seek treatment or warn other mothers about the dangers of FGM.⁷⁶ Furthermore, FGM can bring problems later in life when the scarred or dry vulva of a woman who has undergone FGM is more likely to be torn during intercourse, which can facilitate transmission from an infected partner.⁷⁷

FGM has been recorded historically in ancient Rome, tsarist Russia, and in nineteenth century England, France and North America.⁷⁸ FGM is widely practiced today in 28 countries in Africa, in some countries in Asia and the Middle East,⁷⁹ and in the Arabian Peninsula, Australia and Latin America.⁸⁰ The practice is associated with purity and cleanliness, and in countries where the practice is deeply rooted in the culture it is usually a prerequisite for marriage, as the uncircumcised vagina is viewed as being ugly, by both men and women. FGM is also reported to be a form of control over women, as it can be used to repress their sexual desire and is believed to preserve their virginity.⁸¹ WHO estimates that in Africa 91.5 million girls and women have been subjected to the practice, in most cases before the age of 15.⁸² The United Nations Population Fund and the United Nations Children's Fund are currently working on a joint programme to eliminate the practice, and an Interagency Statement was produced in 2008 involving most of the UN agencies, with the goal of eliminating FGM on the grounds that it is discriminatory against women.⁸³

UN agencies and human rights bodies first problematised FGM on health grounds for women during the 1950s,⁸⁴ and according to WHO, 21 countries in Africa have laws against FGM, but the practice still persists. FGM is mostly carried out by traditional health providers, who often play other central roles in communities, such as attending childbirths.⁸⁵ Although medicalisation of the practice may reduce some, but not all, of the risks of HIV as doctors would perform the procedure using a clean knife, the Interagency Statement advocates the complete elimination of FGM due to the associated medical complications, and because it is characterised as a human rights abuse in itself.⁸⁶

FGM was banned in Kenya in September 2011, making it illegal to practice or procure it, or to take somebody abroad for the procedure. The challenge now will be to implement the ban.⁸⁷ The Maasai Education Discovery (MED), an organisation created and operated by the *Maasai* community in Kenya and Tanzania, has worked to promote alternatives to FGM. Unlike many non-*Maasai* anti-FGM activists, MED have chosen to open dialogue between community members and discussed possible alternatives, noting that confrontational ways would not work.⁸⁸ They have additionally encouraged young girls to speak out about their true feelings on the practice; a method that has been suggested in other jurisdictions.⁸⁹ In cases where a girl is being forced into FGM against her will, they ensure that the girl is taken away from her family to a safe house. After some time, they initiate a reconciliation process to bring the girl back together with her parents and community. MED has also initiated a programme to involve the men which targets young *Maasai* men

75 Fact Sheet No 23 of the Office of the High Commissioner for Human Rights, p.4.

76 Submission made by Ademola Adelekan, Nigeria, for the African Regional Dialogue of the Global Commission on HIV and the Law.

77 UN Women, Understanding the linkages between HIV and AIDS and Violence Against Women and Girls, available at: <http://www.endvawnow.org/en/articles/677-understand-the-linkages-between-hiv-aids-and-violence-against-women-and-girls.html> [accessed 05.05.2011].

78 WHO, An update on WHO's work on female genital mutilation (FGM) Progress report (2011), p.2.

79 *Ibid*, p.1: Countries in which FGM has been documented include: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, Yemen, India, Indonesia, Iraq, Israel, Malaysia, Thailand and the United Arab Emirates. The practice has also been documented amongst immigrant groups in Europe, North America, Australia and New Zealand.

80 WHO, An update on WHO's work on female genital mutilation (FGM) Progress report (2011), p.4.

81 WHO, OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, *Eliminating Female Genital Mutilation, an Interagency Statement* (2008), pp 5 and 6.

82 Oloo P., *The Church's Mission: Gender and HIV / AIDS among the Luos of East Africa* (2004), *Transformation: An International Journal of Holistic Mission Studies*, SAGE p.2.

83 See UNFPA: <http://www.unfpa.org/gender/practices1.htm> [accessed 14.06.2011].

84 WHO, An update on WHO's work on female genital mutilation (FGM) Progress report (2011), p.2.

85 *Sexual and Reproductive Health* (2011), WHO, available at <http://www.who.int/reproductivehealth/topics/fgm/en/index.html> [accessed 05.05.2010].

86 WHO, An update on WHO's work on female genital mutilation (FGM) Progress report (2011),

87 Boseley, S., *Kenya Acts Against Unkindest Cut*, The Guardian, available at: <http://www.guardian.co.uk/society/sarah-boseley-global-health/2011/sep/08/women-africa>, [accessed 09.12.2011].

88 *Ending the Culture of FGM*, The Guardian, available at <http://www.guardian.co.uk/commentisfree/2010/jan/07/female-genital-mutilation-sudan> [accessed 05.05.2011].

89 Makda IYLC, *FGM: Sexism In The Name of Culture*, (2011), Amplify, available at <http://www.amplifyyourvoice.org/u/Makda-IYLC/2011/3/2/FGM-Sexism-in-the-name-of-culture> [accessed 05.05.2011].

who are not educated and are planning to marry young *Maasai* girls. Because circumcision goes hand-in-hand with marriage, they ask these men to refuse to marry circumcised girls.⁹⁰ This change in practice has implications beyond addressing the spread of HIV, as the girls are empowered by being allowed to express their views and have them heard, and the inclusion of men helps to increase men's awareness of women's rights in general. This, of course, may not be the ideal solution as encouraging men to refuse girls who have already been circumcised further marginalises these girls.

The practice has also been reported elsewhere amongst immigrant communities from Asia and Africa. In their submissions to the High Income Countries Dialogue of the Global Commission on HIV and the Law, an American Muslim non-governmental organisation (NGO) described its work to address traditional cultural practices such as FGM, which are frequently justified as being Islamic. It noted that "*many devout religious individuals believe that what is rooted in a local tradition or custom is actually required and sanctioned in the name of divine will.*"⁹¹ The NGO's statement on FGM declares that the practice violates the central tenants of Islamic law, and thereby removes the religious justification for what it argues is a harmful cultural practice.⁹²

FGM violates the right to liberty and security of the person under the UDHR (Article 3). It also amounts to cruel and inhuman and degrading treatment under the ICCPR (Article 7), under the Convention against Torture, and under the ACHPR (Article 18). The regulation of FGM within States is monitored by many of the UN human rights monitoring agencies, and has been condemned by several UN Committees including the CEDAW Committee, the Committee on the Rights of the Child, and the Human Rights Committee.⁹³ Article 5(a) of CEDAW requires State Parties to "*modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*" The CEDAW Committee's Recommendation 14 called for the eradication of FGM, and Recommendation 19 categorises FGM as a traditional practice that constitutes violence against women, and that is harmful to health. A Special Rapporteur on harmful traditional practices, Mrs. Warzazi, was appointed in 1988, and she consequently denounced FGM as a practice that is a human rights abuse of women and girls.⁹⁴ The African Union's Solemn Declaration on Gender Equality in Africa, and its Protocol to the ACHPR on the Rights of Women in Africa both also denounce the practice of FGM.⁹⁵ It is vital that these international laws are implemented at a domestic level, and the Office of the High Commissioner for Human Rights recognises that it is also important for a parallel programme to address the cultural environment that sanctions such harmful traditional practices, in order to eliminate the justifications used to perpetuate the practice of FGM.⁹⁶

1.5 Wife Inheritance

Wife inheritance is a traditional practice whereby when a woman's husband dies, she is 'inherited' by her husband's brother. It is a practice that was historically aimed at protecting the widow and her children from economic hardship upon the loss of her husband⁹⁷, and is referred to in the Bible.⁹⁸ It was largely viewed as a form of social protection where one of the brothers of the deceased would be identified to take care of the immediate needs of the widow and the orphans.⁹⁹ The basis of wife inheritance was never related to sexual intercourse, but, in many countries in Africa the practice has changed over the years, and now women are often coerced into a sexual relationship with their inheritor.¹⁰⁰ For example, in the Kenyan context according to *Luo* tradition widows were not forced into inheritance, rather the

90 Olekina, L., *FGM: Maasai Women Speak Out* (2004), *Cultural Survival* 28.4, available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/kenya/fgm-maasai-women-speak-out>, [accessed 05.05.2011].

91 Submission made by American Society for Muslim Advancement, USA, for the High Income Regional Dialogue of the Global Commission on HIV and the Law.

92 *Ibid.*

93 CEDAW General Recommendation No. 14 on female circumcision, and General Recommendation No. 19 on Violence against Women; CRC addresses FGM under art. 24 (3) and made a reference in its General Comment no 7 on early childhood. In addition, the CRC called for the abolition of FGM in its General Comment 14 on the right to health and ICESCR (Global Commission on HIV and the Law, (2011) Regional issues brief: Rights of children and young people to access HIV-related services, p.1.).

94 WHO, An update on WHO's work on female genital mutilation (FGM) Progress report (2011), p.2.

95 *Ibid.*, p.1.

96 *Ibid.*, p.20.

97 Submission made by FIDA, Kenya, for the African Regional Dialogue of the Global Commission on HIV and the Law.

98 Richard Kalmin, *Levirate Law*, Anchor Bible Dictionary.

99 KELIN 2010, 'Working With Cultural Structures', available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> [accessed 15.06.2011]; Submission made by TAWLA, USA, for the African Regional Dialogue of the Global Commission on HIV and the Law p.73.

100 Human Rights Watch, *Policy Paralysis: A Call For Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa*, (2003), HRW, p.6.

elders would inquire whether the woman was willing to be inherited. This, in a way, respected the widow's right to autonomy.¹⁰¹

The risk factors posed by this practice, in the context of HIV, include the fact that if the widow is HIV-positive and engages in unprotected sexual intercourse with a male relative who is HIV-negative, then it puts the inheritor at a high risk of contracting HIV. Equally where the inheritor is HIV-positive and the widow is HIV-negative, a risk of infection is also posed to the widow.¹⁰²

Wife inheritance practices have been recorded in other African countries including, Zimbabwe,¹⁰³ Malawi,¹⁰⁴ Zambia,¹⁰⁵ Namibia¹⁰⁶ and Uganda,¹⁰⁷ as well as parts of India.¹⁰⁸ The practice, known also as levirate marriage, took place in the ancient Israelite and Near East societies, but seems to have more or less died out in that region.¹⁰⁹ In Kenya, the Luo Council of Elders have formulated culturally appropriate solutions on how to perform the rites of wife inheritance without the need of having sexual intercourse. The symbolic dressing by the widow in the coat of the man who will take care of the widow and the children (the inheritor), is now considered to be enough and no sexual act is required. Another solution is the symbolic patching of the roof by the inheritor by removing a section of it and replacing it. In both cases, the widow can seek consultations with the inheritor without having sex with them,¹¹⁰ thereby preserving the original value of the traditional custom, while eliminating the risks of HIV. Emphasis is also put on community literacy on the dangers of the practice and the harmful effects of HIV.¹¹¹ The Luo Elders have demonstrated their capacity to adapt their own culture in light of new information regarding the risks of HIV, in a way that could only come from within their own community.

All of the countries in Sub-Saharan Africa have ratified the ICCPR. The UN Human Rights Committee has interpreted Article 16 of the ICCPR to prohibit the treatment of women "as objects to be given together with the property of the deceased's husband to his family"¹¹², which is an appropriate description for the practice of wife inheritance. The ACHPR makes provision for the right to the respect of dignity inherent in the human being; this article also outlaws all forms of exploitation and degrading treatment. The provisions of Article 5 of the Protocol to the ACHPR on the rights of women in Africa mandates State Parties to prohibit and condemn all forms of harmful cultural practices which negatively affect the human rights of women, and remains very relevant to the practice of wife inheritance. Countries therefore have a duty under international and regional law to address the human rights of widows and ensure that they are not coerced into being 'inherited'. The interventions described above suggest that these laws need to be incorporated into bottom-up interventions at the level of customary law, rather than being left solely for application through formal legal systems.

1.6 Land Inheritance

Disinheritance of property has become an acute problem for widows and orphans in light of HIV. Disinheritance entails the unlawful appropriation of property of a widow and her children.¹¹³ Emerging legal and social trends relating to the

101 Samson OG, *The politics of Widowhood and Re-Marriage among the Luo of Kenya*, available at <http://www.ajol.info/index.php/tp/article/viewFile/46313/32711> [accessed on 15.06.2011].

102 Mugambi J., *The Impact of HIV/AIDS on Kenyan Rural Women and the role of Counseling* (2006), *International Social Work* 49(1) 87 - 86.

103 Immigration and Refugee Board of Canada, *Zimbabwe: The custom of 'wife inheritance'; the government's attitude towards this custom; protection available to women who refuse to observe this custom* (2004 - January 2006), (2006) available at: <http://www.unhcr.org/refworld/docid/45f147cb23.html>, [accessed 07.05.2011].

104 Adamson S Muula and Joseph M Mfusto - Bengo; *Important but Neglected Ethical and Cultural Considerations in the fight against HIV & AIDS in Malawi*. *Nurs Ethics* 2004 11: 479.

105 The Zambia Integrated Health Programme (ZIHP), led by the Abt Associates and in Partnership with the Zambian Ministry of Health, has undertaken countrywide campaigns focused on the chiefs and their representatives, because they have substantial rural influence. The chiefs are used to induce behavioural change with respect to such matters as wife inheritance. *Securing Our Future*, Report of Commission on HIV & AIDS and Governance in Africa, Economic Commission for Africa (2008)

106 University of Pretoria, AIDS and Human Rights Research Unit *Human Rights Protected? 9 Southern African Country Reports on HIV & AIDS and the Law* p.189.

107 Rachel C. Loftspring, *Inheritance Rights In Uganda: How equal inheritance rights would reduce poverty and decrease the spread of HIV/AIDS In Uganda*, available at <http://www.law.upenn.edu/journals/jil/articles/volume29/issue1/Loftspring29U.Pa.J.Int%27IL.243%282007%29.pdf> [accessed 16.06.2011].

108 Shrivastav, G., *The Unwanted Insider - The Widow*, Datamation Foundation, available at <http://www.datamationfoundation.org/women3.htm>, [accessed 13.06.2011].

109 Davies E.W., *Inheritance Rights and the Hebrew Levirate Marriage*, *Vetus Testamentum* Vol 31, Fasc. 3, July 1981.

110 KELIN 2010, *Working With Cultural Structures*, available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> [accessed 05.05.2011].

111 Agot BO, Agot K, Agingu WO, Bukusi EA; International Conference on AIDS Abstract no. TUPpD2049 (2004), available at: <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102283411.html> [accessed 05.05.2011].

112 Cited in Human Rights Watch, *Policy Paralysis: A Call for Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa* (2003), HRW, p.38; Article 16 reads "Everyone shall have the right to recognition everywhere before the law".

113 'Human Rights Watch, *Policy Paralysis: A Call for Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa*' (2003), Human

ownership and inheritance of property especially land, indicate a practice that has worked to the detriment of women in virtually all communities and social classes in Africa¹¹⁴ and South Asia.¹¹⁵ There is evidence that increased land scarcity has made the situation worse in recent years, so that in Tanzania widows who were previously allowed to stay on their husbands' land have been dispossessed as the land has increased in value.¹¹⁶ Property grabbing from widows is common in Kenya, Uganda, and Zimbabwe,¹¹⁷ and land ownership by women in the region is rare, at only 5% in Kenya, less than 10% in Cameroon, and until 2005 women were not allowed to own land at all in Lesotho and Swaziland.¹¹⁸

The effect of HIV is worse on women than men, as there is a higher prevalence of HIV amongst women worldwide.¹¹⁹ Much of the disinheritance is done in the name of culture. The inability to inherit the land results in an economic dependence on men and a power relationship in which women are unable to negotiate the terms of sex, including consent, fidelity and condom use, and their risk of HIV is increased. In many developing countries access to the formal legal system is difficult as it is lengthy and expensive which exacerbates the violations by effectively denying redress in the event of property grabbing. When evicted, most of the women and orphans unwillingly move to urban areas where they are exposed to circumstances that increase their vulnerability to HIV, and are often drawn into sex work. When women and children lose their land, homes and other assets, destitution and hence greater vulnerability to exploitation follow.¹²⁰

The practice of disinheritance of widows has been recorded in the Sub-Saharan region of Africa in countries such as Kenya, Tanzania, Uganda, Namibia and Zimbabwe.¹²¹ This practice has also been documented in Asia in countries such as Bangladesh and India.¹²²

The Kenya Legal & Ethical Issues Network on HIV & AIDS (KELIN),¹²³ an NGO working on health and human rights in Kenya, sought to encourage work with community-based cultural structures in the counties of Kisumu and Homabay in Kenya as an alternative dispute resolution mechanism (ADRM) to facilitate access to justice by affected widows and orphans.¹²⁴ The ADRM has addressed the historical roots of the problem of disinheritance in Kenya. Under ancient *Luo* custom, all land was collectively owned, and therefore there was no concept of individual inheritance. However, over time, men have manipulated custom to their own advantage, and to the exclusion of widows and orphans.¹²⁵ The old culture was manipulated by men so that women were chased away from the land when their husbands died, on the basis that the women had no rights over the land. KELIN trained the elders and the wider community on human rights, including the Kenyan Bill of Rights, and relevant land laws, highlighting that the law gives women inheritance rights on an equal basis with men. The *Luo* Council of Elders and *Nyakach* Elders were engaged to administer the ADRM, as the community was more comfortable with this customary form of justice than with the formal legal system.¹²⁶ The success of this approach has created an increasing demand in other communities to address other cultural practices that expose women and girls to a higher risk of HIV infection. The use of cultural structures as an ADRM option has facilitated the enjoyment of the right to property by widows and orphans. It is faster, more efficient, less expensive and less adversarial as compared to the formal systems. The approach involves education for the community on human rights issues and is

Rights Watch P.19.

114 *Ibid.*

115 Swaminathan H., Bhatla N. & Chakraborty S., *Women's Property Rights as An AIDS Response; Special Edition for the 8th International Congress on AIDS in ASIA and the Pacific (ICCAP8)* (2007).

116 KELIN 2010, *Working With Cultural Structures*, available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> [accessed 05.05.2011].p.8.

117 Submission made by Women & Law in Southern Africa Research & Education Trust, Zimbabwe, for the African Regional Dialogue of the Global Commission on HIV and the Law.

118 KELIN 2010, *Working With Cultural Structures*, available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> [accessed 05.05.2011].p.8.

119 UNAIDS 2010 Global Epidemic Report. 25 available at http://www.unaids.org/globalreport/documents/20101123_GlobalReport_full_en.pdf

120 Sweetman C., *How Title Deeds Make Sex Safer: Women's Property Rights in an Era of HIV* (2008), p.1, available at: <http://winafrica.org/2010/10/how-title-deeds-make-sex-safer-womens-property-rights-in-an-era-of-hiv/> [accessed 05.05.2011].

121 University of Pretoria, AIDS and Human Rights Research Unit *Human Rights Protected?* 9 Southern African Country Reports on HIV & AIDS and the Law p.v.

122 Swaminathan H., Bhatla N. & Chakraborty S., *Women's Property Rights as An AIDS response; Special Edition for the 8th International Congress on AIDS in ASIA and the Pacific (ICCAP8)* 2007.

123 The author Allan Maleche is, at the time of writing, Coordinator for KELIN, and the author, Emma Day, is a Volunteer Lawyer with KELIN.

124 KELIN *Legal Support & Litigation* (2010), available at: <http://kelinkenya.org/our-work/legal-support-and-litigation/>, [accessed 05.05.2011].

125 Godwin, J., *Scaling Up HIV-Related Legal Services, Report of Cases Studies: Ukraine, Kenya and India* (2010), IDLO p.15, available at: <http://kelinkenya.org/wp-content/uploads/2010/10/100901-HIV-Legal-Services-Case-Studies-IDLO-UNAIDS2.pdf>, [accessed 05.05.2011].

126 KELIN has taken on 84 cases involving disinheritance, of which 43 cases have been resolved in favour of the women, and 41 cases are still ongoing.

therefore a deterrent to future violations at the same time as restoring justice. KELIN has since, in consultation with other stakeholders, developed a toolkit on how to work with elders in communities.¹²⁷

A similar model has been adopted by the Nagorik Uddyog, a citizens' initiative in Bangladesh that promotes human rights, governance and democracy while ensuring gender equity and social justice. The method is called *shalish*, a traditional informal mechanism for dispute resolution.¹²⁸ The *shalish* committee is comprised of community members, at least one-third of which have to be women. Nagorik Uddyog provides training to the *shalish* on human rights within the formal legal system, and within customary and religious laws. Nagorik Uddyog monitors the decisions made by the *shalish*, and where the mediation process fails they provide legal aid to enable the women to access the formal court system. Although the *shalish* has not yet managed to engage with people living with HIV, Nagorik Uddyog believes it has potential to do so.¹²⁹

The Amahich Aamche Sanstha, a network for people living with HIV in Sangli district of Maharashtra State in India, uses pressure groups as an innovative way of naming and shaming families that disinherit their daughters-in-law of property. The pressure group also leverages public opinion and uses radio and other media to persuade families or communities to meet women's demands. The pressure groups are normally comprised of vocal and articulate people who negotiate with the family on behalf of the woman. Though successful, this strategy at times exposes the sensitive nature of HIV and its associated stigma¹³⁰ - the organisation is at times limited to the extent to which it can involve and influence the larger community, due to the need to maintain confidentiality about the widow's status. Addressing women's rights to inherit land greatly enhances their social and economic position in society, and reduces their dependence on men which consequently reduces their vulnerability to sexual exploitation. A study conducted in India shows that women's property ownership is linked with a substantially lower risk of marital violence.¹³¹ Further, research from Honduras and Nicaragua found a favourable correlation between women's property rights and their overall role in the household economy, their control over agricultural income, their share of business and labour market earnings, and their ability to obtain credit.¹³²

As Kapur points out, many African governments have provisions that preclude discrimination against women enshrined in their Constitutions, including Burkina Faso, Namibia, Ghana, Mozambique, Rwanda, South Africa, Tanzania, Uganda,¹³³ and Kenya. It is also a requirement of international and regional human rights law that States should protect women's rights to own property. Article 16(h) of CEDAW obliges States to ensure "*the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property. . .*" In addition, Article 23(4) of the ICCPR provides for equal rights for women at marriage, during marriage, and at the dissolution of marriage,¹³⁴ which would include the right to inherit land. The Protocol on the ACHPR, on the rights of women in Africa obligates states at Article 19(b) to promote women's access to and control over productive resources such as land. This protocol at Article 21 emphasises the right of widows to inherit their late husband's property. However, an International Development Law Organisation (IDLO) study undertaken in Mozambique and Tanzania concluded that women in the two countries, especially those at the community level, would prefer their rights relating to land to be resolved at the community level through traditional leaders, rather than resorting to formal legal systems.¹³⁵ The challenge is therefore to ensure that customary law is consistent with international and regional human rights standards.

1.7 Virginty testing

Virginty testing is a practice involving a physical examination of girls and women to ensure that their hymen is still intact as evidence that they have not yet had sexual intercourse with a man. Rather than being a cultural practice that directly increases the risk of HIV, virginty testing has been justified in terms of HIV prevention in South Africa and Uganda, on the basis that it ensures abstinence in girls, and proves to the new husband that she is not yet sexually active. The

127 KELIN, *Working With Cultural Structures* (2010), available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf>, [accessed 05.05.2011].

128 Swaminathan H., Bhatla N. & Chakraborty S., *Women's Property Rights as An AIDS Response*; Special Edition for the 8th International Congress on AIDS in ASIA and the Pacific (ICCAP8)' (2007).

129 *Ibid* p.16.

130 Sweetman C., *How Title Deeds Make Sex Safer: Women's Property Rights in an Era of HIV* (2008), p.1, available at: <http://winafrica.org/2010/10/how-title-deeds-make-sex-safer-womens-property-rights-in-an-era-of-hiv/> [accessed 05.05.2011].

131 Panda P. & Agarwall B., *Marital Violence Human Development and Women's Property Status in India* (2005), *World Development* v.3 (5).

132 Katz E. & Chamorro J., *Gender, Land Rights and the Household Economy in Rural Nicaragua and Honduras* (2002)

133 University of Pretoria, AIDS and Human Rights Research Unit *Human Rights Protected? 9 Southern African Country Reports on HIV & AIDS and the Law* p.10.

134 Cited in Human Rights Watch, *Policy Paralysis: A Call for Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa* (2003), Human Rights Watch.

135 Submission made by Women & Law in Southern Africa Research & Education Trust, Zimbabwe, for the African Regional Dialogue of the Global Commission on HIV and the Law.p.20.

Special Rapporteur on violence against women referred to Human Rights Watch evidence documenting the practice in Turkey.¹³⁶ Human Rights Watch also quote Mrs Museveni, the first lady of Uganda, who proposed virginity testing as part of a national 'virgin census';¹³⁷ again in the context of HIV prevention. Virginity testing has also been documented in Libya,¹³⁸ Egypt,¹³⁹ Indonesia,¹⁴⁰ Macedonia,¹⁴¹ Afghanistan¹⁴² and Iraq¹⁴³ although not for purposes of HIV prevention.

Apart from the fact that enforced virginity testing amounts to a human rights abuse in itself, it is not an effective practice to prevent HIV. In Uganda, virginity testing was part of an attempt to change the cultural environment in the direction of abstinence, and was in direct opposition to condom promotion efforts. The abstinence policy was strongly backed by the United States (US) government and was driven by ideology rather than science.¹⁴⁴ Abstinence programmes are unrealistic and ineffective, and because they go hand-in-hand with a resistance to condom distribution, the implications for HIV are serious. In South Africa, virginity testing was found to put girls at greater risk of sexual violence because the public testing advertised the 'availability' of virgins to men who seek out virgin girls as sex partners.¹⁴⁵ In many communities in Sub-Saharan Africa there is a belief that sex with a virgin cures HIV,¹⁴⁶ and there are accounts of this belief persisting in other regions as well including Asia, Europe and the Americas.¹⁴⁷ There are also concerns that people may be more likely to engage in riskier practices such as unprotected anal sex in order to pass virginity tests.¹⁴⁸

In South Africa, virginity testing was a traditional practice that although popular in the past, was much less common prior to the HIV epidemic. In the past the practice was common to test a woman's virginity prior to marriage, as this was a factor that would favourably increase the bride price.¹⁴⁹ The practice saw resurgence as a public health response to HIV, in an attempt to promote abstinence amongst girls. The virginity test, carried out by traditional 'testers' involved an examination of the vagina, and also an assessment of the girls' breasts, which should be 'firm and taut', and of her eyes which should 'look innocent'.¹⁵⁰ Many rural women and even members of South Africa's political elite saw the practice as a positive return to traditional cultural values of chastity before marriage, modesty, self-respect and pride.¹⁵¹ The South African government responded by attempting to ban the practice, and it was widely denounced as a human rights abuse. However, George argues that this approach is ineffective, as banning virginity testing will not in reality prevent it from happening, and simply condemning the practice polarises the issue, and shifts the focus from where it should be, which is on realising the right to health through the provision of services and accurate information.¹⁵²

136 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49 Cultural practices in the family that are violent towards women.

137 Human Rights Watch, *The Less They Know, the Better* (2005), available at: <http://www.hrw.org/en/reports/2005/03/29/less-they-know-better> [accessed June 14, 2011].

138 Human Rights Watch, *Libya: A Threat to Society?*, February 2006, available at <http://www.hrw.org/en/reports/2006/02/27/libya-threat-society-0> [accessed June 14, 2011].

139 The Independent newspaper, *Egyptians decry 'virginity tests' on protesters*, May 31, 2011, available at: <http://www.independent.co.uk/news/world/africa/egyptians-decry-virginity-tests-on-protesters-2291348.html> [accessed June 14, 2011].

140 Amnesty International, *Indonesia urged to stop discriminatory pregnancy tests for school girls*, November 11, 2010, available at: <http://www.amnesty.org/en/news-and-updates/indonesia-urged-block-discriminatory-pregnancy-tests-schoolgirls-2010-11-11> [accessed June 14, 2011].

141 Amnesty International, *Macedonia: Little by Little We Women Have Learned Our Rights*, December 6, 2007, available at: <http://www.amnesty.org/en/library/info/EUR65/004/2007/en> [accessed June 14, 2011].

142 IRIN Asia, *Virginity-related penalties "extremely unfair"*, April 26, 2011, available at <http://www.irinnews.org/Report.aspx?ReportID=92581> [accessed June 14, 2011].

143 Amnesty International, *Women, Violence and Health*, p.10, available at: <http://www.amnesty.org/en/library/asset/ACT77/001/2005/en/f6925f5e-d53a-11dd-8a23-d58a49c0d652/act770012005en.pdf> [accessed June 14, 2011].

144 Human Rights Watch, *The Less They Know, the Better* (2005), available at: <http://www.hrw.org/en/reports/2005/03/29/less-they-know-better> [accessed June 14, 2011].

145 Human Rights Watch, *Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence*, March 2004 Vol. 16 No. 3 (A); George, p. 1461.

146 George, E. R., *Virginity Testing and South Africa's HIV/AIDS Crisis, Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, California Law Review, Vol. 96, No. 1447, 2008, p. 1461; Earl-Taylor, M., *HIV/AIDS, the stats, the virgin cure, and infant rape*, available at: <http://www.scienceinAfrica.co.za/2002/april/virgin.htm> [accessed June 15, 2011]; BBC, *Staging Sex Myths to Save Zimbabwe's Girls*, October 24, 2006, available at: <http://news.bbc.co.uk/2/hi/africa/6076758.stm> [accessed June 15, 2011]; The Independent, *Focus Aids: The myth that sex with a virgin can cure HIV*, September 5, 1999, available at: <http://www.independent.co.uk/life-style/focus-aids-the-myth-that-sex-with-a-virgin-can-cure-hiv-1116662.html> [accessed June 15, 2011].

147 Human Rights Watch, *Libya: A Threat to Society?*, February 2006, available at <http://www.hrw.org/en/reports/2006/02/27/libya-threat-society-0> [accessed June 14, 2011] atxi, p. 1462, footnote 90.

148 *Ibid.* p. 1463.

149 *Ibid.* p. 1454.

150 *Ibid.* p. 1456.

151 *Ibid.* p. 1458.

152 *Ibid.* p. 1451.

Virginity testing is now only allowed under South African law for girls over the age of 16, and with their 'consent', although consent in this context is a dubious concept. The full implementation of the provisions in the new *Children's Act* which represent a partial ban on virginity testing is said to be unlikely.¹⁵³

Virginity testing is inherently discriminatory against women and girls, because the practice is only carried out on girls, and there is no known equivalent test for boys. This violates Article 2, 24 and 26 (discrimination) and 17 (privacy) of the ICCPR, Article 5(a) of CEDAW, and Article 2 of the CRC. The practice is also invasive and amounts to inhuman and degrading treatment, and is therefore in violation of the Convention against Torture, and Article 18 of the ACHPR. Where abstinence is presented as the only option to prevent HIV, this also constitutes a violation of the right to health at Article 12 of the ICESCR, because people are kept ignorant about effective methods of protection. The UN Committee on the Rights of the Child expressed concerns about virginity testing in South Africa in its remarks on the government's periodic report, defining it as a practice that threatens the health, affects the self-esteem, and violates the privacy of girls.¹⁵⁴ The UN CEDAW Committee also called for an amendment to the *Children's Act* involving complete abolition of virginity testing.¹⁵⁵

1.8 Male Circumcision

According to the WHO, male circumcision is the surgical removal of all or part of the foreskin of the penis. It is one of the oldest and most common surgical procedures worldwide, undertaken for religious, cultural, social or medical reasons.¹⁵⁶ In adult men, a four-to-six week period is required to fully heal the wound. Healing is usually complete after about one week when circumcision is performed for babies.¹⁵⁷ Male circumcision is almost universal in the Middle East and Central Asia and in Bangladesh, Indonesia and Pakistan, and the WHO estimates there to be 120 million circumcised men in India. Male circumcision is also common throughout Africa.¹⁵⁸ The WHO found that the major determinant globally of this practice is religion, but that a large number of men are also circumcised for cultural reasons.¹⁵⁹ Traditionally this practice is undertaken as a rite of passage within many African communities. It is done by a specific traditional healer, during a particular season, and in most cases, with one unsterilised knife to circumcise an age set of boys.¹⁶⁰

Male circumcision is an example of a traditional cultural practice that has a positive effect on reducing HIV infection in men. It only poses a risk to HIV infection when it is done in unhygienic conditions and one instrument or knife is shared. When circumcision is performed in a clinical setting, under aseptic conditions, by well-trained, adequately equipped health care personnel the level of risk is low, and the concomitant benefits in terms of long-term HIV prevention are high.¹⁶¹ Observational and epidemiological data have long suggested an association between male circumcision and reduced risk of HIV infection in heterosexual men.¹⁶² However, studies have shown that male circumcision does not protect women from HIV.¹⁶³

There have been numerous studies and debates as to whether circumcision helps reduce the risk of HIV transmission among heterosexual men.¹⁶⁴ Some of the studies have put forward arguments that circumcision and HIV claims are based on insufficient evidence.¹⁶⁵ A survey undertaken in South Africa demonstrates that circumcision had no protective effect on HIV transmission.¹⁶⁶ On the other hand the WHO documents the results of three randomised controlled trials that have provided evidence that male circumcision reduces the risk of HIV acquisition in men through heterosexual sex,

153 Human Rights Watch, *Libya: A Threat to Society?*, February 2006, available at <http://www.hrw.org/en/reports/2006/02/27/libya-threat-society-0> [accessed June 14, 2011] at p. 1481.

154 *Ibid.* p. 1464.

155 See http://advocacyaid.com/ecdnewsflash/CEDAW_C-ZAF-CO-4_closing_comments_2011.pdf [accessed June 15, 2011].

156 WHO, *Information pack on male circumcision*, available at http://www.who.int/hiv/pub/malecircumcision/infopack_en_1.pdf [accessed 13.06.2011].

157 WHO, *Information pack 3 on male circumcision*, available at http://www.who.int/hiv/pub/malecircumcision/infopack_en_3.pdf [accessed 13.06.2011].

158 WHO, *Information Package on Male Circumcision and HIV Prevention, Insert 2.*

159 *Ibid.*

160 Divers, J.C., *Laying down the knife may decrease risk of HIV transmission: cultural practices in Cameroon with implications for public health and policy*, U.S. National Library of Medicine, National Institute of Health 2008 Summer;15(2):76-80.

161 *Children's Act No. 38 of 2005 as amended by Children's Amendment Act No. 41 of 2007.*

162 WHO, see: <http://www.who.int/hiv/topics/malecircumcision/en/index.html> accessed [June 14, 2011].

163 Fox M., Reuters, *Male Circumcision Does Not protect Women*, (2009), available at: <http://www.abc.net.au/science/articles/2009/07/17/2628770.htm> [accessed 26.10.2011]. The article cites studies done by Johns Hopkins University recorded in the *Lancet*.

164 Fox, M. and Thomson, M., *HIV/AIDS and Circumcision: Lost in Translation*, *Journal of Medical Ethics* 36 (2010):798-801.

165 Green, L. et al., *Male Circumcision and HIV Prevention: Insufficient Evidence and Neglected External Validity*, *American Journal of Preventive Medicine* 39 (2010): 479-82.

166 Connolly, C. et al., *South African Medical Journal* 98(2008): 789-794.

demonstrating at least a 60% reduction in risk.¹⁶⁷ The UNAIDS Global Report on the AIDS Epidemic 2010 recommends the scaling up of male circumcision in areas of high prevalence and low rates of male circumcision, noting success in the Nyanza area of Kenya.¹⁶⁸ The scale up has also been based on the initiation of male circumcision as an additional tool for prevention in 13 African countries that fit the criteria for scaling up.¹⁶⁹

The involvement of cultural leaders in the intervention is important and has proven effective in Kenya, where HIV prevalence among uncircumcised men in 2007 was found to be three times higher (13.2%) than among men who were circumcised (3.9%). Though male circumcision has not been traditionally practiced in the Nyanza region, with the involvement of elders in partnership with government officials, there has been an increased demand for service, with over 20,000 men having undergone voluntary male circumcision. The elders have been instrumental in promoting and generating this demand.¹⁷⁰ UNAIDS notes that in order to increase the practice of circumcision, it is important to work with cultural structures as catalysts for behavioural change in communities where circumcision is not already a cultural norm.¹⁷¹ The Luo Council of Elders in Nyanza managed to introduce the practice into their culture, creating a new cultural norm.

Traditional cultural practices that help to protect against HIV help to uphold the right to the highest attainable standard of health under Article 12 of the ICESCR. Similar provisions related to the highest attainable standard of health that are contained in Article 24 of the CRC are also important, as the practice is usually carried out in childhood.

2. The Interface Between Culture and Human Rights: Key Populations and HIV

As well as cultural practices that directly increase or decrease the risk of HIV, cultural norms have a significant indirect effect on HIV. Negative cultural attitudes towards key populations can create an environment of stigma and discrimination which has been shown to increase the risk of HIV. The Joint Action for Results: UNAIDS Outcome Framework 2009-11 notes that HIV prevention includes the promotion of a desire for behaviour change while simultaneously acting to shift community norms and broader social environments.¹⁷² The shifting of these social environments directly touches on the interface between culture and human rights, and this paper focuses on that relationship in the context of some of the key populations identified by UNAIDS, which are sex workers and their clients, people who use drugs, MSM and transgender people, and women and girls.¹⁷³

2.1 Sex Workers and their Clients

The UNAIDS Guidance Note on HIV and Sex Work, which was developed to provide the UNAIDS Secretariat with a coordinated human rights-based approach to promoting universal access, indicates that in many countries sex workers experience higher rates of HIV infection than in most other population groups.¹⁷⁴ The Guidance Note says that “in many countries, laws, policies, discriminatory practices, and stigmatising social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes.”¹⁷⁵ Sex workers are entitled to the same universal human rights as everyone else, even where sex work is illegal. Attitudes towards sex workers are hostile to varying degrees in most cultures throughout the world, and discriminatory attitudes and the stigma sex work causes can perhaps best be challenged through culturally familiar contexts.

A report from the Commission on AIDS in Asia found that the HIV epidemic in Asia is mainly driven by men who purchase sex, with around 75 million men purchasing sex from around ten million women. It was further found that men who purchase sex from sex workers far outnumber MSM and people who inject drugs, making them another key population in terms of HIV.¹⁷⁶ The choice of men to have sex with sex workers is often the result of a cultural norm that

167 Auvert B, Taljaard D, Lagarde E, Sobngwi-Tambekou J, Sitta R, Puren A. *Randomized, controlled intervention trial of male circumcision for reduction of HIV infection risk: the ANRS 1265 Trial*. PLoS Med 2005;2:e298; Bailey RC, Moses S, Parker CB, Agot K, Maclean I, Krieger JN, et al. *Male circumcision for HIV prevention in young men in Kisumu, Kenya: a randomised controlled trial*. Lancet 2007;69:643-56; Gray RH, Kigozi G, Serwadda D, Makumbi F, Watya S, Nalugoda F, et al. *Male circumcision for HIV prevention in men in Rakai, Uganda: a randomised trial*. Lancet 2007;369:657-66.

168 UNAIDS, *Global Report on The Global AIDS Epidemic*, 2010 p.81.

169 WHO & UNAIDS, *Progress in Male Circumcision Scale up; Country Implementation and research update*, June 2010 available at http://www.who.int/hiv/pub/malecircumcision/MC_country_progress_June2010.pdf [accessed 13.06.2011]

170 UNAIDS, *Breaking down cultural practices to address HIV*, available at <http://www.unaids.org/en/resources/presscentre/featurestories/2010/january/20100112loucouncil/> [accessed 13.06.2011].

171 *Ibid.*

172 *Ibid*, p.9.

173 Joint Action for Results UNAIDS Outcome Framework 2009-11, p.9 Also included in the focus are prisoners, refugees and migrants, but these populations are not analysed here as the complexity of the ‘cultures’ involved goes beyond the scope of this paper.

174 UNAIDS *Guidance Note on HIV and Sex Work* (2009), p.2.

175 *Ibid*, p.7.

176 Commission on AIDS in Asia (2008) *Redefining AIDS in Asia. Crafting an Effective Response*, Oxford University Press, New Delhi 2008, cited in

condones this practice, and therefore challenging the root of this cultural norm by harnessing existing *contrary* cultural norms can be a very effective approach in changing the behaviour of sex workers' clients. The examples below from India and Thailand show how traditional cultural practices and norms have successfully been harnessed to improve HIV programming interventions amongst sex workers and their clients.

In India, a large proportion of sex workers are based in brothels, but past HIV interventions have not incorporated 'brothel culture' into their programmes.¹⁷⁷ In Sonagachi, an area in Kolkata's red light district, 85% of sex workers operate out of brothels.¹⁷⁸ The Sonagachi HIV/AIDS Intervention Programme (SHIP) successfully harnessed the traditional practice of *adda*, to provide a culturally appropriate forum in which to educate the sex workers about HIV and to promote the use of condoms. The Bengali tradition of *adda* literally means discussion, sometimes with emotion, over a subject of common interest.¹⁷⁹ SHIP, took what is historically a male dominated tradition, and adapted it to work with the women in the brothels over tea to facilitate sex worker gatherings. The *adda* provided an entry point for conversations about HIV, and condom usage, and health educators were brought into this space and included in the discussions. Studies have shown that the SHIP project has led to significantly higher levels of HIV knowledge and condom use amongst the women in the brothel compared to control groups.¹⁸⁰ In addition, the SHIP project had far-reaching effects on the women's sense of autonomy and financial security, and the *adda* led to empowerment of the participants and increased control over their own lives and livelihoods.¹⁸¹

In Thailand, sex work is also predominantly based in brothels. There is a long historical acceptance of sex work in Thailand, and this continues to be an integral part of youth culture amongst young Thai men, who regularly frequent brothels after male drinking sessions.¹⁸² The Thai Youth and AIDS Project has successfully used peer education programmes involving older young people as educators for younger adolescents, which has effectively harnessed the cultural value of respect for elders, to deliver health education messages.¹⁸³ These education campaigns tap into traditional Thai culture – in a similar way to SHIP – by harnessing the cultural values of respect for age and gender, and of male 'honor' or being a 'good person', and applying these to HIV programming, this time targeting the sex workers' clients. Morrison advocates AIDS education campaigns, such as the Thai Youth and AIDS Project, that target men's 'honor' to direct male peer pressure away from brothels and towards condom use with their girlfriends.¹⁸⁴

The kind of interventions described above, are not a replacement for a human rights-based legal framework to protect and empower sex workers. In particular, decriminalisation of sex work is a prerequisite to changing cultural norms regarding sex workers, and to creating an environment in which there can be an open and honest dialogue with their clients. Cultural norms and the legal system are in fact interdependent: it is very difficult to change attitudes to sex work and sex workers in a society in which it and they are criminalised, and it is very difficult to change the law in societies which view sex work as an offence.

2.2 People who use drugs

The UNAIDS Strategy Goal for 2015 is for all new HIV infections to be prevented among people who use drugs. The continuing association between people who inject drugs and HIV was noted with concern by the draft UN Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011)¹⁸⁵, and in addition, communities in which alcohol and stimulant use are part of the subculture have been identified as risk environments for HIV.¹⁸⁶ At the 24th Meeting of the UNAIDS Programming Coordinating Board, one of the actions required was for "*Member States, civil society organisations and UNAIDS to increase attention to certain groups of non-injecting drug users, especially those who use crack cocaine and amphetamine type stimulants, and their link to increased risk of contracting HIV through high-risk sexual practices...*"¹⁸⁷

UNAIDS Guidance Note on HIV and Sex Work (2009), p. 22

177 Ghose, Swenderman, and George, *The Role of Brothels in Reducing HIV Risk in Sonagachi, India*, (2011) SAGE, *Qual Health Res* 2011 587, p588.

178 *Ibid*, p.589.

179 See for example <http://www.shanghaipujo.com/shanghaiadda/index.htm>.

180 UNAIDS, *Global Report on The Global AIDS Epidemic*, 2010 p588.

181 UNAIDS, *Global Report on The Global AIDS Epidemic*, 2010 pp589 & 590.

182 Morrison, *Traditions in Transition: Young People's Risk for HIV in Chiang Mai, Thailand*, (2004), SAGE, *Qual Health Res* 2004 14:328, p.328.

183 *Ibid*. p.340.

184 *Ibid*. p.340.

185 Draft UN Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011), at para. 29.

186 UNAIDS Speech by Michael Bartos, Team Leader, Strategy Support and Evaluation, UNAIDS Geneva, 23rd March 2011, 54th Session of the Commission on Narcotic Drugs, available at: http://www.unaids.org/en/media/unaids/contentassets/documents/speech/2011/20110323_unaids_cnd.pdf [accessed June 13, 2011].

187 UNAIDS/PCB(24)/09.9.Rev.1, 8 June 2009.

The example below details a project that has successfully worked with Native American alcohol and methamphetamine users in the US, by harnessing their traditional value system to persuade community members that the use of drugs is contrary to their cultural norms. Alcohol and methamphetamine are known to reduce inhibitions and often consequently have an aphrodisiac effect, as well as leading to more risky behaviour such as unprotected sex.¹⁸⁸

Native Americans living in America have proportionately high levels of HIV infection, and problems of alcoholism and use of methamphetamine are endemic in their communities. Leaders of the Cherokee Indian Nation in Oklahoma report that their culture is underpinned by strong customary values related to self-reliance.¹⁸⁹ Self-reliance is comprised of three elements: being responsible, disciplined, and confident. Cherokee Indians consider themselves to be responsible for themselves, and for others in their community, and they value respect for others and for the Creator. Being disciplined involves setting goals and creating a plan, which is executed with assistance where necessary. Being confident refers to having a sense of self identity related to being a Cherokee, and to respect for traditional values and beliefs.¹⁹⁰ An important aspect of Cherokee tradition involves the coming together of the community in a Talking Circle, where stories are shared and the cultural values, beliefs, and interrelationships of the community are affirmed. Lowe undertook a study using Talking Circles as a forum for introducing education materials on HIV and Hepatitis C,¹⁹¹ based on the premise that by accessing the traditional value system of the Cherokee, the health messages would be more readily taken on board. The programme was successful in raising levels of awareness around HIV and Hepatitis C amongst the targeted Cherokee adolescents, and showed promise to be emulated as a method of addressing many of the other social problems affecting Native Indian communities.¹⁹²

This kind of intervention can be very effective in changing behaviours in communities and subcultures where drug and alcohol abuse is endemic. However, there is also a need for care and support services such as needle exchange services, and an end to punitive laws that criminalise injecting drug users and other people who use drugs.

2.3 Women and Girls

It was noted in the UN Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011), that women and girls remain particularly vulnerable to HIV, partly due to gender inequalities and all forms of discrimination and violence.¹⁹³ Violence against women is found throughout the world in a variety of forms, and in some countries it has become a cultural norm that is widely condoned by society. Violence against women can involve rape, including marital rape, and other forms of mental and physical abuse which take away women's rights to control when and with whom they have sex, putting them at great risk of HIV.¹⁹⁴ In a ten-country study on women's health and domestic violence conducted by the WHO, between 15% and 71% of women reported physical or sexual violence by a husband or partner. Many women said that their first sexual experience was not consensual.¹⁹⁵ In their submissions to the Africa Regional Dialogue of the Global Commission on HIV and the Law, an organisation from Niger describes how traditional customs confine women to a reproductive role, leaving women without the ability to speak freely, to have safe sex, or to freely access health and reproductive services.¹⁹⁶ It is often possible to work within the culture and retain the underlying value system while abolishing those negative practices that impact on women's rights.

In the US, the American Society for Muslim Advancement, an NGO focusing on Muslim women (referred to above) is working to combat the belief that men have the right to strike their wives, which they say is the result of a common misinterpretation of a Qur'anic verse. The NGO is engaging the Muslim community in dialogue regarding gender-based violence, which it emphasises has no religious justification. The NGO also highlights the correlation between the marginalisation of women through violence and their vulnerability to HIV and AIDS.¹⁹⁷

In Melanesia, in the context of widespread violence against women, rape and other forms of abuse were not taken seriously at a community level under customary law. Dominant male interpretations of culture and customs were found

188 See AIDS.org, *Drug Use and HIV*, available at: <http://www.aids.org/topics/aids-factsheets/aids-background-information/what-is-aids/safer-sex-guidelines/drug-use-and-hiv/> [accessed 06.05.2011].

189 Lowe J., *A Cultural Approach to Conducting HIV / AIDS and Hepatitis C Virus Education Among Native American Adolescents* (2008), *The Journal of School Nursing* 2008 24: 229, p. 229.

190 *Ibid* p.232.

191 *Ibid* p.233.

192 *Ibid* p.237.

193 Draft Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS, 2011, at para. 21.

194 See WHO Facts Sheet No. 239, *Violence against women*, November 2009.

195 *Ibid*.

196 Submission made by AJIN, Niger, for the African Regional Dialogue of the Global Commission on HIV and the Law.

197 Submission made by American Society for Muslim Advancement, USA, for the High Income Regional Dialogue of the Global Commission on HIV and the Law.

to have resulted in customary laws that failed to protect women from violence.¹⁹⁸ To address gender-based violence in the region, the Custom and PEACE Foundation Melanesia (PFM) conducted grassroots training on non-violent conflict resolution in Bougainville, Papua New Guinea. The training emphasised that the level of gender-based violence at the community level represented a marked departure from the past, when women had a more equal position in society, and customary law provided protective safeguards for women. The participants recognised that the conflict resolution training which focussed on mediation was in line with traditional cultural values including the preservation of the community relationships and consensus-based decision making.¹⁹⁹ Many Pacific writers and leaders argue that regardless of customary practices which can change over time, the underlying cultural value system remains constant, and many of these values are in line with international human rights standards.²⁰⁰ PFM used the familiar value system as the context for training that included women as mediators on an equal basis to men, and promoted discussion between men and women, which did not ordinarily happen.²⁰¹ Through the respect of existing cultural values, PFM were able to overcome the traditional hostility towards concepts of human rights which are viewed by many in the Pacific as being foreign values imposed by what they perceive as Western culture.²⁰²

The PFM training was not carried out in the context of HIV, but it is clear that given the strong correlation between widespread gender-based violence and rape in communities, and high levels of HIV infection, such projects can have a significant impact on addressing factors that make women vulnerable to HIV. The PFM project worked towards strengthening the customary justice system to address human rights concerns whilst maintaining community ownership and the traditional value system.²⁰³ However, the PFM training was criticised by IDLO for failing to enhance legal empowerment to the extent it might otherwise have done so, because it neglected to address issues of substantive legal rights and asymmetries.²⁰⁴

Another form of violence against girls that impacts on HIV is forced early marriage. In one of the submissions to the Africa Regional Dialogue of the Global Commission on HIV and the Law there was a description of how Malawian culture encourages young girls of a tender age to marry elder men, due to their ritual and magical belief practice.²⁰⁵ Many of these men have multiple sexual partners, and due to their age have been sexually active for much longer than the girls who are often as young as 11. In addition, it was explained that many of these girls are forced into sex with their new husbands, causing injuries that leave them further susceptible to HIV. In another submission regarding forced marital sex in Malawi, it was noted that under Malawian customary law, consent to sex is assumed within marriage, and therefore there is no such thing as marital rape. One of the submissions proposed that changes in the law result in changes of consciousness in women and society: *“each time a rape law is created or applied, or a rape case is tried, communities rethink what rape is”*. In other words, changes in law result in changes in social perceptions of women, and lead to changes in culture.

It is a central argument of this paper that any intervention that focuses on changing cultural values must be integrated with efforts to strengthen the formal legal system, and ensure the implementation of relevant international human rights laws at the domestic level. International human rights instruments that address the needs and rights of women and girls, as part of effective HIV responses, include CEDAW and its 1999 Protocol, and the Protocol to the ACHPR on the Rights of Women in Africa (2005). Additionally, the Declaration of Commitment on HIV/AIDS (2001), the Political Declarations on HIV/AIDS (2006) and (2011), the UN Millennium Declaration and the Millennium Development Goals (2000), all include commitments from governments to scale up responses to women in relation to HIV.²⁰⁶

2.4 Men who have Sex with Men and Transgender People

UNAIDS reports that almost universally MSM and transgender people are more affected by HIV than the general population, partly due to biological reasons, and partly due to structural factors which include discrimination and lack of access to services.²⁰⁷ Although stigma and discrimination against MSM is common throughout the world, in many countries with a particularly high prevalence of HIV, same-sex behaviour between consenting male adults is illegal, and

198 Johnstone N., *Bush Justice in Bougainville: Custodians Mediating Change by Challenging the Custodianship of Custom*, in *Enhancing Legal Empowerment: Customary Justice Programming in Post-Conflict and Fragile States*, Working Paper Series: Paper No. 3, (2011), International Development Law Organisation, p. 4.

199 *Ibid*, p.7.

200 *Ibid*.

201 *Ibid* p.7.

202 *Ibid* p.6.

203 *Ibid* p.16.

204 *Ibid* p.1.

205 Submission made by James Wilson Phiri, Malawi, for the African Regional Dialogue of the Global Commission on HIV and the Law.

206 See further Operational Plan for UNAIDS Action Framework: addressing women, girls, gender equality and HIV (2009), p.7.

207 UNAIDS Action Framework: *Universal Access for Men who have Sex with Men and Transgender People* (2009), p.2; The draft *UN Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS* (2011) also identified MSM as a key population at para. 29.

in seven countries it is punishable by death.²⁰⁸ The discriminatory environment that has been shown to increase the risk of HIV for MSM and transgender people is borne out of the majority opinion in society that sexual practices and gender identities are determined by a culture to which everybody should subscribe.

Throughout the world 'culture' has been raised as a defence against the human rights claims of MSM and transgender people, and in the Asia-Pacific region this defence has been largely unsuccessful in litigation that has ultimately resulted in decriminalisation of homosexuality and legal recognition of transgender people.²⁰⁹ It is interesting to note that there is a pattern in this litigation which involves an analysis of culture that traces the hostility towards homosexuality and transgender people back to colonialism, whereas often the pre-colonial culture was much more tolerant of sexual minorities and gender diversity.²¹⁰ The formal recognition of the changing nature of culture by various courts removes significant force from the use of 'culture' as a defence to human rights claims.

In *Naz Foundation (India) Trust v. Government of NCT, Delhi and Others (2009)*²¹¹ (*Naz*), the Petitioner successfully challenged the constitutional validity of Section 377 of the *Indian Penal Code* which criminalised "unnatural offences" including sexual acts between consenting adults in private. The case resulted in the decriminalisation of sex between men, and the decision of the Supreme Court of India is pending based on an appeal by parties that opposed the judgment.²¹² One of the respondents, the Union of India through the Home Ministry, submitted that the law cannot run separately from society as the law is a reflection of the perception of society, and Indian society was not yet ready to show greater tolerance to practices of homosexuality.²¹³ The Court recognised submissions from the petitioner showing that the prevalence of HIV amongst MSM was 8%, compared with less than 1% in the rest of the population, and that the hidden nature of MSM leads to sex being hurried and in public places where safer sex practices are more difficult to negotiate.²¹⁴ The government argued that social and sexual mores in foreign countries cannot justify decriminalisation of homosexuality in India, on the basis that western morality standards are not as high as in India.²¹⁵ Two other respondents went further arguing that "*Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country.*"²¹⁶ However, the Delhi High Court embarked on a thorough analysis of the balance between public morality and the right to private life, and recognised commitments made by the government of India under various international human rights instruments. It referred to statements made by the Solicitor General of India before the UN Human Rights Council in which he gave an account of the history of the "sexual offences against the order of nature" clause in the *Indian Penal Code*. The Solicitor General had reported that prior to the drafting of the *Indian Penal Code* by the British Lord Macaulay in 1860 there was no concept in India of something being "against the order of nature", which was essentially a western concept brought to India due to concern that foreigners were visiting India to enjoy their more liberal atmosphere regarding sexual conduct.²¹⁷ The court found that the Indian Constitution had an underlying theme of 'inclusiveness' which was a value nurtured by Indian society for several generations: "*The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.*"²¹⁸ This was a landmark ruling for the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in India, and constituted an affirmation of their place within Indian society and culture, as well as under the law.

The *Naz* ruling was strongly influenced by the importance of improving the rights of MSM in the context of HIV, and by the government's recognition of its commitments under international human rights law. The ruling made by the court regarding India's cultural values of inclusiveness of minority groups, sent a powerful message to Indian society illustrating that the relationship between law and culture works in both directions.²¹⁹

208 *Ibid* p.5.

209 *Ibid* p.5.

210 See case law *infra*, cited in Global Commission on HIV and the Law *Regional issues brief: Laws and practices relating to criminalisation of people living with HIV and populations vulnerable to HIV*. For the Asia Pacific Regional Dialogue 17 February 2011, Bangkok Thailand [Regional Issues Brief A], at 4.4(i).

211 WP(C) No.7455/2001, High Court of New Delhi.

212 Global Commission on HIV and the Law *Regional issues brief: Laws and practices relating to criminalisation of people living with HIV and populations vulnerable to HIV*. For the Asia Pacific Regional Dialogue 17 February 2011, Bangkok Thailand [Regional Issues Brief A], at 4.1.

213 *Naz Foundation (India) Trust v. Government of NCT, Delhi and Others (2009)* WP(C) No.7455/2001, High Court of New Delhi, pp11-12.

214 *Ibid* p.16.

215 *Ibid* p.23.

216 *Ibid* p.24.

217 *Ibid* p.71.

218 *Ibid* p.104.

219 Although important cases recognising the rights of the LGBTI community in Fiji, the Philippines, and Nepal, did not specifically make reference to HIV, all of these judgements contain an analysis of the conflict between 'culture' and human rights, and the affirmation of the LGBTI communities' place within each respective culture contained in these judgements plays an important role in reducing the discrimination that exacerbates HIV.

An NGO from the Pacific reported in its submission to the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law that although in Samoa laws exist which criminalise homosexuality, they are unlikely to be enforced because MSM and transgender people are an accepted part of the community.²²⁰ However, it notes that the persistence of laws that criminalise MSM and transgender people encourages stigma and discrimination, even where the culture is traditionally more accepting of these minority groups.

Throughout Africa attitudes towards MSM and transgender people are extremely discriminatory.²²¹ African leaders frequently state in international human rights forums that tolerance towards MSM and transgender people is 'un-African', and that human rights laws to protect these key populations cannot be imposed upon Africa by the West.²²² The UN Declaration on Sexual Orientation and Gender Identity, read at the General Assembly in 2008, received the backing of 66 States, but was met with a counter-statement by 60 States from the Arab League including several African countries. Lawrence Mute, a Kenyan Human Rights Commissioner, explains that the discourse for ensuring that the rights of LGBTI communities are respected, protected and fulfilled has over the years been framed as a decidedly northern/ developed countries agenda, with minor exceptions in developing jurisdictions such as South Africa.²²³

However, as Roozendaal points out, the irony is that most of the anti-sodomy laws in Africa were brought by the British during colonial times.²²⁴ Mute stresses that the rights of LGBTI communities must be localised in an African context, and although he does not elaborate on what this means, it is likely that solutions that come from African LGBTI communities will work better than outside interventions using Western cultural models.

In many parts of Africa cultural attitudes towards sexuality and gender are closely tied up with religion, and religion is used as a justification for criminalising homosexuality and restricting the rights of transgender people. Uganda's leader, Museveni, addressed a public gathering on Martyrs' Day, stating: "*The church in Africa is very strong and has been at the fore in fighting homosexuality and moral decadence. We must look for modern ways of instilling discipline in society. The Europeans are finished and if we follow their western culture, we shall be headed for Sodom and Gomorrah (the two places which God destroyed because of sexuality).*"²²⁵ Uganda's now infamous *Bahati Bill* which was tabled in 2009 proposed to add a number of new offences to the *Penal Code* which would criminalise any institution supporting same sex relationships, including donors and NGOs, and prescribed the death penalty for same sex relations.²²⁶ The Bill was not passed because it was decided that enough laws exist that criminalise homosexuality in Uganda.²²⁷ However, the Bill appears to have recently resurfaced for debate in Parliament.²²⁸

When we look at culture as something that changes over time, there is space to analyse the history of different moral values, and the prospect for future change. It is important to also question who determines the content of any nation's culture. In every country, MSM and transgender people are also part of their nation's culture, and in recognising this the argument becomes one of politics and power, rather than West versus East or South. Part of a human rights-based approach involves including minority groups and marginalised people in determining the content of their own culture, regardless of the views of the majority in their nation.

Conclusion

This paper has reviewed a selection of traditional cultural practices that affect responses to HIV both positively and negatively. The examples of human rights-based interventions reviewed show that in many cases culture, traditions and norms are not necessarily in conflict with the international human rights framework. The key in each intervention has been to engage in dialogue with the custodians of culture in each context regarding the cultural practice, and its significance both in the past and the present, in order to find resonance with the human rights framework and these norms. Top-down interventions that seek to condemn human rights abuses, and abolish the traditional practices that go to the heart of collective cultures have not worked and do not respect peoples' right to self-determination. The

220 Submission made by PSDN, Pacific, for the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law.

221 See Reddy V., *Homophobia, Human Rights and Gay and Lesbian Equality in Africa*, Agenda No. 50, African Feminisms One (2001), pp. 83-87.

222 Roozendaal B. V., *Homosexuality, a Clash between Cultures?*, International Institute of Social Studies (2011). Available at: <http://www.iss.nl/Dev/ISSues/Articles/Homosexuality-a-Clash-Between-Cultures> [accessed June 11, 2011].

223 Mute, L. M., Africa not clear with LGBTI rights, Gay Activists Alliance Africa Kenya, available at: http://www.gayactivistsallianceafrica.org/index.php?option=com_content&view=article&id=108:africa-not-clear-with-lgbti-rights&catid=1:latest-news&Itemid=18 [accessed June 11, 2011].

224 International Commission of Jurists, Practitioners Guide No. 4, Sexual Orientation, Gender Identity, and International Human Rights Law, p.16.

225 *Uganda Opposed to Homosexuality*, available at <http://allafrica.com/stories/201006040263.html> [accessed June 11, 2011].

226 Nakaweesi-Kimbugwe and Mugisha, Bahati's bill: A convenient distraction for Uganda's government, Pambazuka News (2009), available at <http://www.pambazuka.org/en/category/comment/59556> [accessed on June 11, 2011].

227 *Changing attitudes, Ugandan Government Dismisses Bahati Anti-homosexuality Bill*, available at <http://changingattitude.org.uk/archives/3321> [accessed June 11, 2011].

228 Muhame G., *Breaking News: Anti-Gay Bill Returns to Uganda Parliament*, Chimpreports, available at: <http://www.chimpreports.com/index.php/news/3199-breaking-news-anti-gay-bill-returns-to-uganda-parliament.html> [accessed 26.10.2011].

examples given in this paper from diverse contexts around the world show that bottom-up solutions which involve traditional leaders and engage with customary legal systems, are far more effective. Many of the traditional cultural practices that have negative consequences in terms of HIV and AIDS are part of rituals and ceremonies that can be readily adapted by community leaders if they are given the necessary health information, because all cultures are constantly evolving and reactive to external influences. Through this approach communities from a diverse range of regions throughout the world have demonstrated an ability to harness cultural norms and practices from their own cultures which promote human rights and reduce the risk of HIV.

Culture is also tied up with the stigma and discrimination against key marginalised populations which leads to an increased risk of HIV for those groups. This paper reviewed a range of interventions that successfully harnessed cultural norms and practices to challenge this discrimination, and bring about changes in attitudes and behaviours within communities. In some cases this has involved creating new leaders, and including women in positions of power for the first time in traditionally patriarchal societies. The process of engaging with leaders to discuss issues related to HIV, involves dealing with issues such as violence against women, sexuality, sex work, drug use, and MSM. This process is valuable in itself, as many of these human rights concerns that go beyond health can be addressed as a natural consequence of opening up the debate on HIV.

The issue of culture is important in relation to human rights and HIV because culture is tied up with the formal legal system; cultural acceptance of human rights norms creates a social and political environment in which changes can be made in the law; and changes in the law can in turn also influence this environment by signalling government sanction of the international human rights framework, which can contribute to a change in cultural norms. Cultural acceptance of formal laws is also crucial to effective *implementation* of human rights law because all actors related to the field of justice including judges, lawyers, police authorities, and local administrations, need to buy into the system in order for it to work. Access to justice in terms of HIV involves implementation of human rights law within both formal and customary legal systems, and the internalisation of human rights norms within the prevailing culture.