Women's Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence

By

REBECCA AMOLLO

LLB Hons (Makerere); Dip L.P (LDC); LLM (Pretoria)

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws (LLD) in the Faculty of Law, University of the Western Cape

Promoters:

PROFESSOR LETETIA VAN DER POLL AND PROFESSOR PIERRE F DE VOS

KEYWORDS

HIV and AIDS

Gender

Right to health

Right to housing

Right to property

Gender-based violence

Human rights

Feminism

Capabilities approach

South Africa

ABSTRACT

Women's Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence

R Amollo

LLD Thesis, Faculty of Law, University of the Western Cape

Thirty years into the span of HIV and AIDS, the disease continues to ravage sub-Saharan Africa. A 2010 UNAIDS report reveals that sub-Saharan Africa still bears an excessive share of the global HIV burden. The UNAIDS report also revealed that sub-Saharan Africa has more women than men living with HIV. Moreover the report indicates that the largest epidemics are in South Africa, Ethiopia, Nigeria, Zambia, and Zimbabwe.

Within the above context, women continue to be at the centre, with more women than men are living with HIV, and young women aged 15–24 years are as much as eight times more likely than men to be HIV positive. Women's susceptibility to HIV and AIDS is sustained by lack of economic power, lack of social power, lack of political power and lack of a voice to effectively influence decision-makers and policy-makers.

The above scenario necessitates the protection women and girls from HIV. This thesis argues that it is imperative to address HIV and AIDS by undoing gendered-inequalities at all levels. The thesis argues that the above inequalities can be undone through the realisation of women's rights to access to health services, access to housing, access to property and freedom from gender-based violence. These rights form the core themes in this thesis. The normative bases for the above rights are derived from international human rights law. The thesis argues these themes through the critical lenses of feminism and the capabilities approach.

The thesis focuses on the constitutional jurisdiction of South Africa. South Africa has made several international commitments to the realisation of women's human rights. South Africa's Constitution espouses a regime of socio-economic rights. Also, several laws relating to women have been passed in the last 17 years. The inclusion of socio-economic rights, plus jurisprudential developments in the country in the past few years, therefore, provide a comprehensive avenue to assess the country's laws and policies affecting women in the context of HIV and AIDS.

The thesis finds that the majority of women affected by HIV and AIDS in South Africa still live in conditions of poor access to health services, inadequate access to housing, limited access to property and live amidst gender-based violence. Nevertheless, there exist legal protections and jurisprudential developments in the country that are significant for the realisation of women's rights in the context of HIV and AIDS. The thesis concludes that the law is not the ultimate site for change to improve women's lives, but that applied with other efforts, can be transformative.

May 2011

DECLARATION

I declare that this work: **Women's Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence** is originally mine and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used here are duly acknowledged and properly referenced.

Rebecca Amollo May 2011

Signed……

ABBREVIATIONS AND ACRONYMS

ACHR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
ALP	AIDS Law Project
ANC	African National Congress
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CGE	Commission on Gender Equality
COSATU	Congress of South African Trade Unions
CPRD	International Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
GEAR	Growth, Employment and Redistribution Strategy
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRW	International Center for Research on Women
OHCHR	Office of the High Commissioner for Human Rights
PLWHAs	People Living with HIV and AIDS
PMA	Pharmaceutical Manufacturers' Association
PMTCT	Prevention of Mother-To-Child Transmission
SADC	Southern African Development Community

SAHRC	South African Human Rights Commission
SAPS	South African Police Services
STD/I s	Sexually Transmitted Diseases/ Infections
TAC	Treatment Action Campaign
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNAIDS	United Nations Joint Programme on HIV/AIDS
UNCHS	United Nations Centre for Human Settlements
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNGASS	United Nations General Assembly Special Session
UNICEF	United Nations Children Fund
UNIFEM	United Nations Development Fund for Women
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation

ACKNOWLEDGMENTS

First, thanks to the Centre for Human Rights, University of Pretoria, for setting in pace what led me to this point. Special merit to 'the God Father' – Prof Frans Viljoen and his team! I owe to you the beginning of the dream. It was through your auspices that I discovered what lay at the University of the Western Cape (UWC) which became my academic and social hub.

Choicest gratitude goes to the Community Law Centre (CLC). Special thanks to Prof Nico Steytler for steering the wheel of this centre of excellence. Sincere gratitude to my mentor and friend, Prof Lilian Chenwi for the selfless endeavours you made in my career and life. Heartfelt appreciation to Sibonile Khoza, Prof Christopher Mbazira, Dr Benyam Mezmur, Dr Mujuzi Jamil, Reuben Baatjies, Siyambonga Heleba, Trudi Fortuin, Jill Claassen, Renchia Du Plessis, Virginia Brookes, Jody Bevie, Annette May, Lorenzo Wakefield, Valma Hendricks, Keathela Sapto, Chestlan van Wyk and the entire team at CLC.

Special credit to Prof Julia Sloth-Nielsen: You have a big heart and provided the compass of this work. I will not forget the warmth and patience with which you treated me at the Faculty of Law, UWC. You are nicely 'global'! I also thank Prof Bernard Martins, Prof Israel Leeman, Prof Francois De Villiers, Prof Jacquiline Gallinetti,, Dr Kitty Malherbe, Dr Lea Mwambene, Dr Raymond Koen, Dr Helene Combrinck, Dr Patricia Lenaghan, Karin Chinnian, Ivan Rugema, Adv Zarina Fakier, Chesne Albertus, Ernest Booys, Makara Sentebale, Bramley Lemine, Cheryl Davids, Lynette Thomas, Olwethu Xako, Magdalene Nelson, Hazel Jeftha, Debbie Gordon, Farieda Hendricks and the members of the Law Faculty at UWC for the constant support and encouragement.

Thanks to the School of Nursing and the Health Law Institute at the University of Alberta, Canada, for hosting me during my exchange programme. Extraordinary gratitude to Dr Judy Mill, Dr Solina Richter, Shirley Mogale, Esther Ndiretu, Mary Asirifi and the entire team.

Gratitude to the School of Nursing, University of Ottawa, Canada, for the mentoring provided during the International Research Internship. Unique thanks to Dr Nancy Edwards.

Sincere appreciation goes to the Netherlands Institute of Human Rights (SIM) for a most wonderful hosting you gave me while I served my Africa Fellowship Award. Exceptional recognition to Prof Ineke Boerefijn for a most helpful input into my thesis and thanks for a warm Dutch hospitality! Choicest gratitude to Prof Dr Jenny Goldschmidt, Prof Cees Flinterman, Prof Dr Tom Zwart, Prof Dr Bas de Gaay Fortman, Leo Zwaak, Aleid Bos, Julie Daems, Liselotte van der Scheer and the entire team at SIM.

I am overly grateful to my sponsors – the Faculty of Law, University of the Western Cape, the South African National Research Foundation (NRF), the Norwegian Agency for Development Cooperation (NORAD) through the Community Law Centre, the International Development Research Centre (IDRC) on behalf of the Global Health Research Initiative, the Department of Foreign Affairs and International Trade, Canada, and the University of Utrecht, Netherlands.

To my editors – Ray Mungoshi, Ivan Rugema (again!), Dr Yonatan Fessha, Aquinaldo Mandlate, Zemelak Ayele, Douglas Singiza, Conrad Bosire and Maria Assim. You people 'cured' more errors than one! I think you all have microscopic eyes! Thanks a great deal.

To my bountiful supporters – Lango Development Forum, Prof Eng Gilles-Maurice de Schryver, Prof Adolph Zeze, Dr Sylvia Tamale, Dr John Alfred Alyai, George Ewai, Dawit Bekele, Ebong Alfred, Mary Obonyo, Milton Opio-Orech, Okello Leonard, Norman Taku, Nsibirwa Martin, Ajok Margerate, Atim Julian, Jackson Ogwindi, Muleya Mwananyanda, Jennifer Beckley, Lamunu Pamella, Kimono Susan, Anyinge Jacinta, Blake Lambert, Odokonyero Moses, Onyango Francis, Angella Holzapfel, Temi Tokosi, Dorojaiye Ebenezer, Ramona Biholar, Shamiso Zinzombe, Ataguba John, Ismail Raji, Araoyinbo Idowu-Dele, Beloved Chiweshe, Lorette Arendse, Raphael Masesa, Sharlene Ramlall, Bahati-Chishugi Josue, Berber Hettinga, Anthony Ojekale, Loide Shifula, Kehinde-Agbele Kenny, Okongo-Ofumbi Emmanuel, Akuupa Mike, Nyafwono Tabitha, Ocen-Okuja James, Lagamber Tony, Oliveira Pinoca, Phelisa Nkomo, Lindiwe Farlane, Solomon Ebobrah, Rick Steenbergen, Fabian Wirnsperger, and all those who supported me.

In an extraordinary way: to my promoters – Prof Letetia van der Poll and Prof Pierre De Vos. Please accept my heartiest, most earnest, deepest and humblest appreciation. You are invaluable and without you, this venture would have seen no light. Prof Letetia, your patience, charisma and mentorship is amazing! Pierre, you are the best I could have ever asked for in a mentor, teacher, guide and an academic 'chief whip'! Both of you saw me through the tempest! I humbly say I am very proud of both of you.

To my siblings: Denis Okori, Basil Okori, Daniel Okori, Phillip Okori, Cathy Okori and Gloria Okori. To us, family has always meant putting our arms around each other and being there. And thank you for a house full of people I love. You proved that in time of test, family is best. Our chains will never break! *'Apwoyo apetwere'*!

DEDICATION

To the memory of my parents: Agnes Awello-Okorigeng (RIP) and Martin Acen-Okorigeng (RIP)

The best academies were your love, arms and knees!

Becca

PREFACE

Law is not everything, but [it] is not nothing either. Perhaps the most important lesson is that the mountain can be moved… [and] women's experiences can be written into the law, even though clearly tensions [will] remain.

Catharine MacKinnon *Feminism unmodified: Discourses on life and law,* 1987

A simple vote, without food, shelter and health care is to use first generation's rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.

Nelson Mandela, 'Address on the occasion of the ANC's Bill of Rights Conference,' *A Bill of Rights for a democratic South Africa*, May 1991.

The most vexing and intolerable dimension of the pandemic is what is happening to women. Gender inequality is driving the pandemic, and we will never subdue the gruesome force of AIDS until the rights of women become paramount in the struggle.

Stephen Lewis, Keynote speech at the XVI International AIDS Conference, August 2006, Toronto

TABLE OF CONTENTS

CHAPTER ONE
INTRODUCTION AND BACKGROUND TO THE STUDY

CHAPTER TWO
CONCEPTUAL FRAMEWORK: 'SEXING AND GENDERING' HIV AND AIDS

CHAPTER THREE
THEORETICAL AND PHILOSOPHICAL FRAMEWORK

CHAPTER FOUR
WOMEN'S RIGHTS TO HEALTH, HOUSING, PROPERTY AND FREEDOM FROM VIOLENCE IN THE CONTEXT OF HIV AND AIDS

CHAPTER FIVE

INTERNATIONAL AND REGIONAL NORMATIVE STANDARDS ON WOMEN'S RIGHTS IN THE CONTEXT OF HIV AND AIDS: GENERAL OBLIGATIONS

CHAPTER SIX

SPECIFIC OBLIGATIONS RELATING TO WOMEN, HIV AND AIDS: HEALTH, HOUSING, PROPERTY AND FREEDOM FROM GENDER-BASED VIOLENCE

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

In Africa, AIDS has a woman's face.

Kofi Annan, 2002[1]

> Unless there is recognition that women are most vulnerable... and you do something about social and cultural equality for women, you're never going to defeat this pandemic. This is the fundamental centerpiece of the whole blessed crisis!
>
> Stephen Lewis[2]

1.1.THE PICTURE OF HIV AND AIDS IN SUB-SAHARAN AFRICA

Thirty years after the first clinical evidence of acquired immunodeficiency syndrome was reported, AIDS remains one of the most devastating diseases threatening Africans.[3] In 2010,

[1] Annan, K., 'In Africa, AIDS has a woman's face' *New York Times International Herald Tribune*, 29 December 2002. Available at http://www.un.org/News/ossg/sg/stories/sg-29dec-2002.htm. (Accessed 10 April 2011). Kofi Annan is the former UN Secretary General.

[2] An interview of Stephen Lewis by Africa Recovery. See 'Africa's capacity to deliver is huge' *Africa Recovery*, June 2001. Available at http://www.un.org/ecosocdev/geninfo/afrec/vol15no1/15no1pdf/151aids3.pdf. (Accessed 12 March 2011). Stephen Lewis is the former UN Special Envoy for HIV/AIDS in Africa.

[3] Despite extensive research, the origins of HIV itself remain incompletely understood but the first cases were reported around 1980. See Center for Disease Control, 1981; Jackson, H., *AIDS, Africa: A continent in crisis* (2002) [hereafter Jackson: 2002] 3; The UNAIDS report shows that the number of people living with HIV worldwide continued to grow in 2008, reaching an estimated 33.3 million [31.1 million–35.8 million]. The total number of people living with the virus in 2008 was more than 20% higher than the number in 2000, and the

the UNAIDS[4] reported that sub-Saharan Africa still bore an inordinate share of the global HIV burden.[5] The UNAIDS further reported that sub-Saharan Africa has more women than men living with HIV.[6] The largest epidemics in sub-Saharan Africa – South Africa, Ethiopia, Nigeria, Zambia, and Zimbabwe, have either stabilised or are showing signs of decline.[7]

The UNAIDS noted that slightly more than half of all people living with HIV are women and girls.[8] In sub-Saharan Africa, more women than men are living with HIV, and young women aged 15–24 years are as much as eight times more likely than men to be HIV positive.[9] The UNAIDS has also recently stated that protecting women and girls from HIV means protecting against gender-based violence and promoting economic independence from older men.[10]

---

prevalence was roughly threefold higher than in 1990. See UNAIDS, *Global Report on HIV and AIDS* 2009 [hereafter UNAIDS: 2009] 7.

[4] The UNAIDS is an innovative United Nations partnership that leads and inspires the world in achieving universal access to HIV prevention, treatment and care. For more on the UNAIDS, see website: www.unaids.org.

[5] In 2009, that number reached 22.5 million [20.9 million–24.2 million], 68 percent of the global total. See UNAIDS, *Global Report* 2010 [hereafter UNAIDS: 2010] 25.

[6] UNAIDS: 2010, 25.

[7] The estimated 1.3 million [1.1 million–1.5 million] people who died of HIV-related illnesses in sub-Saharan Africa in 2009 comprised 72 percent of the global total of 1.8 million [1.6 million–2.0 million] deaths attributable to the epidemic. See UNAIDS: 2010, 25.

[8] UNAIDS: 2010, 10.

[9] UNAIDS: 2010, 10.

[10] UNAIDS: 2010, 10. In 2009, women constituted about 50 percent of the world infection rate and about 60 percent of the total rate in Africa. See UNAIDS: 2009, 8.

1.2. PLACING WOMEN IN CONTEXT

Within the above context, a woman remains at the lowest end of the pandemic. The underlying social and economic factors which contribute to women's vulnerability to HIV infection are vast. They include the lack of economic power to access treatment or preventive measures such as condoms,[11] the lack of social power to make responsible sexual decisions, or opt for early diagnosis and a healthy and open approach to living with AIDS,[12] the lack of political power to change oppressive myths, cultural values and practices that perpetuate and exacerbate the powerlessness in the face of the pandemic,[13] and the lack of a voice to effectively influence decision-makers and policy-makers.[14] Furthermore, the issue of HIV and AIDS raises profound ethical questions about human sexuality and relationships between women and men.[15]

Consequently, HIV and AIDS is a gendered pandemic exacerbated by, *inter alia*, poverty, gender inequities, sexuality biases and the biological make up of women.[16] It feeds off and worsens pre-existing human rights violations in society such as gender inequality and socio-

[11] Gupta, GR., 'Gender, sexuality, and HIV/AIDS: The what, the why, and the how. Plenary Address, 13th International AIDS Conference, Durban, South Africa, July 12, 2000 [hereafter Gupta: 2000].

[12] Gupta: 2000.

[13] Gupta: 2000.

[14] Gupta: 2000.

[15] Gupta: 2000.

[16] Berer, M., & Ray, S., Women and HIV/AIDS: An International Resource Book: Information, Action and Resources on Women and HIV/AIDS, Reproductive Health, and Sexual Relationships (1993).

economic exclusion and deprivation.[17] Moreover, apart from being a sexually transmitted disease, HIV and AIDS adds another burden on People Living with AIDS (PLWAs) in the form of stigmatisation. I wish to argue that it requires a human rights response that is prepared to grapple with the implications of gender inequity in traditions, practices and attitudes.

Besides devastating the social fabric through high levels of death and illness, HIV and AIDS has particularly placed women in a situation of double jeopardy in the sense that apart from being viewed as vessels of transmission, they are consigned to an inferior place in society, further prejudicing their position in a world that already marginalises them in many ways. As part of the process of challenging the so far gender neutral approaches to treatment, care and support,[18] the place of law and policy, as informed by human rights principles on the right to health becomes crucial.[19] It is therefore, imperative to address HIV and AIDS by undoing gendered-inequalities at all levels. In this thesis, I will argue that the feminist capabilities approach provides an avenue that could be explored to address this problem.[20]

[17] Viljoen, F., *International human rights law in Africa* (2007) [hereafter Viljoen: 2007] 586.

[18] Bellamy, C., 'Facing the future together: Report of the Secretary General's task force on women, girls and HIV/AIDS in Southern Africa' (2004) [hereafter Bellamy: 2004].

[19] Bellamy: 2004; UNAIDS, *Report on the Global HIV/AIDS epidemic* 2004 [hereafter UNAIDS: 2004]; UNAIDS, *Report on the Global HIV/AIDS epidemic* 2005 [hereafter UNAIDS 2005]; UNAIDS: 2006.

[20] The feminist capabilities approach is examined in detail in chapter three of this thesis. See section 3.4.3; 3.4.4.

1.3. STATEMENT OF THE PROBLEM

Despite bearing the brunt of the HIV and AIDS epidemic, globally, many women lack access to reproductive health care, face discrimination and stigma as women living with HIV and AIDS, lack economic agency to make decisions about their sexual behaviour and yet responses to this global pandemic continue to be largely neither gendered nor based on human rights principles. Thus, until now, most efforts to halt HIV and AIDS have been 'gender-neutral'. Only the symptoms of the pandemic have been targeted rather than the underlying socio-economic causes, such as inequities and inequalities relating to access to health services, access to housing, access to property and freedom from gender-based violence. My main argument is that these inequalities have ensured women's subordination and in turn limited their capacity and capabilities to live amidst the pandemic.

In recent years, however, consensus has emerged among experts that the subordination of women and girls in Africa in the areas of access to health services, access to housing, access to property and freedom from gender-based violence are the major driving forces of the AIDS epidemic on the continent.[21] Nonetheless, these issues have not been fully studied and are vastly underrepresented in legislation, policy discussions and decision-making. Furthermore, laws, policies, and programmes to combat HIV and AIDS by protecting the rights of women and girls are negligible. The attitude of fatalistic resignation to gender inequality remains far too common while bold initiatives to address abuses against women and girls and their grave

[21] Albertyn, C., 'Prevention, treatment and care in the context of human rights', Centre for Applied Legal Studies, University of Witswatersrand, South Africa. Available at http://www.un.org/womenwatch/daw/csw/hivaids/albertyn.html. (Accessed 12 January 2010].

implications for HIV and AIDS are virtually nonexistent.[22] Hence the suggestion in this thesis for a rights-based approach through the realisation of women's capabilities.

Currently, there is no binding UN instrument in place to address the AIDS epidemic. UN human rights treaty bodies have issued General Comments to show the relevance to HIV and AIDS of existing human rights instruments,[23] but these do not constitute new binding standards in their own right. The international community has contributed mostly at the level of policy and through a plethora of declarations. An important example is the International Guidelines on HIV/AIDS and Human Rights.[24]

1.4 HUMAN RIGHTS, SOCIAL JUSTICE AND ACCOUNTABILITY

Human rights are no longer considered peripheral to the AIDS response.[25] In the context of HIV and AIDS, protections comprise legal approaches that implement international human rights commitments as well as efforts to address harmful social and gender norms that put,

[22] Human Rights Watch, 'Abuses of women and girls that fuel HIV/AID'. Human Rights Watch, 2003. Available at http://www.hrw.org/reports/2003/africa1203/2.htm. (Accessed 10 April 2007) [hereafter Human Rights watch: 2003].

[23] See, for example, CESCR General Comment 14: The right to the highest attainable standard of health (2000); CESCR General Comment 20: Non-discrimination in economic, social and cultural rights (2009).

[24] UN Doc E/CN.4/1997/37 adopted in 1996 by a consultative meeting convened by two UN entities, UNAIDS and the Office of the High Commissioner for Human Rights.

[25] UNAIDS: 2010, 10.

inter alia, women and girls at increased risk of HIV infection and increase its impact.[26] The UNAIDS has aptly stated that a rights-based approach to HIV requires:[27]

> Realisation and protection of the rights people need to *avoid exposure* to HIV; enabling and protecting people living with HIV so that they can live and thrive with *dignity*; attention to the most *marginalised* within societies; and *empowerment* of key populations through encouraging social participation, promoting inclusion and raising rights-awareness.

This thesis, therefore, proposes that the above requirements can be realised through a feminist capabilities approach. In brief, the capabilities approach is a theoretical approach to quality of life assessment and to theorising about social justice.[28] The capabilities approach holds that the key question to ask, when comparing societies and assessing them for their decency or justice, 'What is each person able to do and to be?'[29] The choice of this approach provides an important framework to address issues relating to women as a marginalised population in South Africa in the context of HIV and AIDS. Furthermore, this thesis argues for women's dignity and empowerment in the context of HIV and AIDS.

Moreover, I hereby assert that human rights-based approaches to women, HIV and AIDS, are also grounded on priniciples of social justice. Failure to address women's health needs is a

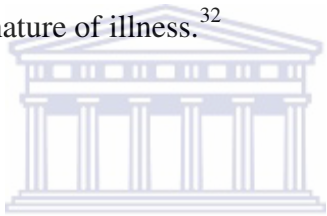
[26] UNAIDS: 2010, 122.

[27] UNAIDS: 2010, 122. My emphasis.

[28] Dixon, R., & Nussbaum, MC., 'Abortion, dignity and a capabilities approach' Public law and legal theory working paper No. 345, March 2011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799190 ((Accessed 19 April 2011). [hereafter Dixon & Nussbaum: 2011] 3.

[29] Dixon & Nussbaum: 2011, 3.

matter of social justice.[30] Hence, if social justice is about fair distribution, governments and other stake holders should take into account women's circumstances when planning and implementing policies. Thus, I hereby argue that in the context of HIV and AIDS and women, the principle of distributive justice requires that women receive equitable access to the basic services – health care services, adequate housing, access to property and be protected from any form of violence that hinders the realisation of women's rights. This is in support of the argument I make in this thesis, of the feminist capabilities approach to women in the context of HIV and AIDS. Hence, the principle of distributive justice implies that society has a duty to the individual in serious need and that all individuals have duties to others in serious need.[31] In decisions regarding the allocation of resources, the duty of society is not diminished because of the person's status or nature of illness.[32]



[30] For more on health as social justice, see Cook, RJ et al., *Reproductive health and human rights: Integrating medicine, ethics and the law* (2003) [hereafter Cook et al: 2003] 158. See also, Hofrichter,R., (ed) *Health and social justice: Politics, ideology, and inequity in the distribution of disease* (2003) [hereafter Hofrichter: 2003]; Annandale, E., & Hunt, K., 'Gender inequalities in health: Research at the Crossroads' in Annandale, E., & Hunt., K., (eds.) *Gender inequalities in health* (2000) [hereafter Annandale et al: 2000]; Arno, PS., & Figueroa, JB., 'The social and economic determinants of health' in Madrick, J., (ed.) *Unconventional wisdom: Alternative perspectives on the new economy* (2000) [hereafter Arno et al: 2000]; Krieger, N., 'A vision of social justice as the foundation of public health: Commemorating 150 Years of the spirit of 1848' (1998) 88 *American Journal of Public Health* 1603-1606 [hereafter Krieger: 1998].

[31] For more on distributive justice, see generally, Rawls, J., *A theory of justice* (1971); Rawls, J., 'Distributive justice: Some addenda' (1968) 13 *Natural Law Forum* 51-71. See also, Abramovich, V., 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR – International Journal on Human Rights* 81–216 [hereafter Abramovich: 2005] 183; Modak-Truran, M.,'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law and Humanities* 249 250 [hereafter Modak-Truran: 2000]. According to Aristotle, distributive justice is that 'which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution'. See V Aristotle *Nicomachean ethics* 2.

[32] Cook et al: 2003, 158.

Against this background, this thesis is informed by principles of substantive equality as argued within the theoretical framework of the feminist capabilities approach. Furthermore, this thesis relies on the regime of socio-economic rights as those human rights which aim to recognise that all human beings have access to resources, opportunities and services needed for an adequate standard of living.[33] For example, socio-economic rights litigation is meant, *inter alia*, to protect and promote the rights of the poor and marginalised.[34] In the context of South Africa, Liebenberg accurately asserts:[35]

> The socio-economic rights in the Constitution have the potential to contribute to the transformation of our legal and political culture by inviting recourse to a set of values and social and material realities which have hitherto been suppressed in our legal culture. The conditions of social and economic deprivation in which many people in South Africa live their lives are rendered important subjects of constitutional concern.

On the above basis, socio-economic rights impel governments and in some situations, private individuals and organisations should be held accountable if they do not respect, protect,

---

[33] Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development* 159.

[34] In this regard, see generally, Gabriel, A., 'Socio-economic rights in the bill of rights: Comparative lessons from India' (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 9–14; Peiris, G., 'Public interest litigation in the Indian sub-continent:Current dimensions' (1991) 40 *International and Comparative Law Journal* 66–90; Mbazira, C., *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009). See also, generally, the Indian cases of *Paschim Banga Khet Mazdoor Samity v State of West Bengal* [1996] ICHRL 31 (6 May 1996) [Supreme Court of India]; *Tellis and Others v Bombay Municipal Corporation and Others* (1987) Law Reports of the Commonwealth (Const.) 351; *People's Union for Democratic Rights and Others v Union of India and Others* (1982) 3 SCC 235.

[35] Liebenberg, S., *Socio-economic rights adjudication under a transformative constitution* (2010) [hereafter: Liebenberg: 2010] 45.

promote and fulfil these rights.[36] The idea behind this standpoint is that people deserve 'social citizenship'[37] and accountability. Social citizenship means that individuals and groups enjoy full citizenship when they are able to participate equally and actively in the political, economic and social life of the country.[38] In other words, citizenship should mean more than voting. In this way, socio-economic rights are especially germane to vulnerable and disadvantaged groups like women living with or affected by HIV and AIDS. It is also relevant for people affected by gender roles and racial classifications like black women.[39] It also leads to the important principle of the indivisibility and interdependence of rights on which I elaborate later in chapter two of this thesis.[40]

Related to the ideal of social citizenship is accountability. Accountability means the 'state of being responsible or answerable'.[41] Cook accurately cautions that accountability is a wide concept which 'requires a state to explain an apparent violation and to offer an exculpatory

[36] Liebenberg: 2010, 36–37.

[37] The idea of social citizenship was developed by Marshall in Marshall, TH., *Citizenship and social class* (1950). See also, Liebenberg, S., 'Social citizenship – A precondition for meaningful democracy'(1999) 40 *Agenda* 59; Klare, K., 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 147–188 [hereafter: Klare: 1998]; Langa, P., 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 352; Van der Walt, AJ., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253 255; Ackerman, BA., *Social justice in the liberal state* (1980) 5; Dworkin, R., *Taking rights seriously* (1977) 198–269.

[38] See Liebenberg, S., 'Advancing equal access to socio-economic rights: The new equality legislation' (1999) 2 *ESR Review* 12 [hereafter Liebenberg: 1999].

[39] See hereafter Liebenberg: 1999.

[40] See chapter three, section 3.5.

[41] Black, HC., *Black's law dictionary* (1990) 19.

explanation if it can'.[42] Furthermore, Yamin[43] has correctly observed that accountability is a central concept of any human rights-based approach to health because it converts passive beneficiaries into claims holders, and identifies the state and other actors as duty bearers, who may be held to account for their policies, programmes and strategies to provide universal access to health care.[44] I agree with Yamin's observation that:[45]

> Monitoring and oversight by both government officials and those who are affected; such accountability demands transparency, access to information and active popular participation. It is not enough to have access to reliable information and indicators; true accountability requires processes that empower and mobilise ordinary people to become engaged in political and social action...accountability in a human framework also requires effective and accessible mechanisms for redress in the event of violations.

Furthermore, the law is a site for promoting health rights, including HIV and AIDS among women.[46] Gostin and Mann have fittingly submitted that a human rights-based approach to HIV and AIDS depends on the availability of justiciable guarantees, secured through

[42] Cook, RJ., 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in Cook, RJ., (ed) *Human rights of women: National and international perspectives* (1994) 222–228.

[43] Yamin, AE., 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) 10 *Health and Human Rights* 1 [hereafter Yamin: 2008].

[44] Yamin: 2008, 1–2.

[45] Yamin: 2008, 1–2. See also, Langford, M., *Claiming the Millennium Development Goals: A human rights approach* (2008) 15 199 – Langford points out that the *raison d'être* of the human rights-based approach is accountability. See also Mubanjizi, JC., & Twinomugisha, BK., 'The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?' (2010) 10 *African Human Rights Law Journal* 105 [hereafter Mubanjizi & Twinomugisha: 2010] 128–129.

[46] Hassim, A et al., (eds) *A Guide to human rights, health and policy in post-apartheid South Africa* (2007) [hereafter Hassim et al: 2007] 10.

constitutions and legislation, rather than on discretionary ad hoc policies.[47] Currently, such a human rights-based approach has only formed a negligible part of sub-Sahara Africa's response to the HIV and AIDS pandemic. Although policy documents (such as strategic plans, programmes of action, and declarations) on HIV and AIDS abound, and do have an important role to play as non binding guides, few African countries have adopted comprehensive legislation to secure a consistent and clear framework for the protection of human rights,[48] especially as it relates to women's health.

Viljoen rightly asserts that the lack of a legislative response may be attributed to underlying weaknesses in sub-Saharan African legal formulation and drafting systems.[49] Legal reform institutions (such as law reform commissions) in Africa often do not function effectively, and law-making processes are frequently burdensome and weak.[50]

The relationship between HIV, AIDS and human rights is now acknowledged.[51] This is highlighted in the areas of increased vulnerability, discrimination and stigma and the fact that

---

[47] Gostin., L & Mann., J., 'Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies' (1994) 1 *Health and Human Rights* [hereafter Gostin et al: 1994] 58; Kisoon, C et al., 'Whose right?' (2002) AIDS Review. Pretoria: Centre for the Study of AIDS, University of Pretoria [hereafter Kisoon et al: 2002) 13–19; See also, Levinson, JH., & Sandra, P., 'Women's health and human rights' in Agosin, M., (ed) *Women, gender, and human rights: A global perspective* (2001) 132.

[48] See Viljoen: 2007, 587.

[49] Viljoen: 2007, 587.

[50] Viljoen: 2007, 587.

[51] The early approach was to define and 'own' the problem as a health issue and belonging to the sphere of bio-medicine only. For a discussion on the development of the rights-based approach, See, generally, Mann, J., 'Health and human rights: If not now, when: Human rights and the new public health' (1997) 2 *Health and*

lack of observance of human rights impedes effective responses.[52] The law can function at various levels with strengths and limitations. The law can play three distinct roles in the approach to any issue: a proscriptive role, a protective role and an instrumental role.[53] Further, human rights and HIV and AIDS play three separate, but related roles. These are: accountability, advocacy and approaches to programming in law and policy.[54] I therefore argue that these roles form the strands for assessing whether a system is effectively using a human rights approach to women and HIV and AIDS. These functionalities of law will be borne out in chapter seven of this thesis where I examine the extent to which South Africa's laws have served to advance women's rights to health, housing, property and freedom from violence in the context of HIV and AIDS.

The promotion and protection of human rights are necessary to empower individuals and communities to respond to HIV and AIDS, to reduce vulnerability to HIV infection and to lessen the adverse impact of HIV and AIDS on those affected.[55] Mann was the pioneer of making the link between HIV and AIDS and human rights.[56] He was a central advocate of

---

Human Rights 118 [hereafter Mann: 1997). Dr Jonathan Mann was the director of the World Health Organisation and is renowned for his pioneering work in the field of health, human rights and more recently, HIV/AIDS; Kirby, M.,'The never ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 163 [hereafter Kirby: 2004].

[52] OHCHR, 'Introduction to HIV/AIDS and Human Rights' 2008 [hereafter OHCHR: 2008]. Available at http://www2.ohchr.org/english/issues/hiv/introhiv.htm. (Accessed 12 September 2008).

[53] Kisoon et al: 2002.

[54] Kisoon et al: 2002.

[55] The human rights abuses that facilitate the spread of AIDS within gendered aspects are discussed in chapter two and four.

[56] Mann, J et al., (eds) *Health and human rights: A reader* (1999) [hereafter Mann et al: 1999] 11.

combining the synergistic forces of public health, ethics and human rights. He theorised and actively promoted the idea that human health and human rights are integrally and inextricably connected, arguing that these fields overlap in their respective philosophies and objectives to improve health, well-being, and to prevent premature death.[57]

Mann succinctly proposed a three-pronged approach that has appropriately acted as a fundamental explanation of the relationship between health and human rights. First, he propounded that health is a human rights issue. Second, that the realisation and protection of human rights is located in the realm of health. He therefore, concluded that human rights violations result in adverse health effects. Third, he asserted that there are linkages between health and human rights.[58] This is reflected in the 'AIDS paradox,' which recognises that punitive and coercive laws marginalise individuals in affected groups with little impact on

[57] Gostin, L., 'Public health, ethics, and human rights: A tribute to the late Jonathan Mann' (2001) 28 *Journal of Law, Medicine & Ethics* 121–130 [hereafter Gostin: 2001).

[58] Literature substantiates the affects of the first two points, but Mann and colleagues proceeded to call for the validation of the third point and challenged the world to practice it. See, generally, Mann et al: 1999, 7. Mann's work led to the development of the Four-Step Impact Assessment, a multi-disciplinary approach of evaluating interdependent and overlapping elements of both disciplines of Human Rights and Public Health. With this framework, Mann attempted to bridge a perceived gap of philosophies, correspondence and vocabulary, education and training, recruitment, and work methods between the disciplines of bioethics, jurisprudence, public health law and epidemiology. Furthermore, Mann knew that the history of "conflictual relationships" between officials of public health and civil liberties workers presented challenges to the pursuit of what he called a "powerful" confluence of health and human rights – a positive approach. While conflict between disciplines exists, Mann thought it important to first raise awareness of these challenges. In the spirit of negotiation and acting as mediator, Mann pointed out that such an intersection of fields can only benefit if a common ground in philosophies is uncovered and planted with a flag of cooperation. Information available at http://en.wikipedia.org/wiki/Jonathan_Mann. (Accessed 14 September 2009).

prevention, whereas measures that protect the rights of people most at risk of infection encourage and sustain behaviour modification.[59]

Laws, policies and practices that obstruct women's access to health care can function as direct causes of infection or factors increasing vulnerability. This occurs when services are inaccessible or unavailable because they are unaffordable, not geographically accessible, or delivered in poor quality. For example, some practices require that women requesting health services obtain their husbands' authorisation,[60] or that adolescent girls seeking health services obtain parental authorisation,[61] thereby obstructing medically indicated care and placing women and girls at risk. Many times, permission to seek treatment is impossible to receive, or women are afraid or embarrassed to seek it.

An additional anomaly found in laws and health regulations or policies is that they require unreasonably high qualifications of health service providers for routine health care.[62] Such laws are often enacted in the belief that they are necessary for women's protection.[63] However, they frequently unduly obstruct care, or make it unavailable because of limits of

[59] Kirby, M., 'Human rights and the AIDS paradox' (1996) 348 *The Lancet* 1217 [hereafter Kirby: 1996].

[60] See, Cook, RJ., & Maine, D., 'Spousal veto over family planning services' (1987) 77 *American Journal of Public Health* 339 [hereafter Cook & Maine: 1987].

[61] Packer, CA.,' Preventing adolescent pregnancy: The protection offered by international uman rights law (1997) 5 *International Journal of Children's Rights* 46–76.

[62] Cook & Maine: 1987, 339.

[63] Cook & Maine: 1987, 339.

facilities, personnel or women's financial means to meet unnecessarily high costs.[64] For example, in the context of HIV and AIDS, many African countries exceedingly limit access to Anti Retroviral Treatment (ARVs) to accredited centres. This is ideally meant to ensure quality but can also limit access to health care if not carefully implemented.

I submit that laws that entrench women's inferior status to men, and interfere with women's access to health services and access adequate housing seriously jeopardise efforts to reduce HIV and AIDS. These laws take a variety of forms, such as those that obstruct economic independence, for example, by impairing women's right to inheritance and infringing on women's ability to make their own choices about their lives and health. Account should be taken of criminal laws that condone or fail to adequately address violence against women, and, for instance, of inequitable family laws that deny women access to property or inheritance.

Furthermore, violence against women provides an environment that reduces women's autonomy making them vulnerable to HIV and AIDS.[65] Laws that inadequately protect women and girls from violence (including coercion in sexual relations) undermine women's independence and ability to protect themselves from infection. Hence, investigations should determine, for instance, whether existing laws adequately protect women and girls from sexual coercion,[66] including sexual abuse.[67] Family law frequently expresses communities'

[64] Cook & Maine: 1987, 339.

[65] Violence against women as a factor contributing to HIV and AIDS is explored in chapter two of this thesis.

[66] Heise, L et al., 'Ending violence against women' *Population Reports Series* I, 1999, 11:9–18 [hereafter Heise et al: 1999].

basic cultural values. Cultures resistant to women's equality with men have subliminally perpetuated women's subordination as a 'natural' condition of family life and social order so profoundly as to render women's disadvantage invisible.[68]

In essence, human rights can be of helpful in mainly three ways: first, by providing a system for holding governments accountable for their actions; second, through advocacy in which case governments are responsible for what they do, do not do, and should do for their populations.[69] This enables activists to engage in a wide range of advocacy actions targeted towards securing human rights enjoyment and protection for people living with and affected by HIV and AIDS and all other groups vulnerable to HIV infection. Third, through human rights-based approaches to HIV and AIDS policy. This human rights approach, I argue, finds support in the feminist capabilities approach to women, HIV and AIDS which looks to improving women's material circumstances.

1.5. RESEARCH QUESTION

This thesis seeks to examine the extent of South Africa's realisation of women's rights within the context of women, HIV and AIDS. Analyses will be through four themes, namely, the right of access to health services,[70] right to adequate housing,[71] right to property in family

---

[67] Armstrong, A., 'Consent and compensation: The sexual abuse of girls in Zimbabwe' in Ncube, W., (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) [hereafter Armstrong: 1998] 129.

[68] Cook, RJ., & Dickens, B., *Advancing safe motherhood through human rights* (2001) [hereafter Cook & Dickens: 2001] 18.

[69] OHCHR: 2008.

[70] This right is examined in chapters four and five of this thesis.

relations[72] and the right to freedom from gender-based violence. [73] These analyses will be based on the normative standards established at the regional and international level, and against the theoretical framework of the feminist capabilities approach.

1.6. CONCEPTUAL FRAMEWORK AND THEMATIC FOCUS AREAS

On the basis of the above question, this thesis focuses on four thematic rights, namely: the right to health,[74] the right to housing,[75] the right to property[76] and freedom from gender-based violence.[77] Focus is, therefore, on the laws and practices relating to marriage and domestic relations laws, criminal and penal laws, laws against violence (domestic and public), housing

---

[71] This right is examined in chapters four and five of this thesis.

[72] This right is examined in chapters four and five of this thesis.

[73] This right is examined in chapters four and five of this thesis.

[74] This right is examined in chapters four and five of this thesis.

[75] This right is examined in chapters four and five of this thesis.

[76] This right is examined in chapters four and five of this thesis.

[77] This right is examined in chapters four and five of this thesis.

laws and policies, property and inheritance laws are assessed against the theoretical framework of feminism and the capabilities approach.

The role of law and human rights in reducing women's vulnerability to HIV and AIDS overlaps with the rights to health, housing, property and violence against women. Thus, the focus on health, housing, property and violence relates to the several factors sustaining the epidemic amongst women in South Africa.[78] While the right to health is a more direct link to women, HIV and AIDS, the rights to housing, property and freedom from violence are argued as *inextricable overlapping factors* that intersectionalise to place women in a *quilt of jeopardies* in the face of HIV and AIDS. These factors are capable of sustaining themselves as individual areas of research within the context of women, HIV and AIDS. The preference to discuss all the four areas is to draw attention to the *nested* and *indivisible* nature of the rights involved. The right to property which traditionally belongs to the hegemony of private law is analysed within the understanding that rights in relation to deprivation and expropriation of property are constitutionally protected. Hence, the state must ensure equitable access to, *inter alia*, land.[79]

Furthermore, the inclusion of freedom from violence, which is not 'typically' a socio-economic right is on the basis that violence is the most endemic feature of the abuse of women's rights and central to the HIV and AIDS pandemic.[80] Violence also overlaps with

[78] Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2001) 5 *Law, Democracy and Development* 179 [hereafter Albertyn: 2001].

[79] See Liebenberg: 2010, 342.

[80] See Vetten, L., & Bhana, K., *Violence, vengeance and gender: a preliminary investigation into the links between HIV/AIDS and violence against women in South Africa* (2001); Albertyn, C et al 'Women's freedom

women's right to sexual and reproductive rights.[81] More so, gender-based violence has been described as 'one of the most extreme manifestations of power inequality between women and men'.[82] Moreover violence against women affects women's ability to realise their rights.[83] Consequently, the exclusion of gender-based violence from this thesis would render the work incomplete. These four areas will be further developed in chapters four and five of this thesis.

1.7. KEY CONCEPTS AND CLARIFICATIONS

1.7.1 Women and girls

This thesis adopts the definition of 'women' which includes girls. This is based on the definition of women under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol). [84] This definition is important

and security of the person' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) 295–381; Albertyn: 2001.

[81] Albertyn: 2001.

[82] Obando, A., 'How effective is a human rights framework in addressing gender-based violence?' (2004) as cited in Combrinck, H., 'The role of international human rights law in guiding the interpretation of women's right to be free from violence under the South African Constitution' *Unpublished doctorate thesis, University of the Western Cape, 2010* , 5.

[83] The role of violence in the context of women, HIV and AIDS is analysed in chapter two of this thesis.

[84] Article (1)(k) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter referred to as the African Women's Protocol) provides that "Women" means persons of female gender, including girls. The treaty was adopted in Maputo in July 2003 and entered into force 25 November 2005.

in this thesis because within the context of HIV and AIDS, girls and women face related challenges.[85]

1.7.2 Sex and gender

Simply stated, sex refers to the biological or physiological differences between men and women, while gender signifies the differences which societies and cultures ascribe to people on the basis of their sex.[86] Thus, gender refers to a structural relationship of inequality between men and women that is reinforced by custom, law and specific developmental policies.[87] Often the term 'gender' is used interchangeably or conterminously with 'women'.[88] Gender as a concept and an analytical framework is further explored in chapter two of this thesis.

[85] See, generally, Bellamy: 2004.

[86] See Naffine, N., 'In praise of legal feminism' (2002) 22 *Legal Studies* 71 87.

[87] MacKinnon, C., *Feminism Unmodified: Discourses on Life and Law* (1987) 32; Garrett, S., *Gender* (1987); Argyrous, G., & Stilwell, F., *Economics as a Social Science: Readings in Political Economy* (2003) 233-234; Akeroyd, A., 'Some gendered and occupational aspects of HIV and AIDS in Eastern and Southern Africa: Changes, Continuities and Issues for Further Consideration at the End of the First Decade, 1996. Occasional Paper #60. Centre for African Studies: Edinburgh University; Ferguson, A., 'Water reform, gender, and HIV/AIDS: Perspectives from Malawi. 2003. Paper delivered at the Society for Applied Anthropology Meetings, Portland; Fleishman: 2003; Gupta, GR., 'Gender, sexuality, and HIV/AIDS: The what, the why, and the how in global perspectives on gender, sexual health, and HIV/AIDS (2001) SIECUS Report 29(5); Page, S., 'Promoting the survival of rural mothers with HIV/AIDS: A development strategy for Southern Africa' (2001) 44 *Development* 40-46; Tallis,V., 'Gender and HIV/AIDS: Overview Report' 2002. Institute of Development Studies, UK; Meena, R., 'Gender research/studies in Southern Africa: An Overview' in Meena, R., (ed) *Gender in Southern Africa: Conceptual and theoretical issues* (1992)1 [hereafter Meena: 1992]; WHO, 'What do we mean by "sex" and "gender"?'. World Health Organization. http://www.who.int/gender/whatisgender/en/index.html. (Accessed 12 February 2010).

[88] Gender as a concept is further developed in chapter two of this thesis. See chapter two, section 2.2.

1.7. 3 Patriarchy

As a concept, patriarchy was first used by social scientists to describe a system of government where men held political power in their capacity as head of households.[89] Patriarchy is a cardinal concept of radical feminists[90] who used it to describe the social structures which allow men to dominate women.[91] This concept is important for this thesis given the role of male dominance in sustaining the HIV epidemic.[92]

1.7.4 Violence against women

Article 1 of the Declaration on the Elimination of Violence against Women had defined violence against women as 'any act of gender-based violence that results is, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats or

[89] van Marle, K., & Bonthuys, E., 'Feminist theories and concepts' in Bonthuys, E., & Albertyn, C., (eds), *Gender, law and justice* (2007) 18–19.

[90] See, for example, the works of Millett, K, *Sexual politics (1970)*; Lerner, G., *The creation of patriarchy (1986)*; MacKinnon, C., *Toward a feminist theory of the state (1989).* Radical feminism aims to challenge and overthrow patriarchy by opposing standard gender roles and the male oppression of women and calls for a radical reordering of society. Radical feminists locate the root cause of women's oppression in patriarchal gender relations. Radical feminism is analysed in chapter three of this thesis. See chapter three, section 3.2.2.

[91] See Walby,S., *Theorising patriarchy* (1990) 19; Beechey,V.,'On patriarchy' (1979) 3 *Feminist Review* 66 69; Beasly, C., *What is Feminism*? *An introduction to feminist theory* (1999) 62-64; Hartmann, H., 'The unhappy marriage of marxism and feminism' in Jagger, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) 193; Whelehan, I., *Modern feminist thought: From the second wave to post-feminism* (1995) 80.

[92] The role of male dominance is examined in chapter two of this thesis. See chapter three, section 3.2.2.

such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[93] This study adopts this definition.

1.7.5 Gender-based violence

This study relies on the definition of the term 'gender-based violence' as set out in General Recommendation No 19 adopted by the UN Committee on the Elimination of Discrimination against Women (CEDAW), i.e. 'violence that is directed at a woman because she is a woman or that affects women disproportionately'.[94] This definition is broad enough to also include violence committed against *men* based on their gender[95] – although it is generally accepted that the vast majority of victims of gender-based violence are women.

1.8. METHODOLOGY AND SCOPE

This is an analytical and philosophical thesis. It cuts across several disciplines. Hence, it combines mainly aspects of law, and to some extent, biomedical, development, social and

[93] This thesis adopts the definition of violence against women as set out in Art 1 of the Declaration on the Elimination of Violence against Women, i.e. 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' – Declaration on the Elimination of Violence against Women GA Res 48/104 UN Doc A/48/104 (adopted 20 December 1993).

[94] CEDAW General Recommendation 19: Violence against Women (1992) para 1.

[95] Mitchell provides the vivid example of sexual violence committed against the male Iraqi prisoners at Abu Ghraib prison – Mitchell, DS., 'The prohibition of rape in international humanitarian law as a norm of jus cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative and International Law* 219 219–220.

anthropological angles. I therefore rely on legal, scientific, medical, anthropological, social, historical and development sources. Analyses are normative and conceptual. The thrust of discussion and arguments are informed by human rights principles. The thesis also engages on the basis of feminist theories and the capabilities approach.[96] The thesis will mainly rely on literature on the subject of HIV and AIDS as it relates to women's health. To some extent, secondary empirical research is used.

The primary sources are identified within international and regional legal and normative standards that can be used to call states to enact gender-responsive laws and deliver gender-responsive services. This involves the identification of applicable legal provisions, court cases and policies of South Africa that can be used to stimulate women-responsive interventions on HIV and AIDS. Examples are also cited from other jurisdictions.

As secondary sources, the study relies on relevant scholarly articles, news articles, intergovernmental agency health reports, country reports, public health legislation and polices. Pertinent court cases are also reviewed in terms of how they have a bearing on achieving gender-responsive measures. The study also examines articles specialised on HIV and AIDS and gender and other medical journals providing empirical evidence on some of the issues discussed, such as the vulnerability of women to HIV and AIDS, among other issues.

[96] The feminist and capabilities approach theories are examined in chapter three of this thesis.

1.9. DELIMITATION OF STUDY

This study limits its scope to South Africa for various reasons. As mentioned above, the country has particularly registered one of the fastest expanding epidemics in the world.[97] There have been recent trends of a decline[98] but the epidemic is generalised in the country with women still the most burdened. Furthermore, South Africa's Constitution also espouses a regime of justiciable socio-economic rights, thereby giving room for investigation as to whether these guarantees make a difference for women in the context of HIV and AIDS. Moreover, the transformative constitutional scheme of South Africa[99] presents a framework that is useful in an investigation concerning women's circumstances. The thesis limits its focus to the period between 1994 and 2010.[100] However, where necessary, especially on historical accounts, dates before 1990 will be cited.

[97] Refer to footnotes 5, 6 and 7 of this chapter.

[98] See HSRC, 'South African National HIV Prevalence, Incidence and Communication Survey, 2008' HSRC, 2008.

[99] For more on transformative constitutionalism, see generally, Klare: 1998; Liebenberg: 2010. At page 34, Liebenberg accurately asserts that:

> Transformative constitutionalism implies that the project of social transformation must be guided by and take place within the normative and institutional framework of the Constitution.

[100] It is important to note that the first meaningful programme against HIV and AIDS was only initiated by the South African government in 1994. After 1994, a number of strategic documents and actions guided HIV and AIDS interventions. These included the African National Congress Health Plan, NACOSA plan for HIV and AIDS and subsequently the Operational plan for Comprehensive HIV and AIDS Care, Management and Treatment (2004) and finally the National Strategic Plan for HIV and AIDS 2007–2011.

While the country is not a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[101] it has ratified other core treaties, notably the International Covenant on Civil and Political Rights (ICCPR),[102] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), [103] the Convention on the Rights of the Child (CRC), [104] the African Charter on Human and Peoples' Rights (African Charter);[105] and the African Women Protocol. These treaties form part of the primary sources in this thesis.

1.10 WHAT DOES THIS STUDY ATTEMPT TO CONTRIBUTE?

This thesis assesses South Africa's realisation of women's rights within the context of HIV and AIDS based on four themes: the right of access to health services,[106] right to adequate housing,[107] right to inheritance in family relations[108] and the right to freedom from gender-

[101] The CESCR was adopted by the UN General Assembly on 16 December 1966. It entered into force on 3 January 1976.

[102] The ICCPR was adopted the UN General Assembly on 16 December 1966. It entered into force on 23 March 1976. Its treaty monitoring body is called the Human Rights Committee.

[103] The CEDAW was adopted in December 1979. It entered into force on 3 September 1981.

[104] The CRC was adopted on 20 November 1989. It entered into force on 26 January 1990.

[105] The African Charter was adopted on 27 June 1981. It entered into force on 21 October 1986.

[106] This is examined in chapters five and six of this thesis.

[107] This is examined in chapters five and six of this thesis.

[108] This is examined in chapters five and six of this thesis.

based violence.[109] These analyses are grounded on the theoretical foundation of the feminist capabilities approach.[110] In this way, this study makes a contribution because it supplements earlier studies that have focused on the country using different approaches.[111] Moreover, this thesis, does not only focus on the health sector (as many studies in the field of HIV and AIDS tend to), but also on the realities, and legislative and customary norms affecting women in areas such as access to property and housing, as well as their right to be free from all forms of violence. The thesis, therefore, also represents a 'case study' of the interdependency of human rights under international law and in the constitutional jurisdiction of South Africa.

1.11. OVERVIEW OF THE THESIS

This work is presented in seven chapters, in addition to this introductory chapter. In chapter two, I substantiate why gender forms the focus of this study. Thus, the chapter makes the link between women and HIV and AIDS. The chapter also highlights the concepts of gender as a concept and tool of analysis. The chapter focuses on the factors that contribute to gender inequality within the context of HIV/AIDS, including both biological and physiological and

[109] This is examined in chapters five and six of this thesis.

[110] The feminist capabilities approach is examined in chapter three of this thesis.

[111] See for example, Abdool, K et al., (eds) *HIV/AIDS in South Africa* (2005); Nattrass, N., *Mortal combat: AIDS denialism and the struggle for antiretrovirals in South Africa*' (2007); Nattrass, N., *The moral economy of AIDS in South Africa* (2004); Thornton, R., *Unimagined community: Sex, networks and AIDS in Uganda and South Africa* (2008) [hereafter Thornton: 2008]. Thornton compares Uganda and South Africa by discussing sexual networks, family structures and property. The author argues that the explanation for the difference in the prevalence trend lies in the differing configuration of sexual networks. This, the author argues is embedded in and shaped by differing social contexts, especially with respect to marriage, reproduction, the development of households, and the transfer of wealth and property. See pages 33–38. See also Parkhust, JO., & Louisiana, L., 'The political environment of HIV: Lessons from a comparison of Uganda and South Africa' (2004) 59 *Social Science and Medicine* 1913–1924.

socio-economic and cultural factors. Illustrations and examples are drawn widely but focusing on sub Saharan Africa. It highlights the fact that inequality (and inequity) is the underlying 'epidemic' in terms of women's vulnerability to HIV and AIDS.

Chapter three presents the philosophical and theoretical basis of the thesis. The chapter discusses feminist theory as a basis for the analysis of laws relating to women in the context of HIV and AIDS. Centrally, the chapter examines the significance of the capabilities approach as an alternative framework to analyse women's circumstances in the face of HIV and AIDS.

In chapter four, I delve into key themes forming the crux of analysis in this thesis. These key themes of analysis, in turn, form the basis of a legal yardstick to be set in chapters five and six of this study. This chapter relies on the core rights of access to health services and resources (including food and housing as determinants of health), freedom from gender-based violence and laws and practices affecting access to property (including succession, inheritance and marriage). Illustrations are drawn widely from sub-Saharan Africa to argue these themes.[112]

Both chapters five and six provide the normative framework of the thesis. For practical reasons, the two chapters are divided to present general and specific obligations respectively. In both chapters, substantive equality is the underlying principle. Chapter five examines obligations placed upon the state to realise women's equality and socio-economic rights. The chapter therefore lays out general obligations to realise women's right to health, housing, property and the immediate obligation to eliminate gender based violence. The state obligations are presented on the basis of the framework of the ICCPR, the ICESCR, the CEDAW, the CRC, the African Charter and the African Women Protocol.

[112] The challenges presented by HIV and AIDS amongst women in sub-Saharan Africa are similar.

Chapter six analyses the specific obligations to realise women's to health, housing, property and the immediate obligation to eliminate women gender based violence. State obligations are analysed on the basis of the framework of the ICCPR, the ICESCR, the CEDAW, the CRC, the African Charter and the African Women Protocol. The specific obligations are drawn from regional and international court decisions, Special Rapporteur reports, General Comments, Concluding Observations and General Recommendations of the respective treaty bodies.

Chapter seven is a contextualisation of the epidemic within the circumstances of South Africa. Thus, the chapter provides an overview of the epidemic in the country. It also provides an overview of the current health system pointing out the inadequate health care for women against the apartheid background. The chapter presents a discussion tracing the country's efforts to manage and combat the epidemic in law and policy highlighting key trends such as the shift from regulation to inaction and then to denialism. The chapter then appraises legislation, court cases and policy within the context of women, HIV and AIDS in South Africa. These relate to the thematic areas identified in chapter four against the yardstick set out in chapters five and six.

Chapter eight of this thesis presents a summary of the thesis and lessons that other countries can learn from South Africa's experience. The chapter also presents conceptual, legal and practical recommendations. The chapter concludes that South Africa has performed relatively well in legal and jurisprudential terms. The chapter concludes that the law is not the ultimate site for change to improve women's lives, but that applied with other efforts, can be transformative.

CHAPTER TWO

CONCEPTUAL FRAMEWORK: 'SEXING AND GENDERING' HIV AND AIDS

> It is true, and very much to the point, that women are objects, commodities, some deemed more expensive than others–but it is only by asserting one's humanness every time, in all situations, that one becomes someone as opposed to something. That, after all, is the core of our struggle.
>
> Andrea Dworkin[1]

> One is that if women's sexuality in Africa wasn't under assault, if women were able to say no, if women weren't subject to predatory attacks by men, or predatory behaviour generally, then you would have a disease in Africa called AIDS. But you wouldn't have a pandemic.
>
> Stephen Lewis[2]

2.1 INTRODUCTION

There is a plethora of evidence confirming that the HIV and AIDS epidemic has had a more deleterious effect on women than men.[3] Against this background, the current chapter seeks to

[1] See Dworkin, A., *Woman hating* (1974) 62. Andrea Dworkin, a radical feminist whose early activism including working against the Vietnam War, became a strong voice for the position that pornography is a tool by which men control, objectify, and subjugate women.

[2] Available at http://www.searchquotes.com/quotation/One_is_that_if_women%27s_sexuality_in_Africa_wasn%27t_under_assault,_if_women_were_able_to_say_no,_if_wo/143515/. (Accessed 10 March 2011).

[3] See, generally, Fleishman, F., 'Fatal vulnerabilities: Reducing the acute risk of HIV/AIDS among women and girls.' 2003. Washington: CSIS. Available at http://www.csis.org/africa/0302_fatalvulnerabilities.pdf. (Accessed 12 June 2010] [hereafter Fleishman: 2003]; Matlin, S., & Spence, N., 'The Gender Aspects of the HIV/AIDS

substantiate why gender forms the focus of this study. I demonstrate this by, *inter alia*, providing evidence on how women are more vulnerable to the HIV and AIDS epidemic. In this chapter, I demonstrate the connection between women, HIV and AIDS by highlighting the key concepts of gender, sex and sexuality. The chapter will therefore, focus on the factors that contribute to gender inequality within the context of HIV and AIDS, including both biological and physiological, and socio-economic and cultural factors. Illustrations and examples are drawn widely from sub-Saharan Africa. Hence, examples used in this chapter are not limited to the geographical setting of South Africa.

2.2. UNPACKING THE CONCEPT OF GENDER

Gender has been defined as socially constructed and culturally variable roles that women and men play in their daily lives.[4] It refers to a structural relationship of inequality between men and women that is reinforced by custom, law and specific developmental policies.[5] Often the

---

Pandemic.' World Health Organization, Division for the Advancement of Women, 2002. Presentation at an Expert Group Meeting on 'The HIV/AIDS pandemic and its gender implications', Windhoek, Namibia. Available at http://www.un.org/womenwatch/daw/csw/hivaids/matlinspence.html. (Accessed 11 November 2009); Mill, JE., & Anarfi, JK., 'HIV risk environment for Ghanaian women: Challenges to prevention' (2002) 54 *Social Science and Medicine* 325–337; Gupta, GR., 'Gender, sexuality, and HIV/AIDS: The what, the why, and the how' Plenary Address, XIII International AIDS Conference, Durban, South Africa, July 12, 2000 [hereafter Gupta: 2000].

[4] See Moore, H., *Feminism and anthropology* (1988).

[5] MacKinnon, C., *Feminism unmodified: Discourses on life and law* (1987) 32; Garrett, S., *Gender* (1987); Argyrous, G., & Stilwell, F., *Economics as a social science: Readings in political economy* (2003) 233–234; Akeroyd, A., Some gendered and occupational aspects of HIV and AIDS in Eastern and Southern Africa: Changes, Continuities and Issues for Further Consideration at the End of the First Decade, 1996. Occasional Paper #60. Centre for African Studies: Edinburgh University; Ferguson, A., 'Water reform, gender, and HIV/AIDS: Perspectives from Malawi. 2003. Paper delivered at the Society for Applied Anthropology Meetings,

term ‘gender’ is used interchangeably or conterminously with ‘women’ or ‘female’. In some cases gender is claimed to refer to the relations between men and women, but in actual use, the concept often retains ‘women’ as its central focus.[6] As such, the object of gender history has tended to be either women, or those areas of social life which are centrally associated with, and also defining of the female gender, such as family, the domestic sphere, biological reproduction and sexuality, among others.[7]

This study, however, adopts a comprehensive definition of ‘gender’ which would also include men and boys, thus helping us to identify the norms and practices that generate and sustain a male behavior and moral framework that uphold the hierarchical social constructs referred to above.[8] This definition would also allow for variations in such norms and practices as well as

---

Portland; Fleishman: 2003; Gupta, GR., ‘Gender, sexuality, and HIV/AIDS: The what, the why, and the how in global perspectives on gender, sexual health, and HIV/AIDS (2001) SIECUS Report 29(5); Page, S., ‘Promoting the survival of rural Mothers with HIV/AIDS: A development Strategy for Southern Africa (2001) 44 *Development* 40–46; Tallis, V., ‘Gender and HIV/AIDS: Overview Report’ 2002. Institute of Development Studies, UK; Meena, R., Gender research/studies in Southern Africa: An Overview in Meena, R., *Gender in Southern Africa, Conceptual and Theoretical Issues*, (ed) (1992) 1 [hereafter Meena: 1992]; WHO ‘What do we mean by "sex" and "gender"?’. World Health Organization.Available at http://www.who.int/gender/whatisgender/en/index.html. (Accessed 12 February 2010).

[6] Manicom, L., ‘Ruling relations: Rethinking state and gender in South African history’ (1992) 33 *The Journal of African History* [hereafter Manicom: 1992] 443.

[7] Manicom: 1992, 443.

[8] This is especially so when men and women strive to live by what society constructs as masculine and feminine behaviour. The men, will, for example desire to have many sexual partners to show their manliness. This makes them victims of the stereotype in the end exposing them to HIV/AIDS. For details, See generally, Bellamy, C., ‘Facing the future together: Report of the Secretary General’s task force on women, girls and HIV/AIDS in Southern Africa’2004 [hereafter Bellamy: 2004]; Report on the Global HIV/AIDS epidemic, 2004, UNAIDS, Report on the Global HIV/AIDS epidemic, 2005, UNAIDS, Report on the Global HIV/AIDS epidemic, 2006, UNAIDS; See also, Gupta, GR et al., A Review paper of the Department of Gender and Women’s Health,

how they can be changed to more respectful and equal views of and behaviors towards women and girls.

2.3. GENDER AS AN ANALYTICAL TOOL

In as much as gender issues have more often than not been associated with women, this work does not ignore the important point that gender stereotypes prejudice both men and women.[9] In effect, the approach does not suggest that men do not count or that they are not at risk. Women are simply more vulnerable as will be demonstrated in this chapter.

Gender as a conceptual tool has increasingly become relevant in evaluating whether states are paying allegiance to the treaty obligations they undertake when they ratify regional and international instruments. Domestically, it is also a yardstick for measuring obedience to constitutional guarantees and national legislation.[10] A gender analysis examines the differences in men's and women's lives, including those that lead to social and economic inequity, and applies this understanding to legal and policy development and service delivery.[11]

Family and Community Health, World Organisation, International Center for Research on Women, Washington DC, 2003 [hereafter Gupta et al: 2003].

[9] This is especially so when men and women strive to live by what society constructs as masculine and feminine behaviour. The men, will, for example desire to have many sexual partners to show their manliness. This makes them victims of the stereotype in the end exposing them to HIV/AIDS. For details, See generally, Bellamy: 2004; UNAIDS: 2004, UNAIDS: 2005, UNAIDS: 2006, UNAIDS: 2008; See also, Gupta et al: 2003.

[10] For a detailed account of this approach, See generally, Hassim, A et al., (eds) *Health and democracy: A guide to human rights, health law and policy in post apartheid South Africa* (2007) [hereafter Hassim et al: 2007].

[11] Doyal, L., 'Gender and health: Technical paper' Geneva, World Health Organisation, 1998 [hereafter Doyal: 1998] 6.

A gender approach addresses the critical roles that social and cultural factors, and power relations between women and men, play in promoting or inhibiting health. Doyal accurately points out that the technique of gender analysis is:[12]

> To identify, analyse and act upon inequalities that arise from belonging to one sex or the other, or from the unequal power relations between the sexes. These inequalities can create, maintain or exacerbate exposure to risk factors that endanger health. They can also affect the access to and control of resources, including decision-making and education, which protect and promote health, and the responsibilities and rewards in health work.

A typical gender analysis would, therefore, focus on the following variables: sex and gender, gender roles, resources and benefits, gender needs and constraints and opportunities. In light of women's circumstances in the context of HIV and AIDS, these variables interact to place women at the lowest end of the picture, that is, as women, they are biologically and physiologically more susceptible to HIV infection. As women, their roles are defined by largely patriarchal socialisations and stereotypes that consign them to an inferior position and as a generally marginalised and poor group, have less access to public resources and benefits, thereby influencing how much their needs are met. All this means that they encounter constraints in achieving health and miss opportunities of attaining the highest attainable standard of health. Thus, the WHO rightly suggests: [13]

> Gender inequalities can create, maintain, or exacerbate exposure to risk factors that endanger health. They can also affect the access to and control of resources, including decision-making and education, which protect and promote health.

[12] Doyal: 1998, 6.

[13] WHO, 'Gender and health: A technical paper' World Health Organisation, 1999.

In these extreme situations, gender can be used as a concept and as an analytical tool to enable one to understand the nature of the wrongs that affect women, that is, poverty and inequality.[14] Gender as a tool for analysis encourages an understanding of women's subordination, oppression and exploitation that recognises women and men in relation to each other in society. It involves the political, economic, social, cultural and religious context manifested in the institutions which might perpetuate unequal gender relations due to gender insensitivity or gender blindness.[15] Gender analysis, therefore, offers the platform to understand and correct these inequalities.[16] As an analytical variable, gender has its historical location in the feminist movement within the liberal frameworks.[17]

On the strength of the above, a critical concept arising within the context of gender, HIV and AIDS is sexuality. Accordingly, the next section of this thesis examines the role of sex and sexuality in the women's circumstances, HIV and AIDS.

2.4. SEX AND SEXUALITY

Sex and sexuality are central in understanding the link between women, HIV and AIDS. As a concept, sexuality is central to the account of the dominance model of feminist

[14] Barnett, T., & Whiteside, A., *AIDS in the twenty-first century: Disease and globalisation* (2002) [hereafter: Barnett & Whiteside: 2002].

[15] Barnett & Whiteside: 2002.

[16] Barnett & Whiteside: 2002.

[17] Feminist theory is accordingly explored in chapter three of this thesis. See section 3.2.

jurisprudence.[18] MacKinnon aptly asserted that implicit in feminist theory is a parallel argument:[19]

> The molding, direction, and expression of sexuality organises society into two sexes: women and men. This division underlies the totality of social relations. Sexuality is the social process through which social relations of gender are created, organized, expressed, and directed, creating the social beings we know as women and men, as their relations create society. As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind.

I am in agreement with MacKinnon on the above position. The sexuality of men and women interrelate in a manner that defines the way someone acquires HIV, the way it is managed and how the disease then impacts on men and women.[20] I wish to argue that this interaction

---

[18] The dominance model of feminist jurisprudence is developed in chapter three. See chapter three, section 3.2.2.

[19] MacKinnon argues that to be deprived of control over work relations in marxism, over sexual relations in feminism, defines each theory's conception of lack of power...They exist to argue, respectively, that the relations in which many work and few gain, in which some dominate and others are subordinated..., are the prime moment of politics. See MacKinnon: 1991, 3–4.

[20] McFadden, P., 'Sex, sexuality and the problems of AIDS in Africa' in Meena, R., (ed.). Gender in Southern Africa: Conceptual and theoretical issues (1992) 157–195 [hereafter McFadden: 1992]. The author discusses that sex is one of the most basic human activities, bringing us closest to other members of the animal world in its commonality as well as in its essentially overlooked or underplayed, because humans would like to emphasise their unique characteristics of choice and decision – making. But both these elements exist at much lower levels of development among all animals, so that even among the least developed of the animal species, sex is not completely random. Among human beings, however, the sexual act is not simply for the purpose of reproducing the species. Over past millennia, sex has assumed a complex and varied character, impacted upon by culture, custom, norms of behaviour, morals and by the commoditisation process. See generally, Garcia-Moreno, C., 'AIDS: Women are not just transmitters,' in Wallace, T., & March, C (eds) *Changing perceptions*, (1991) [hereafter Garcia-Moreno: 1991]; Peltzer, K., & Pendid, S., 'Sexuality of 16 to 17 year-old South Africans in the context of HIV/AIDS' (2006) 34 *Social Behaviour and Personality* 239-256. Society for Personal Research (Inc), Available at available at http://www.sbp-journal.com. Accessed 4 September 2009; Harvey, E., & Kehler, J., 'Sex and sexuality in the context of HIV and AIDS' A publication of the AIDS Legal Network, November 2005.

corroborates the important point that both the epidemiological and socio-cultural facets of HIV and AIDS have to be addressed in law and policy. Tamale persuasively argues that sexuality has been used to regulate women's behaviour in such a manner that places them in a precarious situation when it comes to decision-making.[21] Sexuality is gendered by the reproductive, social, economic, political, cultural and religious roles people play as women and men in each society.[22] Female sexuality in all human societies is largely constructed in

---

Available at www.aln.org.za. (Accessed 15 July 2009); Heywood, M., *The AIDS epidemic in Africa: 'Openness' and human rights*, Paper for the Xth International Conference on AIDS and STDs in Africa, 7. Available at http://www.hri.ca/partners/alp/resource/icasa.shtml. (Accessed 23 July 2009); Baylies, C., & Bujra, J., 'Discourses of power and empowerment in the fight against HIV/AIDS in Africa' in Aggleton, P et al., (eds) *AIDS: Safety, sexuality and risk* (1995) [hereafter Baylies & Bujra: 1995]; Baylies, C., & Bujra, J., *AIDS, sexuality and gender in Africa: The struggle continues* (2000) [hereafter Baylies & Bujra: 2000].

[21] Tamale, S., 'Eroticism, sensuality and 'women's secrets' among the Baganda: A critical analysis' (2006) 5 *Feminist Africa* 9–36 [hereafter Tamale: 2006]. Tamale writes that sexuality is a key site through which women's subordination is maintained and enforced in postcolonial Africa. She writes that in Uganda, the colonialists' constructions and perceptions of Africans as profligate and hypersexual led to intensified surveillance and repression of African women's sexuality in particular. Such double standards are clearly reflected in Ugandan law: for example, until recently, the crime of adultery in Uganda applied to women, but not men; and the offence of prostitution penalises only the 'sellers' (the majority of whom are women) and not the procurers (who are almost exclusively men). Having constructed the hypersexed female body, the case was made for the strict regulation and control of African women's sexuality. To do so, various legal and policy strategies and discourses in the areas of medical health and hygiene were deployed. Traditional customs, which in the first instance were seldom egalitarian, were reconfigured in order to introduce new sexual mores, taboos and stigmas. See also, Vaughan, M., *Curing their ills: Colonial power and African illness* (1991); Musisi, N., 'The politics of perception or perception as politics? Colonial and missionary representations of Baganda women, 1900–1945', in Allman, J et al., (eds) *Women in African colonial histories* (2002); McFadden, P., 'Sexual pleasure as feminist choice' (2003) 2 *Feminist Africa* 50–60; Pereira, C., 'Where angels fear to tread? Some thoughts on Patricia McFadden's "Sexual pleasure as feminist choice"' (2003) 2 *Feminist Africa* 61–65; Schmidt, E.,. 'Patriarchy, capitalism, and the colonial state in Zimbabwe' (1991) 16 *Signs: Journal of Women in Culture and Society* 4; Mama, A., 'Women's studies and studies of Women in Africa during the 1990s',1996.*CODESRIA Working Paper Series* 5/96. Dakar: CODESRIA; Goodson, A.,*Therapy, nudity and joy (*1991).

[22] McFadden: 1992, 157–195.

relation to a perceived male sexuality and pleasure, and is intimately linked to reproduction.[23] Women tend to be socialised into a concept of sexuality which is often externally directed – as a young woman, a wife, a lover, a mother.[24] These categorisations in turn become the context of vulnerability, for example, as a young woman and lover, she is expected to be sexually attractive and be desired by men; as a mother and wife, to be a care giver and provide sex upon demand from a husband.[25]

Sexuality is, therefore, the social construction of a biological drive.[26] Sexuality also relates to the aspects of gender identity that relate to sex.[27] It includes sexual desire, sexual behavior and sexual orientation. As far as sexual behavior is concerned, men in many societies can be proud of having multiple partners – it shows their sexual prowess.[28] Sexually Transmitted Infections may be viewed as acceptable 'battle scars' showing that a man has succeeded in 'getting his way' with a woman. Sex is predominantly about pleasing a man, essentially the husband, and about having babies; women who enjoy sex may be distrusted and be seen as

[23] McFadden: 1992, 157–195.

[24] McFadden: 1992, 157–195.

[25] McFadden: 1992, 157–195.

[26] Dixon-Mueller, R., 'The sexuality connection in reproductive health' (1993) 24 *Studies in Family Planning* 269–282; Zeidednstein, S., & Moore, K., *Learning about sexuality: A practical beginning* (1996); Richard, P., & Aggleton, P., *Culture, society and sexuality: A reader* (1999).

[27] Jackson, H., *AIDS: Africa, a continent in crisis* (2002) [hereafter Jackson: 2002] 87.

[28] Jackson: 2002, 87.

loose and uncontrollable.[29] Hence sexuality often refers to male needs and desires, while women's sexuality is looked down on, ignored or feared and repressed.[30]

In the context of South Africa, the issues of sex, sexuality and AIDS have assumed a specific character as a consequence of the long and excessive economic and political exploitation.[31] Women in South Africa live in different racial, class, geographic, religious and cultural contexts.[32] Post-colonial feminists have added further layers to this image by considering how wider systems of political and economic and social domination regulate, discipline and control women.[33]

Geographical displacement during apartheid played a major role in sustaining Black women's subordination.[34] Over four million Black people were displaced from urban to rural areas designated as 'homelands' for the different ethnic groups.[35] In addition, within the urban areas, people of colour were moved from designated 'white spots' to designated 'black

[29] Jackson: 2002, 87.

[30] Jackson: 2002, 87.

[31] See Bonthuys, E., and Albertyn, C., (eds) *Gender, law and justice* (2007) [hereafter Bonthuys & Albertyn: 2007] 6–7.

[32] Bonthuys & Albertyn: 2007, 6.

[33] Bonthuys & Albertyn: 2007, 6–7.

[34] Sachs, J., 'South Africa as the epicenter of HIV/AIDS: Vital political legacies and current debates' (2002) 3 *Current Issues in Comparative Education* 52 [hereafter Sachs: 2002].

[35] Sachs: 2002, 52.

spots'.[36] These were mainly grossly disadvantaged areas on the periphery or outside the urban areas. The effect was to leave behind the grave of a viable community and establish an outskirts conglomeration.[37] For example, Soweto became a segregated township outside the city of Johannesburg.[38] The inhabitants had to endure long distances to travel to work, inadequate health and educational services, disrupted families and exceptionally poor housing.[39] South African Blacks were also forced to carry identity books commonly known as 'passes' – these were established to control and bully the citizens, and often used to endorse a person out of the urban and peri-urban areas back to their so-called Homelands.[40] The effect of all of this was to create an enormous reservoir of people in the barren countryside with little hope of work or even a subsistence existence. By the nature of apartheid, these areas were also grossly deprived of, *inter alia*, health and educational facilities.[41] In such areas it was very difficult to inform the communities of the dangers of HIV and AIDS, and how to prevent its spread. Furthermore, there was no infrastructure and facilities to do so.[42]

Furthermore, migratory labour in South Africa enabled a situation to grow that provided a breeding ground for HIV and AIDS. Black workers were brought in from the Homelands to

[36] Sachs: 2002, 52.

[37] Sachs: 2002, 53.

[38] Sachs: 2002, 53.

[39] Sachs: 2002, 53.

[40] Sachs: 2002, 53.

[41] Sachs: 2002, 53.

[42] Sachs: 2002, 53.

supply the mines and industrial complexes in the urban areas. They were not allowed to bring their families with them, and they lived in overcrowded single-sex hostels with little recourse to study, recreation or even basic living conditions.[43] Such a situation inevitably led to sexual activity with multiple partners.

Following the breakdown of apartheid and the ensuing democratic elections, the pass laws were abolished, and people had the right to move where they pleased. This caused an influx of individuals and families into 'informal settlements' which often had no water, electricity or sanitation, and minimal health and educational services.[44] The impact on this demographic change on the spread of HIV is self-evident. Women were to be at the centre of this socio-economic and political dispossession.[45] Over the past century, hundreds of thousands of women have moved from the rural areas where their men had been forced to go.[46] This resistance to enforced 'villagisation' resulted in a reconstruction of sexuality vis-a-vis traditionally defined sexual norms, as well as in relation to the urban milieu.[47] The female-headed, often single household emerged as women broke free of the traditional requirements that men head households. The manner in which women related to men in this context

[43] Sachs: 2002, 53.

[44] Sachs: 2002, 53.

[45] I further elaborate on women's condition of poor access to health services in this thesis – see chapter seven, section 7. 4.

[46] For more this type of migration, see generally, Campbell, C., 'Migrancy, masculine identities and AIDS: the psychosocial context of HIV transmission on the South African gold mines' (1997) 45 *Social science & Medicine* 273–281 [hereafter Campbell: 1997]; IOM, '*HIV/AIDS, population mobility and migration in Southern Africa: Defining a research and policy agenda*. International Organisation on Migration: 2005.

[47] See Campbell: 1997, 273–281.

signified a new sexuality.[48] This analysis leads to the logical conclusion that the gendered constructions of sex and sexuality form part of the problem and laws and policies should be tailored to address this aspect of the epidemic. This will mainly call for a change of attitudes and socialisations. Having explored the concepts of sex and sexuality, the next section of this work examines the factors that make women more vulnerable to HIV and AIDS.

2.5. WHY WOMEN ARE MORE VULNERABLE

Initial approaches to HIV and AIDS centred on epidemiological and biomedical understanding of the pandemic.[49] Thus, AIDS has also been described as a 'biologically sexist' organism for reasons like the fact that its per-exposure transmission is higher from a man to a woman.[50] Although it is difficult to quantify clinically, there is strong evidence that women and girls are physiologically more vulnerable than men and boys to HIV infection

[48] Campbell: 1997, 273–281.

[49] Mann, J., 'Health and human rights: If not now, when: Human rights and the new public health' (1997) 2 *Health and Human Rights* 118 [hereafter Mann: 1997]; Kirby, M., 'The never ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 163 [hereafter Kirby: 2004].

[50] It is well known, for example, that physiological factors account for the more efficient transmission of infection from an infected man to a woman than from an infected woman to a man. Certain studies suggest that transmission from a man to a woman is five times more efficient than from woman to man. Other investigations have prompted researchers to argue that HIV is up to 20 times more efficiently transmitted from men to women than vice versa. See, Levinson, JH., & Levinson, SP., 'Women's health and human rights' in Agostin, M., (ed) *Women, gender, and human rights: A global perspective* (2001) 129; Simmons, J et al., 'A global perspective' in Farmer, P et al., (eds) *Women, poverty and AIDS: sex, drugs and structural violence* (1996) [hereafter Simmons et al: 1996] 39; Chersich,MF., & Rees, HV., 'Vulnerability of women in southern Africa to infection with HIV: biological determinants and priority health sector interventions' (2008) *AIDS* 2008 Dec;22 Suppl 4: S27–40.

through heterosexual sex.[51] Vulnerability to HIV transmission is heightened for girls and young women because the vaginal lining is less well developed and the cervix more vulnerable to injury and erosion.[52] Furthermore, for women, successive pregnancies repress the immune system.[53] Other physiological factors like menstruation and co-efficiency with other Sexually Transmitted Diseases and Infections which thrive more in women, also make women more susceptible to HIV infection. This is further exacerbated by culturally-sanctioned practices like dry sex and cross-generational sex.[54] Cross generational sex is discussed later in this chapter.[55]

---

[51] A number of determinants of this higher risk have been cited, including the large surface area of the vagina and cervix, the high concentration of HIV in the semen of an infected man, and the fact that many of the other sexually transmitted diseases (STDs) that increase HIV risk are asymptomatic in women, which may lead to their being untreated for longer periods. Girls and women may also face discriminatory barriers to treatment of STDs, such as needing permission of a husband or male relative for certain services. See, e.g., the website of Global Campaign for Microbicides, 'About Microbicides: Women and HIV Risk'. Available at http://www.global-campaign.org/womenHIV.htm. (Accessed July 26, 2009); UNAIDS, "AIDS: Five years since ICPD—Emerging issues and challenges for women, young people and infants," Geneva, 1998, 11 – Also available at http://www.unaids.org/publications/documents/human/ gender/newsletter. PDF. (Accessed July 26, 2009); and Population Information Program, Center for Communications Programs, The Johns Hopkins University Bloomberg School of Public Health, 'Population Reports: Youth and HIV/AIDS' vol. XXIX, no. 3, (Baltimore, MD, Fall 2001) 7. See also, Carpenter, LM et al., 'Rates of HIV-1 Transmission within marriage in rural Uganda in relation to the HIV sero-status of the partners' (1999) 13 *AIDS* 1083–1089.

[52] Fleishman: 2003.

[53] Page: 2001, 40–46.

[54] Simmons et al: 1996, 39; Schoepf, BG., 'Women, AIDS, and economic crisis in Central Africa' (1988) 22 *Canadian Journal of African Studies* 625–44; Orubuloye, IO et al., 'Women's role in reproductive health decision making and vulnerability to STD and HIV/AIDS in Ekiti, Nigeria' (1996) 7 *Health Transition Review* 329–36; Mgalla, Z et al., (eds.) *HIV Prevention and AIDS Care in Africa: A district level approach* (1997) 85–100.

[55] See chapter two, section 2.5.3.

The biological nature of the epidemic led to medical and biomedical approaches to dealing with HIV and AIDS. Virtually all the earlier literature on the subject was premised on the assumption that this was a problem for the health system to resolve.[56] This approach was fatalistic and resulted in several important consequences which should really be spelt out more clearly in a critique of the relationship between medicine/health, gender and class in Africa, especially with reference to the problem of AIDS.[57] It is this defeatist approach that this thesis generally contends with.

It was, however, soon discovered that women's vulnerability has been compounded by other socio-cultural concerns such as the fact that medical personnel have tended to focus on the symptoms of the disease as it is manifested in men, for example, mouth ulcers, Tuberculosis, weight loss, while the gendered symptoms of the disease in women such as, persistent vaginal thrush and genital ulcers are often assumed to be symptoms of curable sexually transmitted

[56] For a discussion on the reservation of the epidemic to biomedical aspects, See, generally, Mann: 1997, 118; Kirby, M., 'Human rights and the paradox' (1996) 348 *The Lanchet* 1217-1218; Kirby: 2004, 163; Kisoon, C et al., 'Whose Right?' *AIDS Review* 2002. Pretoria: Centre for the Study of AIDS; Hassim: 2007; Meerkotter, A., 'The Impact of the HIV/AIDS epidemic on women's citizenship in South Africa' in Gouws, A., (ed) *(Un) Thinking citizenship: Feminist debates in contemporary South Africa* (2005) 157; Tallis, V., 'Treatment issues for women', Discussion Document produced for the Treatment Action Campaign, (2001); Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2002)5 *Law, Democracy and Development* 179; Dorrington, R et al., *The Demographic Impact of HIV/AIDS in South Africa: National indicators for 2004* (2004) 13; Kenyon, C et al., 'Mainstreaming HIV/AIDS: Progress and challenges in South Africa's HIV/AIDS campaign' (2001) *South African Health Review*.Health Systems Trust, Durban; Joni, J ., 'Promoting the right health care services for people living with HIV/AIDS in rural and peri – urban communities in Viljoen, F., (ed), *Righting stigma: Exploring a rights-based approach to addressing stigma* 2005, AIDS and Human Rights Research Unit, University of Pretoria 132; Heywood, M., 'Human rights and HIV/AIDS in the context of 3 by 5: time for new directions?' (2004) 9 *Canadian HIV/AIDS Policy & Law Review* 1 7–13; Heywood, M., & Richter, M., 'Discrimination and HIV/AIDS Report to the Department of Health' (2002) Johannesburg: Centre for Applied Legal Studies.

[57] McFadden: 1992, 157–195.

diseases.[58] This resulted in numerous unreported AIDS-related deaths among women, as well as having serious implications for the manner in which the virus and its manifestations are interpreted within the medical and social spheres.[59] Not only do these trends indicate unequal access to medical care for women who are HIV positive, they also highlight the gendered nature of medical training and the inbuilt biases against women in relation to the treatment of STDs and other sexually related problems.[60] Clinical management of HIV and AIDS is, therefore, androcentric in design.[61]

The increased physiological risk borne by women and girls in Africa is compounded by the HIV risk they bear from subordination, discrimination and inequality under the law.[62] Hence, one of the consequences of medicalising the problem is that it resulted in a poor understanding of the socio-cultural characteristics of HIV transmission and its life-threatening implications for those affected, gender being one of them.[63] The medical interpretation of the problem thus served to reinforce the unequal relationships of power/powerless which generally characterises persons.[64] The medicalisation of the epidemic has, therefore, reinforced this divide with an unfortunate result in the face of the HIV and AIDS. Because of

[58] McFadden: 1992, 157–195.

[59] McFadden: 1992, 157–195.

[60] McFadden: 1992, 157–195.

[61] McFadden: 1992, 157–195.

[62] Fleishman: 2003.

[63] See McFadden: 1992, 157–195.

[64] McFadden: 1992, 157–195.

its inevitable culmination in the death of anyone infected by the virus, those so affected have been made virtually powerless in the absence of a cure, whilst paradoxically those with medical knowledge of the virus seem to have become even more powerful in their status such as healers.[65]

In most of Africa, sexually transmitted diseases still carry a lot of stigma – of being sexually related as well as being believed to be 'a woman's disease'.[66] Examples across the continent attest to the widespread belief that women are inherently sexually unclean and that they, therefore, cause sexually transmitted diseases.[67] There is no doubt that such stereotypes further prejudice women in the face of the epidemic. Of most significance has been the detrimental impact such beliefs have had on women's health statuses across most African cultures.[68] The generally negative self-health images which many African women hold,[69] compounded by the maternal-focused nature of mainstream health have created a situation where the majority of women accept that they are carriers of the virus. Also, the fear that if they go to clinics and hospitals to report symptoms of sexually transmitted diseases, they will be embarrassed or humiliated by service personnel. Consequently, women accept their fate as victims of the virus.[70] This scenario is not helped by the behaviour of men as discussed below.

[65] McFadden: 1992, 157–195.

[66] McFadden: 1992, 157–195.

[67] McFadden: 1992. The author adds that even men with high educational standards do articulate such erroneous myths and that the sex worker is the most obvious scapegoat of such superstitions.

[68] McFadden: 1992, 157–195.

[69] McFadden: 1992, 157–195.

[70] Kaleeba, N., 'Success of campaigns in Uganda.'1991. WGNRR. January – March.

2.5.1 The role of men

The debate around sex and sexuality, therefore, raises the issue relating to the place of men in the context of women and HIV and AIDS. Male attitudes and behaviours largely present the crux of the HIV and AIDS problem.[71] This is exemplified in, for example, male clients of sex workers who usually demand 'skin to skin' sexual intercourse (and husbands often have the same expectation).[72] As the dominant partner in most sexual interactions and the main initiators of sexual activity, many men put personal pleasure first and responsibility, respect and restraint a poor second.[73] Men are twice as likely to introduce HIV infection into a marriage and women twice as likely to contract HIV from their husbands.[74] Essentially widespread stereotypes of masculinity, 'machismo' and what it means to be a 'real man', encourage male dominance over women, risk-taking, and promiscuous sex. For example, the stereotype that a 'real man is not satisfied by one woman'.[75] Despite this, many HIV and

---

[71] UNAIDS, 2000. See also, Kometsi, K., *(Un)Real AIDS Review* (2004); Leclerc-Madlala, S., 'Masculinity and AIDS in KwaZulu Natal: A treatise, (2005). Available at http://quod.lib.umich.edu/p/passages/4761530.0010.015?rgn=main;view=fulltext. (Accessed 20 January 2010).

[72] Jackson: 2002 , 89.

[73] Jackson: 2002 , 89.

[74] Carpenter et al: 1999, 1083–1089.

[75]Jackson: 2002, 89. Jackson argues that in many cultures, ideals of manhood include strength, courage and dominance and, critically accept men as having an uncontrollable sex drive that lets them off the hook of responsibility. For many men, alcohol is a major contributing factor reducing their sense of responsibility further. Little blame or stigma is attributed when a man says he had casual sex when he was drunk and in many male circles he will be applauded for his manliness. A woman in the same circumstances, on the other hand, would usually be put down by both men and women as cheap, or a whore. For either, knowledge about HIV/AIDS may not be a sufficient deterrent to casual sex even if they think they should remain monogamous. It is not however entirely true that all men fall within the description. It is important to recognise that some men in

AIDS-related prevention and treatment programmes in sub-Saharan Africa region continue to 'not to' involve men, yet their inclusion is paramount for effectiveness.[76]

In 2002, the UNAIDS World AIDS Campaign theme was male involvement.[77] Key reasons for this focus were several. Some of them included: men's health needs receive too little attention, men are often slow to seek health care and do not cope as well as women with illness. Furthermore, men are also more likely to undertake risky activities (such as drinking, reckless driving), men's behaviour puts them at risk of HIV infection. In addition, men's behavior put women at risk of HIV infection and men are likely to infect more women over their lifetime than HIV-positive women infect men. Moreso, this is because of more risky behavior and also because HIV is transmitted more easily from male to female than vice versa. Additionally, unprotected sex between men endangers the health of both men and women. Also, men need to give greater consideration to AIDS as it affects the family. The World AIDS Campaign strategies aimed to make inroads into all these areas through diverse approaches.[78]

---

all cultures do not fit the stereotype depicted above, but rise above it. They remain faithful to their partner, they are deeply concerned about avoiding infection, and they respond to their partner's sexual needs as well as their own. See also, Doyal: 2001.

[76] Chigodora, J., 'Young men and HIV/AIDS' (2001) 9 *SAfAIDS* 17; Foreman, M., 'What makes a man' (2000) 8 *SAfAIDS* 2.

[77] UNAIDS, 2002.

[78] UNAIDS (2000) cites one visual example of this - the White Ribbon Campaign that started in 1991 in Canada and has now spread to many other countries. It urges men to wear a white ribbon, or to put white ribbons in their offices, cars and so forth for one week a year as a symbol of their commitment to oppose all forms of violence against women. This study outlined why women are more vulnerable in the face of the epidemic. See also, Panos Institute, 'Triple jeopardy: Women and AIDS' (1990) [hereafter Panos: 1990].

One of the major consequences of the AIDS pandemic for female sexuality, and to a limited extent for male sexuality, is that female sexuality is being redefined in even more rigid, guilt-ridden terms.[79] Sexual activity is at present one of the main causes of HIV infection, and sex and sexuality have become the main focus of most preventive policies. This has led to an exaltation of monogamy, heterosexuality and the repression of other forms of sexuality. Fear and terror have also become an essential part of sex, and women in particular are expected to repress their sexuality in the face of a resurgence of sexist myths about female impurity.[80] Many AIDS prevention programmes buy into such sexist myths as 'sexually transmitted diseases are a woman's disease',[81] by showing pictures of women enticing men into sex-either as sex-workers, or as 'easy women'.[82] Hence, contents of such programmes have tended adopt a moralist point emphasising the repression and inhibition of female sexuality. Such trends are particularly disadvantageous to women in the sense that the regulation of their sexuality means they have little chances to negotiate sex. The result is that men, whose sexuality is treated with less scrutiny and 'leniency', take control and decide on when and how to have sex, for example, with or without a condom. This places the woman in a precarious position.[83]

---

[79] McFadden: 1992; Garcia-Moreno: 1991; Albertyn, C., 'Contesting democracy: HIV/AIDS and the achievement of gender Equality in South Africa' (2003) 29 *Feminist Studies* 595–615.

[80] McFadden, 1992, 157–195.

[81] See generally, Faithfull, J., HIV-positive and AIDS-infected women: Challenges and difficulties of mothering (1997) 67 *American Journal of Orthopsychiatry* 144–151 [hereafter Faithfull: 1995].

[82] McFadden: 1992, 157–195; Moreno-Garcia: 1991.

[83] See for example a study done in Namibia –Wise, SJ., 'The male 'powersexual': An exploratory study on manhood, power and sexual behaviour among elite Afrikaner and Owanbo men in Windhoek' in McFadden, P., 'Contesting sexualities in the remaking of African female bodies as sites of power' (2007) 4 *Sexuality in Africa Magazine* 4.

The lopsided myths on women's sexuality are thus an expression of stigma and discrimination as succinctly put by O'Regan, J and Sachs, J in the case of *S v Jordan*:[84]

> The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women…In the present case, the stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen; he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.

The Constitutional Court accurately added:[85]

> The salient feature of the differentiation in the present matter is that it tracks and reinforces in a profound way double standards regarding the expression of male and female sexuality. The differential impact is accordingly not accidental, just as the failure of the authorities to prosecute male customers as accomplices is entirely unsurprising. They both stem from the same defect in our justice system which holds women to one standard of conduct and men to another.

The reasoning of O'Regan, J and Sachs, J goes to the route of stigma and discrimination as directed at women based on their gender. Within the context of HIV and AIDS therefore, this difference plays out in a manner that erodes women's dignity within the context of disease.

---

[84] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* 2002 (11) BCLR 1117 (9 October 2002). See paras 64–65.

[85] Para 67.

Women continue to be blamed as vessels of disease which then impacts on the way, for example, health workers treat them.[86] Similarly, this attitude translates into the way preventive methods like condoms are viewed as explained below.

2.5.2. The condom example

To demonstrate the power imbalance between men and women on matters of sex, and to elucidate the crooked constructions of sexuality, I use the example of the condom. It is not doubted that sexual desire is a powerful energy and the need for sexual pleasure, sexual exploration and intimacy has a great influence on HIV transmission. Thus, gender-conflict may entail challenges to condom usage or the recognition that people in sexual interaction with one another may have critically differing agendas, it also leads to the acknowledgment that gender-based violence is both a cause and an effect of transmission.[87] Condoms have for a long time been used both as a contraceptive device and a form of protection against HIV and AIDS.[88] As a prevention approach, the 'ABC' model[89] employs population-specific

[86] See generally, Faithfull: 1995.

[87] See Dunkle, KL et al., 'Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection' (2004) 59 *Social Science and Medicine* 1581–1592 [hereafter Dunkle et al: 2004]; Dunkle, KL et al., Gender-based violence, relationship power and risk of prevalent HIV infection among women attending antenatal clinics in Soweto, South Africa. *The Lancet*, in press (hereafter Dunkle et al: 2004); MacPhail, C., & Campbell, C., 'I think condoms are good but, aai, I hate those things': Condom use among adolescents and young people in a Southern African township (2001) 52 *Social Science and Medicine* 1613–1627; Vetten, L., & Bhana, K., *Violence, vengeance and gender: a preliminary investigation into the links between HIV/AIDS and violence against women in South Africa*. 2001. Johannesburg: The Centre for the Study of Violence & Reconciliation.

[88] Condom use can be traced back several thousand years. It is known that around 1000 BC the ancient Egyptians used a linen sheath for protection against disease. The earliest evidence of condom use in Europe

interventions that emphasise abstinence for youth and other unmarried persons, including delay of sexual debut, mutual faithfulness and partner reduction for sexually active adults, and correct and consistent use of condoms by those whose behaviour places them at risk for transmitting or becoming infected with HIV. As an approach, it has been credited for reducing HIV infection rates and has therefore been recommended – for example, in Uganda.[90] However, as applied to women's realities, this approach is now contested. Some have argued

comes from scenes in cave paintings at Combarelles in France. There is also some evidence that some form of condom was used in imperial Rome. On the history of condoms, See generally, Durex website: History of Condoms www.durex.com; Durex website: History of Condoms www.durex.com; Himes, ME., 'Medical history of contraception' in Lewis, M., 'A Brief history of condoms' in Mindel, A., 'Condoms' (2000). There are varied statistics on the rate of effectiveness of condoms both as a contraceptive device and a form of protection against HIV/AIDS. Studies have shown that if a latex condom is used correctly every time one has sex, this is highly effective in providing protection against HIV. For a further discussion on condoms and their effectiveness, See generally, CDC, 'Male latex condoms and sexually transmitted diseases', Fact sheet for public health personnel. 2003. Available at http://www.avert.org/condoms.htm. (Accessed 15 May 2007); CDC, 'Basic facts about condoms and their use in preventing HIV infection and other STDs', 30 July,1993; Sexuality Information and education Council of the United States (SIECUS) (2002) 'Fact Sheet: The truth about condoms', November; CDC, 'Condoms and their use in preventing HIV infection and other STDs', September, 1999; CDC, 'Condoms and their use in preventing HIV infection and other STDs', September, 1999; Nordenberg, T., 'Condoms: barriers to bad news', FDA Consumer Magazine, March–April, 1998; NIAIDD, 'Workshop Summary: Scientific evidence on condom effectiveness for sexually transmitted disease (STD) prevention, June 12–13, 2001, Hyatt Dulles Airport, Hernon, Virginia', July 20; UNFPA, 'Donor Support for Contraceptives and Condoms for STI/HIV Prevention 2005'UNFPA: 2005.

[89] The 'ABC' approach – namely: 'Abstain; *Be faithful*/reduce partners; use Condoms.

[90] The 'ABC' approach to HIV prevention is often said to have started in Uganda, and it is said by some people to have been the reason for Uganda's unique success in reducing its HIV prevalence (defined as the proportion of adults living with HIV).

that women are victims of the "ABC" approach because when they insist on condoms, they are accused of not being faithful and even called 'sluts'.[91]

Condoms and their use, therefore, are pertinent in any discussion concerning HIV and AIDS and gender. Unfortunately, condoms have been criticised for being *female unfriendly* and do not guarantee protection for women.[92] Knowledge of gender differences is particularly relevant to the study of condom use. Unlike many health behaviours, condom use is inherently interpersonal, typically involving explicit and implicit agreement by both partners.

Literature on gender roles and gender differences in social behaviour suggests that males and females may enter sexual relationships with differing expectations, attitudes, and habits with

[91] See for example, Nuwaha, F et al., 'Lay people's perceptions of sexually transmitted infections in Uganda' (1999) 10 *International Journal of STD and AIDS* 709; Loxley, W., 'Sluts' or 'sleazy little animals'?: Young people's difficulties with carrying and using condoms' (1996) 6 *Journal of Community and Applied Social Psychology* 293.

[92] Eagly, AH., & Wood, W., 'Explaining sex differences in social behaviour: A meta-analytic perspective (1991) 17 *Personality & Social Psychology Bulletin* 306–315; Campbell, C., 'Selling sex in the time of AIDS: The psycho-social context of condom use by sex workers on a Southern African mines' (2000) 50 *Social Science and Medicine* 479–494 [hereafter Campbell: 2000]; Hunter, LK., 'Condom use of female college students as a function of information versus role play and modeling' *Electronic Journal of Human Sexuality* , 1 November, 10; Breitman, P et al., *How to persuade your lover to use a condom...and why you should* (1987); Brown, IS., 'Development of a scale to measure attitude toward the condom as a method of birth control'(1984) 20 *Journal of Sex Research* 255–263; Edwards, L., 'HIV/AIDS, poverty and patriarchy: A gendered perspective. Research Report, Nara Training Center. Available at http://www.securethefuture.com/publications/data/research_report.pdf. (Accessed 09 April 2007); Woods, LN., 'HIV, Sex and Poverty in sub-Saharan Africa: Why the Condom Doesn't protect women from the AIDS Virus' *Masters dissertation, University of London, 2009*. Available at http://www.scribd.com/doc/25683306/HIV-Poverty-and-Sex-in-Sub-Saharan-Africa-Why-the-Condom-Does-Not-Protect-Women-from-the-AIDS-Virus. (Accessed 21 January 2010).

respect to AIDS-relevant condom use.[93] For example, studies have also shown that a lack of knowledge or incomplete knowledge fosters the development of fears and myths about condom use, for example, studies conducted in South Africa have found that women did not like using condoms because they feared that if the condom came off in the vagina it could get lost or travel to the throat, or that a woman's reproductive organs would come out when the condom was removed.[94] It has also been argued that condom use, especially among younger African men, remains low because, among other reasons, agencies encouraged this option without concrete knowledge of the prevailing power relationships, sexual patterns and the context within which sexual and reproductive decisions are made.[95] These challenges led to the development of female condoms.

[93] In East Africa, it is considered a risk factor for a woman to be married and monogamous. Even if a woman is aware that her husband is infected with HIV, she cannot protect herself against infection because of her lack of social and economic power. She cannot refuse unprotected intercourse with him for fear of a beating and serious bodily injury. In addition, her refusal may result in divorce, which means economic or social death for a woman because of the way divorce, marriage, and inheritance laws are structured in the region.

[94] Mane, PG et al; 'Effective communication between partners: AIDS and risk reduction for women' (1994) 8 *AIDS* S325–S331; Weiss, E., and Gupta, GR., 'Bridging the gap: Addressing gender and sexuality in HIV Prevention' Washington, DC: International Center for Research on Women. 1998; Weiss, E et al., 'Gender, sexuality and HIV: Making a difference in the lives of young women in developing countries' (2000) 15 *Sexual and Relationship Therapy* 233–245; Gupta et al: 2000. Even when a woman is informed or has accurate information about sex and HIV prevention, the societal expectation that a woman, particularly a young woman, should be naïve makes it difficult for her to be proactive in negotiating safer sex. Accordingly, the female role is characterized by communal qualities including kindness, compassion, concern for the welfare of others, avoiding physical harm to oneself, and a willingness to be influenced by others. Young women tend to view sex in emotional rather than physical terms, and regard sexuality in the context of relationships. The male role, in contrast, is characterised by qualities including chivalrous helping or heroic helping, a willingness to take risks, aggressiveness, and resistance to being influenced by others. If these stereotypes are an accurate reflection of young adults in this culture, then differences in sexual behaviour may occur.

[95] Ahlberg, BM., *Women, sexuality and the changing social order* (1991) [hereafter Ahlberg: 1991].

I wish to express that female condoms were presented as a beacon of hope to women and is projected as giving women more autonomy in sexual decisions. It is a device that is used during sexual intercourse to prevent pregnancy and reduce the risk of sexually transmitted infections, including HIV.[96] The external genitals of the wearer and the base of the penis of the inserting partner may be more protected than when the male condom is used. Inserting a female condom does not require male erection.[97] Regulatory bodies have been found to be obstacles to female condom usage together with cultural norms.[98] Sales of female condoms have been disappointing in developed countries,[99] though developing countries are increasingly marketing them to complement already existing family planning and HIV and AIDS programming.[100] It is posited that the probable causes for poor sales are that inserting the female condom is a skill that has to be learned and that female condoms can be significantly more expensive than male condoms (upwards of 2 or 3 times the cost).[101]

[96] It was invented by Danish MD Lasse Hessel . It is worn internally by the receptive partner and physically blocks ejaculated semen from entering that person's body. The female condom is a pouch with flexible rings at each end. Before vaginal intercourse, the ring inside the pouch is inserted deep into the vagina, holding the condom in the vagina. The penis is directed into the pouch through the ring at the open end, which stays outside the vaginal opening during intercourse. Female condoms have been available since 1988.

[97] See Norsigian, J., *Our bodies, ourselves: A new edition for a new era* (2005) [hereafter Norsigian: 2005].

[98] Gollub, EL., 'The female condom: Tool for women's empowerment' (2000) 90 *American Journal of Public Health* 1377–1381.

[99] Norsigian: 2005.

[100] PATH, 'Global consultation on the female condom' Baltimore, MD: PATH. September 26–29, 2005.

[101] Norsigian: 2005.

Also, it is reported that 'rustling' sounds during intercourse turn off some potential users, as does the visibility of the outer ring which remains outside the vagina.[102] The female condom option therefore, apparently presents little in the way of sexual pleasure.[103] All this means that the female condom has not delivered the gains it promised, that is, women's sexual empowerment, especially in the context of HIV and AIDS. The long term goals of HIV prevention and human rights are to increase substantially the number of men who display gender sensitivity and believe in gender equity and equality in all areas of life, not just sex.[104] On top of this condom debacle, the role of poverty in relation to women's susceptibility to HIV needs no further emphasis. The instinct to survive has led many women to resort to transactional sex and cross-generational sex as explored below.

2.5.3 Survival: Transactional and cross-generational sex

For many young women, particularly in light of the feminisation of poverty, sexual partnerships are often necessary for survival. In this context, often, sexual partnerships mean the only access to credit, further education, jobs, or other forms of financial and material support.[105] Girls are often forced into relying on older, economically established men for

[102] Norsigian: 2005.

[103] See Ahlberg: 1991. Ahlberg contends that it is necessary to integrate educational processes that tend to prevent sexual and pre natal transmission of AIDS within the context of global education which includes gender viewpoints, aiming at the development of a critical awareness and of a positive image of one's sexuality based on the human right of enjoying a rich sexuality.

[104] See Jackson: 2002, 90.

[105] De Bruyn, M., `Women and AIDS in developing countries' (1992) 34 *Social Science and Medicine* 249 255; See also Bassett, MT., & Mhloyi, M., `Women and AIDS in Zimbabwe: The making of an epidemic' (1991) 21 *International Journal of Health Services* 151.

survival as their own economic prospects are limited.[106] Recent studies in South Africa show that the practice has almost become normalised among young women.[107]

For many women, their economic security and survival is sometimes dependent on the support of their male partner. Sexual intercourse done the way he desires may well be the price one pays for that support. Some will make requests for safe sex but if they are ignored, they will have few options to enforce safe sex. Research shows that in some parts of Africa, many women have long-term boyfriends on the explicit understanding that they will receive money in return.[108] Whatever the form of sexual/economic exchange, women will be constrained in their attempts to protect themselves. The greater the degree of financial dependence, the greater the constraint. Such economic hardships for women continue to sustain their vulnerability to HIV/AIDS infection.

[106] For example the 'sugar daddy' in Africa. A 1992 study among girls in Zambia asked them why they exchanged sexual favours for money to buy shoes and books. They responded that surviving in the present was worth the risk of dying in ten year's time. For a further discussion on sex as a survival mechanism, See, generally, Moupali, D., 'Patriarchy and Health: Women and the World AIDS Epidemic' Available at http://www.digitas.harvard.edu/~perspy/old/issues/1996/may/wldaids.html. (Accessed 07 May 2007); See also, Campbell: 2000, 479–494.

[107] HSRC, 'South African National HIV Prevalence, Incidence and Communication Survey, 2008.' HSRC, 2008 [hereafter HSRC:2008]; Katz , I., & Low-Beer, D., 'Why has HIV stabilised in South Africa, yet not declined further? Age and sexual behaviour patterns and counselling' (2008) 11 *AIDS* 1045-1051; SADC Press Release: Launching of the SADC Report on the Expert Think Tank Meeting on HIV Prevention in the Region. SADC, 2006. The report is available at http://www.sadc.int. (Accessed 20 August 2009).

[108] Studies in South Africa revealed that women in mining towns revealed that the decision to provide sexual services is an economic one. See Jochelson, K et al., 'Human Immunodeficiency Virus and Migrant Labour in South Africa' (1991) 21 *International Journal of Health Services* 157 167 [hereafter Jochelson et al: 1991].

Closely related to the above issue is the practice of cross-generational sex. Cross-generational sex generally refers to a sexual relationship in which one person is significantly older than the other.[109] In the face of HIV and AIDS, young women have been described to be in double jeopardy of sex and gender.[110] HIV infection rates for girls, between the ages of 15 and 19, in sub-Saharan Africa are up to six times higher than those of their male peers.[111] Age-mixing in sexual relationships between older men and adolescent girls is a likely explanation for these differences as older men often have higher rates of HIV infection than adolescent boys.[112]

---

[109] ICRW, 'Cross-generational and Transactional Sexual Relations in Sub-Saharan Africa.' ICRW, 2002. Available at http://www.icrw.org/docs/CrossGenSex_Report_902.pdf; (Accessed 10 June 2007). Making the Connection -- News and Views on Sexuality: Education, Health and Rights, A quarterly international newsletter on sexuality, sexual health, and sexuality education. Volume 3, Issue 2 - Summer 2004. Available at http://www.siecus.com/inter/connection/conn0044.html. (Accessed 16 June 2007).

[110] Ewelukwa, U., 'The Girl Child, African states, and international human rights law: Toward a new framework for action' in Nnaemeka, O., & Ezeilo, J., (eds) *Engendering human rights, cultural and socio economic realities in Africa* (2005) [hereafter Ewelukwa: 2005] 133. At the International Conference in Cairo in 1994 adolescents were identified as a particularly vulnerable group and their reproductive health needs were addressed as a separate section of the Programme for Action.

[111] Green, EC., & Berman, J., 'Liaisons fuelling AIDS in Africa,' *The Washington Times*, December 28, 2003. See generally, also UNAIDS: 2006; UNAIDS 2005; UNAIDS, 2004.

[112] Gregson, S et al., 'Sexual mixing patterns and sex-differentials in teenage exposure to HIV infection in rural Zimbabwe' (2002) 359 *The Lancet* 31896–1903 [hereafter Gregson et al: 2002] ; Glynn, JR et al., 'Why do young women have a much higher prevalence of HIV than young men? A study in Kisumu, Kenya, and Ndola, Zambia' (2001) 15 *AIDS* S51-S60 [hereafter Glynn et al: 2001]; Kelly, RJ et al., 'Age Differences in sexual partners and risk of HIV-1 infection in Rural Uganda' (2003) 32 *Journal of Acquired Immune Deficiency Syndromes* 446–451[hereafter Kelly et al:2003] ; Laga, M et al., 'To stem HIV in Africa, prevent transmission to young women' (2001)15 *AIDS* 931–934 [hereafter Laga et al: 2001]; UNAIDS, 'National AIDS Programmes: A guide to monitoring and evaluation.' Geneva: UNAIDS, 2000. Available at www.unaids.org. (Accessed 15 September 2009);SAFAIDS. 2000., *Newsflash*; Gorgen, R et al., 'Sexual behavior and attitudes among unmarried urban youths in Guinea' (1998) 24 *International Family Planning Perspectives* 65–71[hereafter Gorgen et al: 1998]; Matasha, E et al., 'Baseline questionnaire survey of sex and reproductive heatlh among primary and secondary school pupils in Mwanza Region,Tanzania: Report for the adolescent sexual and reproductive health project.' AMREF, 1996; UNAIDS 'AIDS in Africa.' Geneva: UNAIDS. 1998; Lule, K et al., 'Adolescent sexual networking and HIV transmission in rural Uganda' (1997) 7 *Health Transition Review* 89–

Older men are more likely to have or have had other partners, including spouses, and therefore, are more likely to have been exposed to HIV. In fact, many of the men who engage in cross-generational sex do so because they perceive younger girls to be 'HIV-free'.[113] In addition, the power imbalance in these sexual relationships leaves young women unable to negotiate condom use.[114]

Research indicates that men tend to control the conditions of sexual intercourse, including condom and contraceptive use.[115] For example, girls participating in small discussion groups in South Africa have explained that they would rather give in to their older partners' insistence on not wearing condoms than lose the benefits of the relationship.[116] Studies in Uganda have shown that among young women ages 15–19, the risk of HIV doubles for those with male partners 10 or more years older,[117] and in Zimbabwe the risk increases for each

100; McLean, P., 'Sexual behaviors and attitudes of high school students in the Kingdom of Swaziland' (1995) 10 *Journal of Adolescent Research* 400–420.

[113] Luke, N., & Kurz, K., 'Cross-generational and transactional sexual relations in sub-Saharan Africa' Washington: the International Center for Research on Women, 2002 [hereafter Luke & Kurz: 2002] 22.

[114] Luke & Kurz: 2002.

[115] Luke & Kurz: 2002.

[116] UNOCHA, 'AFRICA: Focus on the "sugar daddy" phenomenon,' .New York: United Nations Office for the Coordination of Humanitarian Affairs, April 15, 2004 [hereafter UNOCHA: 2004].

[117] Kelly et al: 2003.

year of age difference.[118] Cross-generational sex is a risk factor for HIV infection for girls in Africa, but many strategies fail to insist on a substantive focus on this issue.[119]

In addition to biological factors that render young women more vulnerable to HIV infection, trends in 'cross-generational' sex are increasing their risk of infection.[120] Overwhelmingly, cross-generational sex is characterised by adult men having sexual relationships with female partners ages 15 to 19.[121] Cross-generational sex can take place outside of marriage or within a marital relationship. A recent study in Kenya found that 25 percent of men over the age of 30 who reported non-marital partners had a partner at least 10 years younger.[122]

The on-going HIV and AIDS pandemic contributes to an environment in which young people, especially girls, have few options. For example, when parents die of AIDS, the eldest girl child often drops out of school in order to support herself and her siblings.[123] These girls, saddled with the responsibility of an entire household and few economic options, become

---

[118] Gregson, S et al., 'Sexual mixing patterns and sex-Differentials in teenage exposure to HIV infection in rural Zimbabwe,' (2002) 359 *The Lancet* 1896–903 [hereafter Gregson et al: 2002].

[119] See President's Emergency Plan for AIDS Relief: The U.S. Five-Year Strategy to Fight Global HIV/AIDS, (U.S. Department of State, Office of the Spokesman, February 3, 2004) 26;29. Available online at http://www.state.gov/documents/organization/29831.pdf. (Accessed 12 November 2009).

[120] See, generally, UNAIDS: 2004; UNAIDS: 2005.

[121] Gregson et al: 2002.

[122] UNOCHA: 2004.

[123] Nakuti, J et al., 'Children-headed households; vulnerability of the young orphaned girls in S.W. Uganda.' International Conference on AIDS. *Int Conf AIDS.* 1996 Jul 7–12 [hereafter Nakuti et al: 1996].

vulnerable to sexual relationships with much older men who can provide them with money, food, or other necessities.[124]

Abstinence-until-marriage programmes are presented as one of the acceptable methods for unmarried people, and specifically state that condoms are only 'appropriate' for narrowly defined 'high risk groups', that is, 'prostitutes' and 'sero-discordant couples', couples in which one partner is HIV-positive and the other is HIV-negative.[125] The assumption seems to be that marriage is 'HIV and AIDS risk-free', obscuring the fact that many marriages in Africa are between an adolescent girl and a significantly older man. According to the United Nations Population Fund, the younger the girl is when she marries, the larger this age gap tends to be.[126] In 16 sub-Saharan African countries, husbands of girls 15-19 are on average at

---

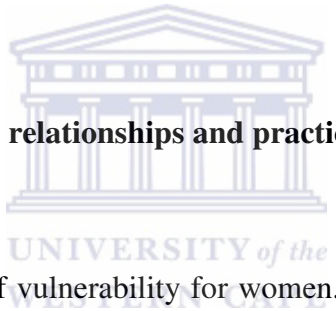
[124] Nakuti et al: 1996; Tsegaye, S 'HIV/AIDS and the new face of orphanhood in Africa: The emerging challenge of children heading households.' *Unpublished paper delivered at the 3rd Annual World Conference on Children without Parental Care,* 23 to 26 October *2006,* Hague/Amsterdam, The Netherlands; Amollo, R., 'The phenomenon of child headed households and orphans in the face of HIV/AIDS in sub Saharan Africa.' *Unpublished paper delivered at Golder Trust for Orphans*, Edmonton, Canada, 15 May, 2008; Sloth-Nielsen, J., & Mezmur, B., 'HIV/Aids and children's rights in law and policy in Africa: Confronting hydra head on' in Sloth-Nielsen, J., (ed) *Children's rights in Africa: A legal perspective* (2008) 281.

[125] The 15 focus countries for the PEPFAR are: Botswana, Cote d'Ivoire, Ethiopia, Kenya, Mozambique, Namibia, Nigeria, Rwanda, South Africa, Tanzania, Uganda, Zambia, Haiti, Guyana, and Vietnam. The President's Emergency Plan For AIDS Relief (PEPFAR/Emergency Plan) was a commitment of $15 billion over five years (2003–2008) from United States President George W. Bush to fight the global HIV/AIDS pandemic. The program initially aimed to provide antiretroviral treatment (ART) to 2 million HIV-infected people in resource-limited settings, to prevent 7 million new infections, and to support care for 10 million people (the "2–7–10 goals") by 2010. PEPFAR increased the number of Africans receiving ART from 50,000 at the start of the initiative in 2004 to at least 1.2 million in early 2008. PEPFAR has been called the largest health initiative ever initiated by one country to address a disease. The budget presented by President Bush for the fiscal year 2008 included a request for $5.4 billion for PEPFAR.

[126] UNFPA, *'State of the world population 2003: Gender inequality and reproductive health'* New York: United Nations Population Fund: 2003 [hereafter UNFPA: 2003].

least 10 years older.[127] The factors that render cross generational sex high-risk, such as a greater number of previous partners and an inability on the part of the girl to negotiate safer sex, therefore, do not disappear simply because the behaviour is happening under the auspices of marriage.

Given the fact that young people are the key to controlling the HIV and AIDS epidemic, an important first step would be to acknowledge that many young men and women are sexually active and thus need to receive sex education. Young women should also play a central role in AIDS prevention and care programmes and strategies need to be developed that utilise their energies and expertise. This does not always happen.[128]



2.5.4 Marriage and other sexual relationships and practices

Marriage continues to be a site of vulnerability for women. Some of the controversial issues in marriage that exacerbate women's vulnerability to HIV/AIDS infection are child/early marriage, violence (including marital rape) and polygyny.[129] For, example, in many societies in sub-Saharan Africa, a husband cannot be punished for having sex with his wife because by

---

[127] UNFPA: 2003.

[128] Durojaiye, E., & Amollo, R., 'Advancing adolescents' sexual health rights in Africa' (2010) 11 *ESR Review* 3 [hereafter Durojaiye & Amollo: 2010].

[129] Polygyny is a situation in which a man is allowed to have more than one wife. See – Tikambenji, MG., 'Women, reproductive rights and HIV/AIDS: The value of the African Charter Protocol' (2007) 72 *Agenda* 127 [hereafter Tikambenji: 2007]. The author argues that polygamy fuels the spread of STIs, including HIV and AIDS.

entering into marriage, each partner is taken to have consented to sexual intercourse with each other.[130] The attitude amongst many men is therefore, that "marriage gives a licence to rape". Some men contend that it is just another form of domestic violence that has been in existence for many years. But many women across Africa have, among other reasons, attributed the increasing number of women living with HIV and AIDS to marital rape.[131]

One of the main messages of prevention of HIV and AIDS, especially as championed by Uganda is 'no sex before marriage'. This message is fatally modelled upon the belief that sex within marriage is safer because spouses will be faithful to each other. To the contrary, marriage presents a perfect hub for acquiring HIV.[132] In essence, such approaches as 'no sex before marriage' carry little or no guarantee for married women. This view is supported by recent studies in Uganda showing that marriage is a huge risk factor for married women regarding the contraction of HIV.[133] This is enabled by the neglect of marital rape as an unproblematic dimension of sex in marriage. Most African men deny the existence of and/or

[130] See, generally, Young, D., 'Domestic violence and the spread of HIV/AIDS among married women' *Paper presented at the annual meeting of the The Law and Society Association, TBA, Berlin, Germany*, July 25, 2007. *Unpublished conference paper* [hereafter: Young: 2007].

[131] They argue that this places a woman at a higher risk of contracting the disease, as her pleas to deny sex to an unfaithful husband are normally not heeded to –see Young: 2007.

[132] See generally, Zeitzen, MK., *Polygamy: A cross-cultural analysis* (2008) [hereafter Zeiten: 2008]; Young: 2007; Tikambenji: 2007.

[133] Recent studies in Uganda, for example, shows that while HIV prevalence among young people in Uganda has gone down dramatically, married women remained at high risk of contracting the disease. Adult women, especially married women, remain at the greatest risk of contracting HIV. Some of the factors propagating this are: domestic violence, child marriage and the fact that married women even have less room to negotiate sex which is considered a given right to a man in most marriages. Moreover, married women often find it difficult to negotiate sex and to persuade their partners to use condoms or to test for HIV/AIDS. For more, see Namutebi, J., 'Married women at higher risk of HIV/AIDS.' *The New Vision* 13 June 2007 [hereafter Namutebi: 2007].

resist the concept of marital rape.[134] In most of Africa, the resistance to acknowledging this phenomenon seems to be directly related to the notion of sex as the prerogative of the male, because it is still essentially defined in relation to male needs and desires. If the man (especially in the case of husbands), wants to have sex, then the women is obliged to provide her body for this gratification of that need, regardless of whether she wants to or not, except during menstruation or immediately after child birth, when sexual intercourse is socially prohibited.[135]

Furthermore, within the context of marriage, the practice of polgyny is widely accepted among certain tribes in several indigenous ethnic groups and religions in sub-Saharan Africa. Despite this, male partners who often have multiple partners, always demand matrimonial sexual rights with their spouses and/or regular partners habitually without using condoms.[136] There is no doubt the above practices create the perfect environment for HIV to thrive among women in marriage. The role of polygny in the transmission of HIV and AIDS is, however, contested – some views show that the practice has helped contain HIV and AIDS.[137] A recent study found that HIV prevalence is lower in countries where polygyny is most common, and that this negative statistical relationship is reproduced at the sub-national level.[138]

[134] Namutebi: 2007.

[135] Namutebi: 2007.

[136] See Zeiten: 2008, 176. See also Viljoen, F., & Stefiszyn, K., (eds) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007) [hereafter Viljoen & Stefiszyn: 2007] 252.

[137] Reniers, G., & Watkins, S., 'Polygyny and the spread of HIV in sub-Saharan Africa: a case of benign concurrency (2010) 24 *AIDS* 299–307 [hereafter Reniers et al: 2010]. See also Zeiten: 2008, 176.

[138] Reniers et al: 2010; Zeiten: 2008, 176.

2.5.5 Child/early marriage

Another synergistically fatal link between marriage, HIV and AIDS is the practice of child/early marriage. Research has revealed that 82 percent of the 45 countries analysed, over 60 percent of girls aged 15–19 who reported being sexually active, were married.[139] Early marriage is a form of sexual violence which makes young girls highly vulnerable to HIV infection.[140] They are almost always married to an older partner with more sexual experience and history who may not be faithful once married. Sex in marriage is more frequent and often unprotected.[141] In fact, the vast majority of unprotected sexual encounters among adolescent girls occur within marriage.[142] Young girls often cannot negotiate with their husbands for safe sex practices such as condom use, even if they are aware of the need for such protection.[143] In this context, the 'ABC' approach to HIV and AIDS prevention offers no real options for

[139] Clarke, S., 'Early marriage and HIV risks in sub-Saharan Africa' (2004) 35 *Studies in Family Planning* 149–60 [hereafter Clarke: 2004]. For more on the practice, see also, Bracher, M et al; 'Moving and marrying: Estimating the prevalence of HIV infection among newly-weds in Malawi' Atlanta: Paper presented at Population Association of America, Annual Meeting, 2002; Nunn, A et al., 'Risk factors for HIV-1 infection in adults in a rural Ugandan community: a population study' (1994) 8 *AIDS* 81–86; Lindan, Cet al., 'Knowledge, attitudes, and perceived risks of AIDS among urban Rwandan women: Relationship to HIV infection and behavior change' (1991) 5 *AIDS* 993–1002; Kilian, HD et al., 'Reductions in risk behavior provide the most consistent explanation for declining HIV-1 prevalence in Uganda' (1999) 13 *AIDS* 391–398.

[140] Clarke: 2004.

[141] Clarke: 2004.

[142] Clarke: 2004.

[143] Clarke: 2004.

married girls.[144] However, the practice of child marriage is not particularly prevalent in South Africa –South Africa's total fertility rate is estimated to be one of the lowest in sub-Saharan Africa, fewer than three births per woman nationally and declining.[145]

2.5.6 Multiple concurrent sexual partnerships

Multiple concurrent sexual partnerships is one of the factors sustaining the epidemic in sub-Saharan Africa. These are relationships whereby an individual has overlapping sexual relationships with more than one person.[146] This is usually within the period of one month or

---

[144] IWC, 'Child marriage: An overview.' International Women's Coalition. Available at http://www.iwhc.org/resources/childmarriagefacts.cfm. Accessed 16 July 2007; In developing countries, most sexually active adolescent girls are married, and have higher rates of HIV infection than sexually active girls who are not married. Population Council, 'The implications of early marriage for HIV/AIDS policy.' A study by Bruce, Judith and Shelley Clark. 2004. The Population Council. http://www.popcouncil.org/pdfs/EMBfinalENG.pdf; p. 2. shows that among 15- to19-year-old girls in Kisumu, Kenya, 32.9% of married girls were HIV positive, compared to 22.3% of their sexually active, unmarried peers; In a survey by the same study, of adolescent girls in 31 developing countries, 80% of unprotected sexual encounters occurred in marriage; In another studying Mali, Child Marriage Briefing Mali, Population Council, August 2004. Available at http://www.popcouncil.org/pdfs/briefingsheets/MALI.pdf. (Accessed 14 June 2009). It was found that 75% of sexually active girls are married. Among girls who are sexually active and do not want to get pregnant, married girls are more than 10 times more likely to have had unprotected sex in the previous week.

[145] In South Africa, in contrast to many other settings, teenage mothers may return to school once they have given birth. For more on this, see generally, Kaufman, C et al., 'Adolescent pregnancy and parenthood in South Africa' (2001) 32 *Studies in Family Planning* 147–160.

[146] Mah, TL., & Halperin, DT., 'Concurrent sexual partnerships and the HIV epidemics in Africa: Evidence to move forward' (2008) *AIDS and Behavior*. Published online July 22 DOI 10.1007/s10461-008-9433-x [hereafter Mah et al: 2008]; See also, Halperin, DT., & Epstein, H., 'Why is HIV prevalence so severe in Southern Africa? The role of multiple concurrent partnerships and lack of male circumcision: Implications for AIDS prevention' (2007) 26 *The Southern Africa Journal of HIV Medicine* 19–25 [hereafter Halperin and Epstein: 2007]; Lurie, MN., & Rosenthal, S., 'Concurrent partnerships as a driver of the HIV Epidemic in sub-Saharan Africa? The

longer.[147] A recent survey in South Africa showed that young males were more likely to get involved in this behaviour than their female colleagues.[148] The practice is sustained by a belief that permits men to have several partners and condemns a woman who does the same.[149]

The above practice, in conjunction with high viral load during acute or early HIV infection,[150] and the low level of male circumcision have contributed to the rapid spread and the high prevalence levels of HIV among women in southern Africa.[151] The practice is driven by socio-cultural values and norms regarding gender inequality which promotes multiple concurrent sexual partnerships among men by nurturing male 'machismo' or 'macho'

---

evidence is limited (2009) 14 *AIDS and Behavior* 17–24 [hereafter Lurie et al: 2009]; Morris, M., 'Barking up the wrong evidence tree. Comment on Lurie & Rosenthal, "Concurrent partnerships as a driver of the HIV epidemic in sub-Saharan Africa? The evidence is limited' (2010) 14 *AIDS and Behavior* 31–33; Nelson, SJ et al., 'Measuring sex partner concurrency: It's what's missing that counts' (2009) 34 *Sexually Transmitted Diseases* 801–807; Leclerc-Madlala, S.,'Cultural scripts for multiple and concurrent partnerships in Southern Africa: Why HIV prevention needs anthropology'(2009) 6 *Sexual Health* 103–110.

[147] Mah et al: 2008.

[148] HSRC, 'South African National HIV Prevalence, Incidence and Communication Survey, 2008.' HSRC, 2008 [hereafter HSRC: 2008] 65.

[149] See Leclerc-Madlala, S et al., 'The sociocultural aspects of HIV/AIDS in South Africa' in Rohleder, P et al., (eds) *HIV/AIDS in South Africa 25 years on: psychosocial perspectives* (2010) 13–26 [hereafter Leclerc-Madlala et al: 2010]; Lurie et al: 2009*;* Klausner, JD et al., 'Is male circumcision as good as the HIV vaccine we've been waiting for?' (2008) 2 *Future HIV Therapy* 1–7; Halperin, D., 'Letter: HIV prevention.*' Washington Times*, 12 June 2008; Haperin & Epstein: 2007; Edward, CG et al., 'Uganda's HIV prevention success: The role of sexual behavior change and the national response (2006) 10 *AIDS and Behavior* 347–350; Shelton, JD et al., 'Has global HIV incidence peaked? *(*2006) 367 *Lancet* 1120–1122. Halperin, DT et al., 'The time has come for common ground on preventing sexual transmission of HIV' (2004) 364 *Lancet* 1913–15 [hereafter Halperin et al: 2004].

[150] This period is approximately 6 months after infection – see Halperin et al: 2004, 1913–15.

[151] Mah et al: 2008.

attitudes and behaviours in particular and encourages subservience amongst women especially, with young and rural women being rendered particularly vulnerable. Most men perceive themselves as superior to women and can therefore have multiple partners with the number of sexual conquests being generally equated with the concept of masculinity.[152] There is no need to stress that such a practice affects women's capacity to decide with whom, when and how sexual intercourse takes place.

2.6 CONCLUSION

The analysis in this chapter clearly shows the uncontested link between women, HIV and AIDS. Moreover, the analysis in this chapter also highlights that women bear the burden of the HIV and AIDS epidemic. In this chapter, I set out the conceptual issues on the subject of women, HIV and AIDS. The chapter has substantiated the links between women, gender, HIV and AIDS. This is both at epidemiological and socio-cultural levels. It has also defended the use of gender as a tool of analysis that influences this work. The analysis in this chapter further demonstrated that gender constructs are largely discriminatory with the result that women's general wellbeing suffers. The chapter highlighted the glaring fact that the factors sustaining the spread and prevalence of the epidemic are buttressed in gender constructions that shape the trend of the disease. On the foundation of this chapter, the next chapter

[152] Caldwell, JC et al., 'The social context of AIDS in sub-Saharan Africa' (1989) 15 *Population and Development Review* 185–234; Campbell: 1997; Meekers, D., 'Going underground and going after women: trends in sexual risk behaviour among gold miners in South Africa' (2001) 11 *International Journal of STD & AIDS* 21–23; Gubrium, AC., 'Contextualising the constyruction of women and men in South African AIDS prevention' in Holstein, JA., & Miller, G., (eds.) *Perspectives on social problems* (2000) 291–306; Kalichman, C et al., 'Sexual assault, sexual risks, and gender attitudes among South African men' (2007) 19 *AIDS Care* 20–27.

examines and advances the feminist capabilities approach as one of the useful theoretical frameworks for the realisation of women's rights in the context of HIV and AIDS.

CHAPTER THREE

THEORETICAL AND PHILOSOPHICAL FRAMEWORK

The personal is political.[1]

> The struggle for human capabilities is not just a theoretical construct. For women all over the world, and for everyone who cares about women's wellbeing, it is a way of life.[2]

3.1 INTRODUCTION

This chapter presents the theoretical and philosophical framework of this work. Building on chapter two, this chapter adopts the feminist capabilities approach as the framework that best supports a critical understanding of the interaction between women, HIV and AIDS. Aware of the variations, diversity and significant disagreements within feminism, this chapter does not seek to delve into feminist contests. Rather, this thesis aligns with the core principles of feminist legal theory which concern themselves with the belief that women are not treated the same as men by the legal systems, policies, social structures and the actors within them. This unequal treatment then further prejudices women in the context of HIV and AIDS. Thus, the thesis utilises general feminist concerns relating to women's equality, dignity, violence against women, sex, sexuality and material conditions.

[1]The feminist slogan which became synonymous with the second wave – see for example, Oloka-Onyango, J., & Tamale, S., ''The personal is political', or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691 692.

[2] Martha Nussbaum, June 1994 in her introduction to Nussbaum, MC., & Glover, J., (eds), *Women, culture and development* (1995) [hereafter Nussbaum & Glover: 1995] 15.

Conscious of several approaches to women, HIV and AIDS, this chapter primarily advances the feminist capabilities approach as one of the frameworks that presents opportunities for implementation of law in such a manner that seeks to eradicate deep-rooted gender inequalities with the goal of realising women's capabilities. Additionally, aware of some of the areas not articulately addressed by the capabilities approach, this chapter employs the dominance theory as advanced by radical feminists.[3] The concepts – 'feminist capabilities approach' and the 'capabilities approach' will be used interchangeably in this thesis. Also, the concepts – 'capabilities' and 'capacities' will be used interchangeably. All these concepts are clarified in several parts of this chapter.[4]

Capabilities relate to the characteristic activities of the human being – it focuses on what people are effectively able to do and to be.[5] The core argument being that within the context of a sexed and gendered HIV and AIDS, approaches should strive to strengthen women's abilities to live amidst the epidemic. I will argue that law and policy should therefore, be informed by their ability to enhance women's capabilities in the context of HIV and AIDS.

In evaluating the feminist capabilities approach, this chapter defends the usefulness of feminist legal theory in the context of women, HIV and AIDS. The chapter also highlights the diversity of feminism and focuses on the liberal and radical influences.[6] These two feminist influences provide one of the best avenues to evaluate women's rights to health, housing,

[3] Notably Catherine MacKinnon. MacKinnon discussess the sameness/difference theory of sex equality, its dominance in shaping sex discrimination law and policy, and its flaws. For more on this approach, see MacKinnon, C., 'Difference and dominance: On sex discrimination' in Fullinwinder, RK., & Mills, C., (eds) *The moral foundation of civil rights* (1986) [hereafter MacKinnon: 1986]. See also section 3.2.2 of this chapter.

[4] Particularly in sections 3.4, 3.4.1, 3.4.2, 3.4.3.

[5] The term is further clarified in section 3.4.2 of this chapter.

[6] See sections 3.2.1 and section 3.2.2.

property and freedom from violence in the context of HIV and AIDS. This is especially so against the background of both formal and substantive equality.

Furthermore, this chapter draws attention to feminism within the African context – particularly in South Africa. This chapter then deliberates the feminist capabilities approach as conceptualised by Sen and developed in a women's context by Nussbaum. This thesis focuses critically on the latter's philosophy. In presenting the feminist capabilities approach, the chapter examines its importance within the context of women, HIV and AIDS. The chapter further presents the significance of equality – both as a right and value within the context of women, HIV and AIDS. In addition, the chapter evaluates the importance of socio-economic rights for women in the context of HIV and AIDS. Moreover, the chapter defends the place of dignity within the feminist capabilities philosophy. In addition, the dominance theory will be relied upon in examining women's freedom from gender-based violence. It must be clarified that all these concepts are mutually argued within the feminist capabilities approach paradigm.

It also should be borne in mind that this approach does not decisively digress from the human rights approach. Rather, it augments the human rights approach which is the broader lens of this thesis. The chapter concludes that the feminist capabilities approach provides the best possible (albeit not the only) avenue for the realisation of women's rights in the context of HIV and AIDS. By way of introduction, a general examination of feminist legal theory follows below.

3.2. FEMINIST LEGAL THEORY

A frequently elusive concept, the term feminism is used to describe a political, cultural or economic movement aimed at establishing equal rights and legal protection for women. Feminist insights, methods and theories are used to challenge mainstream analyses across political, cultural, psychological, anthropological and sociological theories, as well as philosophies concerned with issues of gender difference.[7] Thus Jaggar notes that feminism is aimed, in one way or another, at advancing the position of women and thus the term is commonly used to refer to all those who seek, no matter on what grounds, to end women's subordination.[8]

Feminist discourse developed in three main stages – first wave,[9] second wave[10] and third wave.[11] As a discourse, feminism involves various thoughts, theories and philosophies.

[7] See van Marle, K., & Bonthuys, E., 'Feminist theories and concepts' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) [hereafter van Marle & Bonthuys: 2007] 15. Also, see, generally, Cornell, D., *At the heart of freedom: Feminism, sex, and equality* (1998) [hereafter Cornell: 2007]; Humme, M., *Modern feminisms: Political, literary, cultural* (1992) [hereafter Humme: 1992]; Collins Dictionary and Thesaurus (2006); Humme, M., The dictionary of feminist theory (1990) 278; Agnes, M., Webster's New World College Dictionary (2007).

[8] See Jaggar, A., 'Feminism as political philosophy' in *Radical feminism and human nature* (1988) 1 5.

[9] First-wave feminism refers to an extended period of feminist activity during the nineteenth century and early twentieth century in the United Kingdom and the United States. Originally it focused on the promotion of equal contract and property rights for women and the opposition to chattel marriage and ownership of married women (and their children) by their husbands. However, by the end of the nineteenth century, activism focused primarily on gaining political power, particularly the right of women's suffrage. In essence, first phase feminists indicted the law on its terms and offered the intellectual justification for the feminist call for equality. The term first wave was coined retrospectively after the term second-wave feminism began to be used to describe a newer feminist movement that focused as much on fighting social and cultural inequalities as political inequalities. For more on first wave feminism, see, generally, Banks, O., *Becoming a feminist: The origins of "first wave feminism'* (1987).

However, all these maintain a common strand – that which is concerned with the issue of gender difference, advocates equality for women, and campaigns for women's rights and interests.[12] A key distinguishing feature of the three waves and feminist theories relates to the concepts of *essentialism* and *anti-essentialism*.[13] Essentialism relates to a feminist

---

[10] Second-wave feminism refers to the period of activity in the early 1960s and lasting through the late 1980s. The difference between first and second-wave is that the first wave focused on rights such as suffrage, whereas the second wave was largely concerned with other issues of equality, such as ending discrimination. Second phase feminism therefore began to develop theories of equality which could account for certain differences between men and women. They perceived the law as a cultural phenomenon, a 'paradigm of maleness', and a 'symbol and a vehicle of male authority'. The slogan 'The Personal is Political' which became synonymous with the second wave was coined by Carol Hanisch. Second-wave feminists saw women's cultural and political inequalities as inextricably linked and encouraged women to understand aspects of their personal lives as deeply politicised and as reflecting sexist power structures. The second phase of feminism was also influenced by MacKinnon who argued that women and men are indeed different but the difference is that men dominate and women are dominated. For more on second wave feminism, see, generally, Evans, J., *Feminist theory today: An introduction to second wave feminism* (1995).

[11] The third-wave has its origins in the mid-1980s although it only began in the early 1990s. It is considered a response to perceived failures of the second-wave and also as a response to the backlash against initiatives and movements created by the second-wave. Third-wave feminism seeks to challenge or avoid what it deems the second-wave's essentialist definitions of femininity, which (according to them) over-emphasise the experiences of upper middle-class white women. A post-structuralist interpretation of gender and sexuality is central to much of the third wave's ideology. Third-wave feminists often focus on "micro-politics" and challenge the second-wave's paradigm as to what is, or is not, good for females. They are sceptical of a single solution to the oppression of women, and assert that categorical, non-contingent rules, and abstraction and generalisation cannot solve the problem. Hence, for them, the idea of 'woman', like the idea of 'self', is socially constructed, produced by various, changing and contradictory social discourses, including the discourse of law.[11] They therefore employ the strategy of deconstruction to debunk and transcend false dichotomies other than sameness/difference; for example, male/female, public/private, as well as to debunk the patriarchal structure of social organisation. For more on third wave feminism, see, generally, George, R., *Postmodern social theory* (1997); Leslie, H., & Jennifer D., (eds) *Third wave agenda: Being feminist, doing feminism* (1997).

[12] Cornell: 2007; Humme: 2006.

[13] See Bohan, JS., 'Essentialism, constructionism, and feminist psychology' (1993) 17 *Psychology of Women Quarterly* 5–21 [hereafter Bohan: 1993].

approach that views all women as the same with men or all women as different from men. Both the liberal and radical theories of feminism are essentialist.[14] Essentialism is, therefore, associated with the first and second wave feminist movements. The liberal feminists insist on the essential similarities between all people and argue that neutral and objective legal norms are necessary to counter women's continued exclusion from male domains. The radical feminists focus on the ways in which women are different from men and the consequences of the differences. MacKinnon calls this the *dominance approach*.[15]

Anti-essentialism on the other hand is the approach of the post modern feminists and is associated with third wave feminism.[16] Anti-essentialists argue that sameness or difference is no longer only that which separates men from women but also that which separates women from women.[17] They seek for norms to be defined relatively to a local context and locally held beliefs. They argue that humans have no fixed inherent identities – identity is continuously constructed in different contexts of competing discourses. Anti-essentialists employ the

---

[14] Bohan: 1993. 5–21. Liberal and radical feminist theories are examined in sections 3.2.1 and 3.2.1 of this chapter.

[15] See MacKinnon, C., *Feminism, marxism, method and the state: Toward feminist jurisprudence* (1983) [hereafter MacKinnon: 1983]; MacKinnon: 1987; MacKinnon, C., 'Difference and dominance: On sex discrimination' in Bartlett, KT., & Kennedy, R., (eds) *Feminist legal theory* (1991) 87. My emphasis.

[16] See Williams, JC., 'Dissolving the sameness/difference debate: A post-modern path beyond essentialism in feminist and critical race theory' (1991) 2 *Duke Law Journal* 296–323 [hereafter Williams:1991].

[17] Williams: 1991, 296–323.

strategy of deconstruction[18] to debunk and transcend false dichotomies other than sameness/difference.[19]

Hence, within socialist feminist critiques, essentialism was typically contrasted to 'social constructionism', which relies on the distinction between biological sex and social gender.[20] On the social constructionist view, sexed biology is both different from, and causally inert with respect to, gender – an individual's socially acquired role and sense of identity. So, while being female may require certain anatomical features, being a woman is something different, dependent on identification with the feminine gender – the social traits, activities, and roles that make up femininity.

I am in agreement with Nussbaum's defence of essentialism – Nussbaum employs the *Aristotelian essentialism* approach.[21] This guides the latter to refer to it as a 'thick vague theory of good'.[22] Her proposal of an essentialist approach to the human good – consisting in defining a list of basic human functions and related functional capabilities which are

[18] Deconstruction is the analysis of conceptual oppositions and paradoxes as a method of ideological critique. For more on deconstruction, see Critchley, S., *The ethics of deconstruction* (1992) [hereafter Critchley: 1992]; Derrida, J., 'The deconstruction of actuality' (1994) *Radical Philosophy* 28 [hereafter Derrida: 1994].

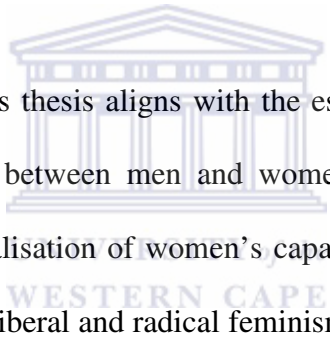
[19] See, generally, Critchley: 1992; Derrida: 1994.

[20] See Stone. A., 'Essentialism and anti-essentialism in feminist philosophy'. Available at http://eprints.lancs.ac.uk/34/2/Microsoft_Word_-_E9130088.pdf. (Accessed 10 April 2011).

[21] Nussbaum, MC., 'Human functioning and social justice: In defense of Aristotelian essentialism' (1992) 20 *Political theory* 202–246 [hereafter Nussbaum: 1992]. See also, Nussbaum, MC., & Glover, J., (eds), *Women, culture and development* (1995) 63.

[22] Nussbaum: 1992, 214.

necessary to be realised in order for human beings to effectively live a 'human' life.[23] This arguably provides an answer to widespread criticisms that have developed in intellectual environment towards essentialism in ethics and social justice theories.[24] In assessing her theory of justice, Nussbaum underlines the capacity of this essentialist approach to overcome these objections; and almost seems to suggest that the real strength of this approach is exactly that of taking into account – instead of rejecting – the legitimacy of these anti-essentialist critics, so that it stays on as the only 'version of essentialism that can survive them'.[25] Nevertheless, this thesis does not necessarily neglect the anti-essentialist argument that norms are defined relatively to a local context and locally held beliefs – this is especially so in light of how HIV and AIDS has come to define new identities between men and women.



On the strength of the above, this thesis aligns with the essentialist approach for the reason that similarities and differences between men and women, in legal and policy positions, contribute significantly to the realisation of women's capabilities in the context of HIV and AIDS. Furthermore, concerns of liberal and radical feminism relating to the place of gender in ensuring women's subordination are critical to the analysis in this thesis. This is in light of the discussion in chapter two which demonstrated the role of gender in the context of women, HIV and AIDS. Hence, the essential similarities and differences between men and women play a central role in dealing with issues relating to women, HIV and AIDS.

[23] Nussbaum: 1992, 206–212.

[24] See Sacchetti, F., 'Martha Nussbaum and the defense of "Aristotelian essentialism'. Available at http://www.imtlucca.it/_documents/courses/005794-ABF9J-.pdf. (Accessed 16 April 2011) 1-3.

[25] Nussbaum: 1992, 206–212.

Evidence abounds that feminism has altered predominant perspectives in an array of areas from culture to law.[26] Feminist activists have campaigned for women's legal rights including rights to property, rights of contract, voting rights, for women's bodily integrity and autonomy.[27] Feminist activists have also championed women's rights to sexual and for reproductive rights, protection from domestic violence, sexual harassment and rape and against other forms of discrimination.[28] Feminist movements of the twentieth century advocated revolutionary changes to the status of women in society[29] and sought to explore the basis of women's legal oppression.[30]

Themes explored in feminism include discrimination, stereotyping, objectification,[31] oppression, and patriarchy.[32] All these issues form the crux of women's rights in the context

[26] See, Bartlett, KT., 'Foundations of women's legal subordination' in Bartlett, KT., & Rhode, DL., (eds) *Gender and law: Theory, doctrine, commentary* (2009) [hereafter Bartlett: 2009]; Bender, L., 'A lawyer's primer on feminist theory and tort' (1998) 30 *Journal of Legal Education* 3 [hereafter Bender: 1998] 5–6.

[27] Bartlett: 2009.

[28] Bartlett: 2009.

[29] Bender: 1998, 5–6.

[30] For further reading on women's legal subordination, see Bartlett, KT., 'Foundations of women's legal subordination' in Bartlett, KT., & Rhode, DL., (eds) *Gender and law: Theory, doctrine, commentary* (2009).

[31] For more on objectification, see Nussbaum, MC., 'Objectification' (1995) 24 *Philosophy and Public Affairs* 249–291. At page 257, Nussbaum has argues that something is objectified if any of the following factors is present:

- Instrumentality – if the thing is treated as a tool for one's own purposes;
- Denial of autonomy – if the thing is treated as if lacking in agency or self-determination;
- Inertness – if the thing is treated as if lacking in agency;
- Ownership – if the thing is treated as if owned by another;
- Fungibility – if the thing is treated as if interchangeable;

of HIV and AIDS. Moreover, the ability of feminism to cut across disciplines is an asset given the intersections and overlaps of issues relating to women, HIV and AIDS. This in turn provides an unavoidable framework for the analysis of women's rights in the context of HIV and AIDS. Feminism, therefore, fights for equality and the non-discrimination of women, a fundamental focus of this thesis. As a value that addresses gender discrimination, principles of equality therefore finds mainstream support in feminist legal theory.

Feminist legal theory thus represents an analysis and critique of women's position in patriarchal society.[33] In essence, it examines the nature and extent of women's subordination. Feminist legal theory essentially has two elements. The first is an exploration and critique of theoretical issues about the interaction between law and gender.[34] The second is the application of a feminist perspective to areas of law such as reproduction, battering, pornography, prostitution, rape and employment.[35] It is based on the belief that the law has been instrumental in women's historical subordination. The goal of feminist legal theory is

- Violability – if the thing is treated as if permissible to damage or destroy;
- denial of subjectivity – if the thing is treated as if there is no need to show concern for the 'object's' feelings and experiences.

[32] See Gilligan, C., 'In a different voice: Women's conceptions of self and morality' (1977) 47 *Harvard Educational Review* 481–517; Nancy, C., *Feminism and psychoanalytic theory* (1989); Hannah, L., *Feminist ethics in psychotherapy* (1990).

[33] Patriarchy as a concept is defined in chapter one, section 1.7.1 of this thesis.

[34] Weisberg, D., (ed) *Feminist legal theory: Foundations* (1990) [hereafter Weisberg:1990]; Weisberg, D., (ed) *Applications of feminist legal theory to women's lives: Sex,violence,work, and reproduction* (1995) [hereafter Weisberg: 1995].

[35] See Weisberg: 1990; Weisberg: 1995. See also Van der Poll, L., 'The constitutionality of pornography' *Unpublished doctorate thesis, University of Stellenbosch* , 2001, 33–68.

therefore twofold: first, feminist jurisprudence seeks to explain ways in which the law plays a role in women's subordinate status, and second, feminist legal theory is dedicated to changing women's status through a reworking of the law and its approach to gender.[36] Within the context of women, HIV and AIDS, both angles are important for two reasons. First, the weak legal protection of women compound women's vulnerability,[37] and second, the lack of women responsive approaches make the existing laws and policies inept at dealing with women, HIV and AIDS.

Most feminist legal theory starts, at least implicitly, with the belief that women are not treated the same as men are by the law or by legal actors.[38] As such, women should be treated equally to men, because they really are not very different in terms of their hopes, dreams, desires and abilities. Although women are in some ways different from men, those differences are not weaknesses or deficiencies, and when the law accounts for these differences correctly, this promotes broadly accepted notions of justice and equality.[39] These two premises relate to the notions of formal and substantive equality as presented here below.

The classic liberal tradition of rights tends to rely on formal rights and formal legal reasoning.[40] According to the formal conception, rights are regarded as having an objective,

[36] Weisberg: 1990; Weisberg: 1995.

[37] For example legal protections relating to domestic violence and sexual offences.

[38] See generally, Cornell: 2007; Humme: 2006.

[39] See generally, Cornell: 2007; Humme: 2006.

[40] For a discussion of the formal conception of rights in the liberal traditions, see generally, Singer, J., 'Legal Realism now' (1998) 76 *CLR* 465–544 [hereafter Singer:1998) 519–522; Botha, H., 'Democracy and rights: Constitutional interpretation in postrealist world' (2000) 63 *THRHR* 563–567; Woods, J., 'Justiciable social rights as a critique of the liberal paradigm' (2003) 38 *Tex Int LJ* 763–794.

value-free and fixed meaning. It is the role of judges to discern this meaning and to apply it as neutrally and objectively[41] as possible to the facts of the specific cases before them. As such, the right to equality is understood in two ways: formal equality and substantive equality. Formal equality is the traditional and liberal conception of equality and is based on the notion of sameness and similar treatment. This is also called the Lockean notion.[42] This approach to equality is usually understood to demand the equal treatment of individuals regardless of their actual circumstances.[43] It presupposes that all persons are equal bearers of rights within a just social order. Hence, according to this view, inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same 'neutral' norm or standard.[44] It therefore, ignores the deeply entrenched social and economic inequalities and reliance on it presents the danger of perpetuating inequality. Substantive

---

[41] Singer: 1998, 497. The author describes formalism in legal reasoning as the belief that the legal system can be categorised into general principles 'composed of rigidly defined concepts'. These principles were thought capable of generating 'specific legal conclusions by a logic, objective, and scientific process of deduction'. Accordingly, '[h]ighly abstract concepts were thought to be operative or capable of generating specific consequences by their very nature'.

[42] The natural equality of all people, as written by Locke emphasises that all men are born in an equal state. No one is greater or lesser than another and therefore subject to no one, unless one willfully permits. This type of equality stresses that all people are free from being ruled or dominated by another person or group – See Locke, J., *Second treatise on government* (1960).

[43] This formulation was first used by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 171:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised as human beings deserving of concern, respect, and consideration.

[44] See, generally, De Vos, P., 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court (2000) 63 *THRHR* 62 [hereafter De Vos: 2006]; Albertyn, C., & Kentridge, J., 'Introducing the right to equality in the Interim Constitution' (1994) 10 *SAJHR* 149–178; Albertyn, C., 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253.

equality therefore pays attention to the deep seating socio-economic inequalities that surround peoples' circumstances. It gives regard to *context* and *positionality*.[45] Taylor succinctly remarks:[46]

> With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognise is the unique identity of this individual or group, their distinctness from everyone else. The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity.

In a similar vein, Downing and Husband argue that 'if you want to treat me equally you may have to be prepared to treat me differently'.[47] Thus, the principle of substantive equality is particularly relevant to women's health in the context of HIV and AIDS because it looks beyond formal guarantees of women's rights. It investigates the socio-economic factors that predispose and prejudice women in the face of HIV and AIDS. It also resonates with the capabilities approach which is explored later in this chapter.[48]

---

[45] See also Albertyn, C., & Goldblatt, B., 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998)14 *SAJHR* 248 [hereafter Albertyn & Goldblatt: 1998] 255; L'Heureux-Dube., 'Making a difference: The pursuit of equality and a compassionate justice' (1997) *SAJHR* 335 338–341; De Vos: 2006*;* Fagan, A., 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220; Westen, P., 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537. My emphasis.

[46] Taylor, C., *Multiculturalism and the politics of recognition* (1992) 38.

[47] Downing, JD., & Husband, C., *Representing race: Racisms, ethnicities and media* (2005) 124.

[48] See the analysis in section 3.4.

Over the past two centuries, there has developed several types and subtypes of feminist thought. This has presented with diversity and oftentimes, complexity. This diversity and complexity derives from the women's liberation movement and consciousness-raising groups of the 1960s.[49] Without attempting to exhaust all these theories, this thesis will analyse two salient influences of liberal feminism and radical feminism. These two schools support my essentialist approach to women, HIV and AIDS. Moreover the liberal approach is the backbone of the feminist capabilities approach,[50] while the radical approach is based on the dominance theory.[51] The reliance on these two influences is against the background of the call for the capabilities approach and the imperative to eradicate male dominance as part of the processes to address women's vulnerability in the context of HIV and AIDS.

3.2.1 Liberal feminist thought

Liberalism raised the demands for democracy and political liberties.[52] These demands were based on the assumption that there is a 'universal, stable and pre-political identity which is

[49] The diverse schools of feminist thought include: liberal feminism, radical feminism (and its subtypes of cultural feminism, separatist feminism and anti-pornography feminism), black feminism, multiracial feminism (also known as "women of colour feminism"), socialist and marxist feminisms, libertarian feminism, post-structural and postmodern feminism and ecofeminism – See Smith, P.,(ed) *Feminist Jurisprudence* (1993) [hereafter Smith:1993] 5–6; Judith, SJ., & Thorne, B., 'The missing feminist revolution in sociology' in Myers, KA et al., *Feminist foundations: Toward transforming sociology* (1998) 219 228–229; Reed, E ., 'Women: Caste, class, or oppressed sex' in Jaggar, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) 170–173 [hereafter Jaggar et al: 1993].

[50] See, generally, Nussbaum, MC., *Women and human development: The capabilities approach* (2000).

[51] MacKinnon, C., *Feminism, marxism, method and the state: Toward feminist jurisprudence* (1983).

[52] Robin, F., 'In search of democracy: Reconciling majority rule, minority rights and group rights in South Africa and the United States' (1996) 16 *Boston College Third World Law Journal* 65 [hereafter Robin:1996] 86.

owed fundamental rights due to one's human status rather than social, political, or historical conditions'.[53] The core elements of liberalism – namely abstract individualism, neutrality, rationality, pre-political private rights and the distinction between the private and public spheres – have all been incorporated into liberal feminist theory.[54] Liberal feminists seek equal rights with men and believe individuals should be treated in accordance with their talents and effort as opposed to the characteristics of their sex.[55] They campaign to remove any obstacle, be it political, social, legal or economic that stands in the way of women having the same opportunities as their male counterparts. This is believed to be feasible, because inherently women and men have the same qualities and capacities.[56]

[53] Robin: 1996, 86.

[54] Robin: 1996, 86; Jaggar, A., & Rothernberg, P., 'Theories of women's subordination' in Jaggar et al: 1993, 113 117.

[55] For further reading on liberal feminism see: Appelbaum., E et al., *Shared work, valued care: New norms for organizing market work and unpaid care work.* (2002); Bartlett, KT & Rosanne, K., (eds) *Feminist legal theory: Readings in law and gender* (1991) Bem, SL., *An Unconventional Family* (1998); Blair-Loy, M., *Competing devotions: Career and family among women executives* (2003); Budig, MJ., 'Male advantage and the gender composition of jobs: Who rides the glass escalator?' (2002) 49 *Social Problems* 258–277; Cockburn, C., *In the way of women: Men's resistance to sex equality in Organizations* (1991); Collinson, DL et al., *Managing to discriminate* (1990); Coltrane, S., *Family man: Fatherhood, housework, and gender equity* (1996); Crittenden, A., *The price of motherhood: Why the most important job in the world is still the least valued* (2001); Daniels, AK., *Invisible careers:Women civic leaders from the volunteer world* (1988); Deutsch, FM., *Halving it all: How equally shared parenting works* (1999); Dienhart, A., *Reshaping fatherhood: The social construction of shared parenting*(1998); Ehrensaft, D., *parenting together: Men and women sharing the care of their children* (1987); Eisenstein, Z., *The radical future of liberal feminism* (1981) New York: Longman; Epstein, CF., *Women's place: Options and limits in professional careers* (1971); Epstein, CF., *Women in law* (1981); Epstein, CF., & Arne, LK., (eds) *Rethinking time and work* (2004); Williams, CL., 'The glass escalator: Hidden advantages for men in the 'female' professions' (*1992)* 39 *Social Problems* 253–267; Williams, J., *Unbending gender: Why family and work conflict and what to do about it* (2000).

[56] Smith, P., 'Feminist jurisprudence and the nature of law' in Smith, P., (ed) *Feminist jurisprudence* (1993) 3 4 [hereafter Smith: 1993]; Ulrich, M., 'A short typology of feminist legal theory' 1993 *Auckland University LR*

Liberal feminism claims that gender differences are not based in biology and, therefore, that women and men are not all that different.[57] Their common humanity supersedes their procreative differences. If women and men are not so different, then they should not be treated differently under the law. Women should have the same legal rights as men and the same educational and work opportunities.[58] Liberal feminism accepts and works with the gender system, with the goal of purging it of its discriminatory effects on women.[59] Hence, the main contribution of liberal feminism has been to show how much modern society discriminates against women by insisting that women and men must be treated differently.

Liberal feminists have been criticised for focusing their attention upon 'equality of opportunity' between males and females.[60] Hence, their arguments have been associated with formal equality.[61] They have largely ignored the study of social structural factors that other feminists see as a basic cause of inequality in capitalist societies (for example, patriarchy and

483 484 [hereafter Ulrich: 1993]; Beasley, C., *What is feminism*? *An introduction to feminist theory* (1999) 51-53 [hereafter Beasley: 1999].

[57] Smith: 1993; Ulrich: 1993; Beasley: 1999.

[58] Smith: 1993; Ulrich: 1993; Beasley: 1999.

[59] Today this goal is termed *undoing gender.* A parallel current goal is *mainstreaming gender*-ensuring that government or organisational policies address women's needs.

[60] For more criticism of liberal feminism, see, MacKinnon: 1991; Kaganas, F., & Murray, C., 'Law and women's rights in South Africa: An Overview' (1994) *Acta Juridica* 12 [hereafter: Kaganas et al: 1994]; Almeder, R., 'Liberal feminism and academic feminism' (1994) *Public Affairs Quarterly* 299 [hereafter: Almeder: 1994]; Smith: 1993, 4. Ulrich: 1993].

[61] Albertyn, C., 'Feminism and the law' in Roeder, C., & Moellendorf, D., (eds) *Jurisprudence* (2004) 301–304.

the inequalities created by capitalist forms of economic production).[62] Liberal feminists have also been criticised (and variously derided as 'bourgeois/middle-class' feminists)[63] for their failure to understand that in any society that is fundamentally unequal in its economic and social structure 'equality of opportunity' is a fairly meaningless concept.[64] In a society divided along class lines and driven by economic exploitation, women – like working class men – are at a fundamental economic disadvantage.[65] Nevertheless, the liberal feminist insistence on women's freedom and equality are central to the analysis in this thesis and will be used. Moreover, the feminist capabilities approach is grounded in liberal philosophy.

3.2.2 Radical feminist thought

Radical feminists are classified as those who perceive women's subordination through the lenses of sex/gender and sexuality.[66] Radical feminists propose that gender oppression precedes all other forms of oppression and is present in all societies, regardless of class, culture and other differences.[67] Hence, radical feminists believe that the main rival of women is patriarchy, which guarantees male supremacy and the subordination of women at work and

[62] MacKinnon: 1991; Kaganas et al: 1994; Almeder: 1994; Smith: 1993, 4; Ulrich:1993.

[63] See MacKinnon: 1991.

[64] See MacKinnon: 1991; Kaganas et al: 1994; Almeder: 1994; Smith: 1993, 4; Ulrich: 1993.

[65] MacKinnon: 1991; Kaganas et al: 1994; Almeder: 1994; Smith: 1993, 4; Ulrich: 1993.

[66] Jaggar & Rothenberg: 1993, 114–115.

[67] Jaggar & Rothenberg: 1993, 120.

in the home.[68] In their view, men inflict physical and sexual violence on women and commandeer the majority of material rewards. They believe men are able to justify their actions by persuading people that it is natural that men should be the dominant sex. For radical feminists sexual inequality is institutionalised.[69]

Radical feminists criticise the focus on the public exploitation of women that is found in liberal and marxist feminisms. The famous slogan 'the personal is political' encapsulates the radical insistence that the roots of women's oppression is to be found in the 'private' domination and control which patriarchal culture exercises over women's bodies.[70] Radical feminists have been particularly interested in issues of reproduction, rape, pornography, sexual harassment and compulsory heterosexuality.[71] They have achieved drawing public and

[68] MacKinnon: 1991; Kaganas et al: 1994; Almeder: 1994; Smith: 1993, 4; Ulrich: 1993.

[69] Radical feminism states that the defining feature of women's oppression is the societies sexist and capitalist hierarchy. The movement believes that only the eradication of our patriarchy society will give women true equality. The radical identifies that the only way to rid society of patriarchy is to attack the causes of the problems and also to address the fundamental components of society that support them. The radical feminists ideology is, "A male-based authority and power structure and that it is responsible for oppression and equality, and that as long as the system and its values are in place, and society will not be able to be reformed in any significant way. The feminist identified other oppression that is apparent in a patriarchal society. The oppression is also based on gender identity, race, and social class, perceived attractiveness, sexual orientation and ability. The radicals theory of patriarchy recognises the key element is a relationship of dominance and exploits others for their own benefit. The use of this oppression is a social system that includes other methods that are incorporated to suppress women and non-dominate men.

[70] Beasley, C., *What is feminism? An introduction to feminist theory* (1999) [hereafter Beasley: 1999] 8; Smith: 1993, 5.

[71] Jaggar & Rothenberg: 1993, 120.

legal attention on issues of domestic violence against women and in having sexual harassment recognised as a gendered legal harm.[72]

The male dominance theory is, therefore, is at the core of the radical philosophy. MacKinnon rightly asserts:[73]

> Male dominance is perhaps the most pervasive and tenacious system of power in history…it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularly the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

It is demonstrated in this thesis that male dominance in sexual relations plays a major role in the context of women, HIV and AIDS.[74] The dominance theory, therefore, supports the view that the gender differences between men and women is critical in the analysis of women, HIV and AIDS. This theory is employed in this thesis alongside the liberal feminist capabilities approach. Hence, the radical dominance theory provides the framework of analysis for gender-based violence within the context of HIV and AIDS.

Radical feminists have been rightly criticised on the basis that there is no real evidence that women constitute a 'sex class',[75] since it is clear that, apart from a common biology, women

[72] Van Marle & Bonthuys: 2007, 34-35.

[73] See MacKinnon, C., *Feminism, Marxism, method and the state: Toward feminist jurisprudence* (1983) [hereafter MacKinnon: 1983] 635. For more on difference and dominance, see also MacKinnon: 1986; MacKinnon: 1987, 32–44.

[74] See chapter two, section 2.5.1.

[75] The concept is based on the biological reality that men and women were created different, and not equal. For more on sex class, see Firestone, S., *The dialectic of sex* (1979) chapter one.

may have no real shared interests 'as a class apart from men'.[76] Black and third world feminists have criticised radical feminists as 'essentialist' and that they construct unrepresentative 'grand theory'.[77] Also, the primary importance attached to patriarchy downgrades the importance of concepts like social class and ethnicity.[78] For marxist feminists, patriarchy itself stems from the way in which women are generally exploited economically. Furthermore, I agree that to view women as a 'sex class' whose basic interest involves emancipation from men would leave unresolved the problem of economic exploitation. It also argued that radical feminism tends to overlook the fact that the general position of women in society has changed over time and this can only be explained in terms of wider economic and political changes in society.[79] Smart also argues that radical feminism's insistence on the ubiquity of patriarchal power leaves women with little agency to challenge patriarchal social structures.[80] This attack against radical feminism however, is inaccurate

---

[76] For example, it is argued that there are common interests shared by upper class and working class women - aside from the fact that they are women. The experiences and life chances of upper class females are significantly different to those of working class females (where the position of the former may be closer to that of men than to their working class counterparts).

[77] Crenshaw, K., 'Demarginalising the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics' (1989) *University of Chicago Legal Forum* 139–167 [hereafter Crenshaw: 1989]. See also, West, R., 'Jurisprudence and gender' in Smith: 1993, 493 [hereafter West: 1993].

[78] Crenshaw: 1989; West: 1993.

[79] Socialist feminists do not see women as a 'sex class', nor do they see all men as 'the class enemy'. Not all male / female relationships are characterised by oppression and exploitation, for example. Technological 'solutions' to female exploitation are also viewed with suspicion (since control over development and exploitation of technology has traditional been a male preserve), as is the idea that a matriarchal society is somehow superior and preferable to a patriarchal society.

[80] Smart: 1989, 76–82.

within the context of women, HIV and AIDS. I hereby argue that the challenge of patriarchal power, as applied with the capabilities approach, gives women the agency to confront patriarchal social structures.

Radical feminism has also been attacked for over-emphasising factors that separate women from men (their biology in particular).[81] It is argued that the radical insistence on the significance of biological differences makes unsubstantiated and uncritical assumptions about male and female psychology.[82] I am however, at variance with this attack. This is based on the clear link between women's biological and physiological make up that makes them more susceptible to the HIV.[83] Hence, I associate with the radical feminist stance on the biological and gender differences between men and women as important facets. Moreover, this approach is unavoidable in the analysis in this thesis.

3.3. FEMINISM WITHIN THE AFRICAN CONTEXT – SOUTH AFRICA

In Africa, research on women and gender took shape in the context of many countries' public sector reforms in the 1990s.[84] This research was led by women's movements and feminist intellectual activism, which put pressure on post-colonial governments to institute more

---

[81] West: 1993.

[82] For further criticism of radical feminism, see, generally, West: 1993; Smart, C., *Feminism and the power of the* law (1989) [hereafter Smart: 1989].

[83] Refer to chapter two, section 2.5.

[84] Lewis, D., 'Feminism and the radical imagination' (2007) 72 *Agenda* 19.

substantive changes in society.[85] Northern donors put pressure on African governments to address gender transformation in relation to 'good governance' and neo-liberal development.[86] Lewis asserts that this officially legitimised gender studies as an academic discipline, as a research field with policy-making implications and as part of a project for modern nation building.[87] In South Africa, in 1996, with the emphasis on the Growth, Employment and Redistribution (GEAR) Strategy,[88] the government re-defined the country's economic and political status as a stable, neo-liberal post-colony.

Within the context of HIV and AIDS, the feminist movement has provided leverage for legal and policy reform. In most of sub-Saharan Africa, for example, 'violence' 'HIV and AIDS' and 'masculinities' have been defined as main crisis areas for driving policy as well as activism.[89] On this approach, Lewis argues that a uni-linear concentration on these 'fields' results in disarticulated speciality research that ignores the broader circumstances and relationships that impinge on violence, gendered behaviour, identities and HIV/AIDS.[90] I agree with Lewis based on the argument that as far as the relationship between gender, HIV and AIDS are concerned, Africa is faced with a complex web of factors which deserve a

[85] Lewis: 2007.

[86] Lewis: 2007.

[87] Lewis: 2007, 20–21.

[88] The GEAR was introduced in 1996 after the 1994 Reconstruction and Development Program (RDP). The GEAR emphasised privatisation, deregulation, rationalisation of the public sector and strict economic stringency in social spending.

[89] Lewis: 2007, 20–21.

[90] Lewis: 2007, 20–21.

different approach to policy. The approach I accordingly suggest is one with a focus on women's socio-economic realities – that pays attention to women's capacities and how these capacities can be realised through the implementation of law and policy.

In South Africa, it is important to consider the role that feminism has played in women's lives. In assessing this, one has to look at the history of women's struggles in the country, the history and present condition of the law, and the position of women in the country today.[91] Women in South Africa live in different racial, class, geographic, religious and cultural contexts.[92] For example, in the 1950s, Black women were required to carry passes to enter designated white urban areas.[93] This led to the formation of the Federation of South African Women which campaigned against the role of the law in oppressing women.[94] The leaders of the anti-pass law campaign were arrested and charged with treason.[95] However, in the closing decades of the twentieth century, women united on a non-racial basis to address issues like rape, prostitution and sexual harassment. Today, South Africa has a Bill of Rights that protects women. The country also has laws on domestic violence and sexual offences, amongst others.[96] Hence, feminist thoughts have played a role to eliminate the subordination

[91] For more on this, see, generally, Walker, C., *Women and resistance in South Africa* (1991) [hereafter Walker: 1991]; Lodge, T., *Black politics in South Africa since 1945* (1983) [hereafter Lodge: 1983]; Albertyn, C., & Bonthuys, E., 'Introduction' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) [hereafter Albertyn & Bonthuys: 2007] 6–14.

[92] Albertyn & Bonthuys: 2007, 6.

[93] Lodge: 1983, 142; Walker: 1991.

[94] Lodge: 1983, 142; Walker: 1991

[95] Lodge: 1983; 142, Walker: 1991.

[96] South Africa's laws are examined in chapter seven of this thesis.

of women in South Africa. Feminist thought should therefore, be utilised to address the HIV and AIDS pandemic among women in South Africa.

Within the context of this thesis, both liberal and radical feminist thoughts provide avenues to address issues pertaining to women, HIV and AIDS in South Africa (and sub-Saharan Africa). This is especially the case as both influences address women's equality based on gender. These two feminist influences also provide the background to address women's substantive inequality, dignity, violence, sex, sexuality and women's access to socio-economic rights. Against this background, I propose an approach that gives women agency in the context of HIV and AIDS – the feminist capabilities approach as developed by Nussbaum.[97] An evaluation of the feminist capabilities approach accordingly follows next.

3.4. THE FEMINIST CAPABILITIES APPROACH

The analysis in chapter two revealed gender inequality (and discrimination) as the underlying factor of women's vulnerability within the context of HIV and AIDS. It is therefore, imperative to remove the structural barriers hindering women from enjoying a state of well being in the context of HIV and AIDS. This imperative necessitates the consideration of the capabilities approach as a constructive framework to address women's vulnerability to HIV and AIDS. The capabilities approach as developed by Sen has evolved as the leading alternative to standard economic frameworks for thinking about poverty, inequality and

---

[97] For more on the feminist capabilities approach, see generally, Nussbaum, MC., *Women and human development: the capabilities approach* (2000) [hereafter Nussbaum: 2000].

human development.[98] The capabilities approach was later developed in relation to women's development and philosophy by Nussbaum.[99] It is beyond the scope of this work to delve into the realm of philosophy, poverty and human development within which the capabilities approach is mostly used. Hence, I limit the analysis to gender inequality in the context of women, HIV and AIDS. The gender differences between men and women are reflected in patterns of health and illnesses, including HIV and AIDS.[100] This leads to acute failure in women's central human capabilities. Hence the feminist capabilities approach concurs that gender affects women's human capabilities.

Nussbaum derives the capabilities approach philosophically from Aristotle and feminism. Writing about feminism and women's development, Nussbaum,[101] elaborates that women in

[98] Sen, A., 'Equality of what' in McMurrin, SM., (ed) *The Tanner lectures on human value* (1980) [hereafter Sen: 1980] 195–220; Sen, A., *Resources, values and development* (1984) [hereafter Sen:1984]; Sen, A., *Commodities and capabilities* (1985) [hereafter Sen: 1985]; Sen, A., *The standard of living: The Tanner lectures* (1987); Sen, A., *Inequality re-examined* (1992); Sen, A., *Development as freedom* (1999) [hereafter Sen:1999].

[99] Nussbaum, MC., 'Nature, function and capability: Aristotle on political distribution' (1988) 145 *Oxford Studies in Ancient Philosophy* 84; Nussbaum, MC.,'Aristotelian social democracy' in Douglas, B et al., (eds), *Liberalism and the good* (1990) 203.52; Nussbaum, MC., 'Human capabilities, female human beings' in Nussbaum, MC., & Glover, J., (eds), *Women, culture and development* (1995) [hereafter Nussbaum 1995] 61 104; Nussbaum, MC., *Women and human development: The capabilities approach* (2000) [hereafter Nussbaum: 2000]; Nussbaum, MC., 'Capabilities as fundamental entitlement: Sen and social justice' (2003) 9 *Feminist Economics* 33–59 [hereafter Nussbaum: 2003]; Nussbaum, MC., 'Well-being, contracts and capabilities' in Manderson, L., (ed) *Rethinking well-being* (2005) 27–44; Nussbaum, MC., 'Women's bodies: Violence, security, capabilities' (2005) 6 *Journal of Human Development* 167–83; Nussbaum, MC., & Sen, A., 'Internal criticism and Indian rationalist traditions' in Krausz, M., (ed) *Relativism, interpretation and confrontation* (1989) 299 325; Nussbaum, MC., & Sen, A., (eds) *The quality of life* (1993).

[100] Doyal, A., 'Draft Framework for designing national health policies with an integrated gender perspective' (1999) New York: UNDAW; Hartigan. P., 'Communicable Disease', Global Health Equity Initiative Working Paper on Gender and Health equity No 9, 1999 Harvard Centre for Population and Development Studies.

[101] Nussbaum: 2000, 1.

much of the world lack support for fundamental functions of human life.[102] The author elucidates that women are less well nourished than men, less healthy, more vulnerable to physical violence and sexual abuse.[103] The author adds that women are much less likely to be literate or to have professional or technical education. The author underscores women's circumstances in this context:[104]

> All these factors take a toll on women's well-being:women have fewer opportunities than men to live free from fear and to enjoy rewarding types of love – especially when, as often happens, they are married without choice in childhood and have no recourse from bad marriages. In all these ways, unequal social and political circumstances give women unequal human capabilities.

What then is the role of the capabilities approach? Sen developed the concept of substantial freedoms or capabilities as a way of addressing questions of social justice and human development.[105] The capability approach is a broad normative framework for the evaluation of individual well-being and social arrangements, the design of policies and proposals about social change in society.[106] The capability approach is used in a wide range of fields, most prominently in development thinking, welfare economics, social policy and political philosophy. It can be used to evaluate a wide variety of aspects of people's well-being, such

---

[102] Nussbaum: 2000, 1.

[103] Nussbaum: 2000, 1.

[104] Nussbaum: 2000, 1.

[105] See generally, Sen: 1999.

[106] Nussbaum: 2000, 3.

as individual well-being, inequality and poverty.[107] It can also be used as an alternative evaluative tool for social cost-benefit analysis, or to design and evaluate policies, ranging from welfare state design in affluent societies, to development policies by governments and non-governmental organisations in developing countries.[108] In academia, it is discussed in quite abstract and philosophical terms, but also used for applied and empirical studies. In development policy circles, it has provided the foundations of the human development paradigm.[109] The literature inspired by the capabilities approach addresses specific communities where women were empowered by giving them choices about the quality of their lives in such areas as education, gender relations, activities outside the home, microcredit, and training.[110]

The capabilities approach asks not just about the total or average achievements of a nation, but about the opportunity set available to each person. It is focused on choice or freedom holding the crucial thing societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may not exercise in action: the choice is theirs.[111] The capabilities approach holds that the capability achievements that are

[107] Nussbaum: 2000, 3.

[108] Nussbaum: 2000, 3.

[109] Sakiko, FP., The human development paradigm: Operationalising Sen's ideas on capabilities (2003) 9 *Feminist Economics* 301–317; Sakiko, FP., & Shiva Kumar, AK., *Readings in human development* (2003).

[110] Nussbaum: 2000.

[111] Dixon, R., & Nussbaum, MC., 'Abortion, dignity and a capabilities approach' Public law and legal theory working paper No. 345, March 2011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799190 ((Accessed 19 April 2011) [hereafter Dixon & Nussbaum: 2011] 3–4.

central for people are different in quality, not just in quantity, that they cannot without distortion be reduced to a single numerical scale, and that a crucial part of understanding and producing them is an understanding of the specific nature of each. It therefore, assigns an urgent task to government and public policy: namely, the improvement of quality of life for all people, as defined by their capabilities.[112]

On the strength of the above, the nucleus of my argument in this thesis is: the state should undertake to realise the rights of women affected by HIV and AIDS in the areas of health, housing, property and freedom from violence. This obligation, I argue, is grounded on the argument that women affected by HIV and AIDS form a specific group whose nature must be understood contextually. In agreement with Dixon and Nussbaum, the idea is that a minimally just society is one that secures to all citizens a threshold of a list of key entailments, on the grounds that such entitlements are requisite of a life worth of human dignity.[113] I thus assert that this approach expands women's choices and opportunities in such a manner as to empower them to live dignified and productive lives. The approach considers women independently and does not lump individuals into families and ignore the relations and unequal distributions of power within families.[114] In this way, the approach provides a useful framework because women's vulnerability in the context of HIV and AIDS is a matter of 'who wields power' in, *inter alia,* sexual relationships and decision-making.

[112] Dixon & Nussbaum: 2011, 4.

[113] Dixon & Nussbaum: 2011, 4.

[114] See Garrett, J., 'Martha Nussbaum on capabilities and human Rights' 2008. Available at http://people.wku.edu/jan.garrett/ethics/nussbaum.htm. (Accessed 12 February 2010).

As a paradigm, the capabilities approach operates at three levels:

a) As a framework of thought for the evaluation of individual and social arrangements;
b) As a critique of other approaches to the evaluation of well-being and justice; and
c) As a formula or algorithm to make interpersonal comparisons of welfare or well-being.

I rely on the first level which is concerned with the evaluation of social arrangements, for example, gender which is a social construction with implications for women's ability to achieve their capabilities. The approach also identifies social constraints that influence and restrict both well-being as well as evaluative exercises and can therefore be used to measure inequality. Thus, Nussbaum's work on capabilities has focused on the unequal freedoms and opportunities of women, and she has developed a distinctive type of feminism, drawing inspiration from the liberal tradition, but emphasising that liberalism, at its best, entails *radical rethinking* of gender relations and relations within the family.[115]

3.4.1 Nussbaum on the feminist capabilities approach

Nussbaum appositely argues that international political and economic thought must be feminist, attentive (among other things) to the special problems women face because of sex.[116] The author further argues that this approach is superior to the preference-based approaches. Nussbaum's argument therefore, provides the philosophical understanding for an account of basic constitutional principles that should be respected and implemented by the governments

[115] Nussbaum: 2000, 4. My emphasis.

[116] Nussbaum: 2000, 4.

of all nations, as a bare minimum of what respect for human dignity requires.[117] Nussbaum then argues that the best approach to this idea of basic social minimum is provided by an approach that focuses on human capabilities.[118] Nussbaum persuasively argues that the capabilities in question should be pursued for each and every person, treating each as an end and none as a mere tool of the ends of others.[119] The author adds that women have all too often been treated as the supporters of the ends of others, rather than as ends in their own rights. The author emphasises that the principle has particular critical force for women.[120]

Nussbaum affirms a 'liberal' view that is in line with the feminist affirmation of the value of women as persons.[121] The author argues that at the heart of the liberal political thought is a twofold intuition about human beings: namely that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consist in the ability to plan a life in accordance with one's evaluation of needs.[122] The author fittingly asserts:[123]

> To these two ideas is linked the thought that 'the more equality of persons gives them a fair claim to certain types of treatment the hands of society and politics…This treatment must do

---

[117] Nussbaum: 2000, 4.

[118] Nussbaum: 2000, 4.

[119] Nussbaum: 2000, 5–6.

[120] Nussbaum: 2000, 5–6.

[121] Nussbaum, MC., *Sex and social justice* (1999) [hereafter Nussbaum: 1999] 57.

[122] Nussbaum: 1999, 57.

[123] Nussbaum: 1999, 57.

> two…things: respect and promote the liberty of choice, and…respect and promote the equal worth of persons as choosers.

On the above basis, I hereby argue that the feminist capabilities framework provides one of the most important analytical approaches for addressing women, HIV and AIDS. The approach is central to achieving gender equality and to ensure women's health and well-being. This approach allows the analysis of 'what is a woman able to do and to be' on multiple levels. A poor woman's health and well-being depends not only on their economic income and access to medical services but on many other elements as shown above. Thus, the capabilities approach in this work is viewed in light of substantive equality as it seeks to eliminate deep-seated barriers as orchestrated and sustained by historical, cultural and socio-economic factors. Hence, the centrality of the capabilities approach is that it looks at what is needed to enable poor women (especially those affected by HIV and AIDS),[124] to function fully within society and family.

The capabilities approach also provides a benchmark to reflect upon the complex links among different areas in a woman's life that can secure health and well being for women in the midst of HIV and AIDS. It advocates for changing women's conditions of vulnerability and creating an enabling environment. In effect, the approach calls for the improvement of women's conditions that includes meeting their *material needs*.[125] Hence, an approach is necessary which will have the effect of changing women's conditions of vulnerability. This entails enabling women to exercise their agency and choice through law and policy.

[124] My addition.

[125] My emphasis.

Nussbaum is aware of the feminist philosophy scepticism towards universal normative approaches.[126] To this influence, Nussbaum argues that it is possible to describe a framework for such feminist practice of philosophy that is strongly universalist, committed to cross-cultural norms of equality and rights.[127] Furthermore, in defence of universal values, Nussbaum replies in five parts: [128]

> First, *multiple reliability*: each of the capabilities may be concretely realised in a variety of different ways, in accordance with individual tastes, local circumstances, and traditions. Second, *capability as a goal*: the basic political principles focus on promoting capabilities, not actual functioning, in order to leave citizens the choice whether to pursue the relevant function or not to pursue it. Third, *liberties and practical reason*: the content of the capabilities list gives a central role to citizens' powers of choice and to traditional political and civil liberties. Fourth, *political liberalism*: the approach is intended as the moral core of a specifically political conception, and the object of a political overlapping consensus among people who have otherwise very different comprehensive ways of good. Fifth, *constraints on implementation*: the approach is designed to offer the philosophical grounding for constitutional principles, but the implementation of such principles must be left, for the most part, to the internal politics of the nation in question, although international agencies and other governments are justified in using persuasion.

[126] Nussbaum: 2000, 7.

[127] Nussbaum:2000, 7.

[128] Nussbaum:2000, 105. Emphasis in the original.

I concur with the above justification for the adoption of universal normative approaches. This is because universal normative approaches lend support to the position that states bear responsibility to realise women's socio-economic rights using the available resources and progressively. Furthermore, this position supports the call for the state to take measures to enable women realise their autonomy. These are key arguments promoting the realisation of women's rights in the context of HIV and AIDS in South Africa (and sub-Saharan Africa).

3.4.2 Functionings and capabilities

The core characteristic of the capability approach is its focus on what people are effectively able to do and to be, that is, on their capabilities.[129] Sen argued that in policy design, the focus should be on what people are able to do and be, on the quality of their life, and on removing obstacles in their lives so that they have more freedom to live the kind of life which, upon reflection, they find valuable. I am persuaded by this argument: [130]

> The capability approach to a person is concerned with evaluating it in terms of his or her actual ability to achieve various valuable functionings as a part of living. The corresponding approach to social advantage—for aggressive appraisal as well as for the choice of institutions and policy-takes the set of individual capabilities as constituting an indispensable and central part of the relevant informational base of such evaluation.

[129] Sen: 1993, 30.

[130] Sen: 1993, 30.

The major constituents of the capabilities approach are thus, functionings and capabilities. Functionings are the 'beings and doings' of a person, whereas a person's capability is the various combinations of functionings that a person can achieve:[131]

> A functioning is an *achievement,* whereas a capability is the *ability to achieve*. Functionings are, in a sense, more directly related to living conditions, since they *are* different aspects of living conditions. Capabilities, in contrast, are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead.

Hence, in the context of women, HIV and AIDS, the capabilities approach means women's ability 'not to get infected' or 'to be able to live normally' amidst the epidemic. This can be achieved through women's access to both material and non-material needs like the appropriate health services, adequate housing, property and protection from violence. These needs also relate to Nussbaum's list of elements for poor women. These are: life; bodily health; bodily integrity; senses; imagination; thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.[132] These elements are developed later in this chapter.[133]

A necessary component of Nussbaum's capability approach is the list of the aspects of life to which capabilities relate. Nussbaum asks an Aristotelian question, 'what activities characteristically performed by human beings are so central that they seem definitive of a life

---

[131] Sen: 1987, 36. My emphasis.

[132] See Nussbaum: 2000, 78–80.

[133] See section 3.4.3.

that is truly human?'[134] Two more questions are then formulated: first, 'which changes or transitions are compatible with the continued existence of a being as a member of the human kind and which are not?'[135] and second, 'what kinds of activity must be there if we are going to acknowledge that a given life is human?'[136] Similar questions are relevant in the context of women, HIV and AIDS. This is especially the case in relation to state responsibility to realise women's rights to health, housing, property and freedom from gender-based violence.

Moreover, Nussbaum makes a critical classification of capabilities, namely: basic capabilities, internal capabilities and combined capabilities.[137]

> *Basic capabilities* are the innate equipment of individuals that is the necessary basis for developing more advanced capabilities, and a ground of moral concern... *Internal capabilities* are states of the person herself that are, so far as the person herself is concerned, sufficient conditions of the requisite functions...*Combined capabilities* which may be defined as internal capabilities combined with suitable external conditions for the exercise of the function.

This classification goes to the core of the call in this thesis for the realisation of women's socio-economic rights in the context of HIV and AIDS. This is the case because women living in the situation of the epidemic should ideally, have most of the basic capabilities and internal capabilities realised through the provision of conditions that enable these capabilities to be realised. Thus the core proposal in this thesis – for the realisation of women's socio-economic

[134] Nussbaum: 1999, 39.

[135] Nussbaum: 1999, 39.

[136] Nussbaum: 1999, 39.

[137] Nussbaum: 2000, 84-85. Emphasis by author.

rights that should enable them live normal lives amidst the epidemic. If this is realised, women will not *merely live*, but *live with dignity.*[138]

Elucidating on capabilities and functioning, Nussbaum analogously points out: [139]

> It is perfectly true that functionings, not simply capabilities are what render a life fully human, in the sense that if there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained...Citizens must be left to determine their course after that. The person with plenty of food may choose to fact, but there is a great difference between fasting and starving, and it is this difference that I wish to capture. Again, the person who has normal opportunities for sexual satisfaction can always choose a life of celibacy, and my approach says nothing against this. What it does speak against (for example) is the practice of female genital mutilation, which deprives individuals of the opportunity to choose sexual functioning.

Consequently, I wish to argue that the capabilities approach covers a wide array of women's rights – rights that are useful in the context of HIV and AIDS. This means that the state should put financial resources, economic production, political practices, such as the effective guaranteeing and protection of equality, freedom from gender-based violence, political participation, or social structures, social institutions, public goods, social norms, traditions or habits that enable women to exist amidst the AIDS epidemic. This approach is also arguably more relevant in the context of poor countries such as those in sub-Saharan Africa.

[138] My emphasis.

[139] Nussbaum: 2000, 87.

3.4.3 Capabilities and human rights

While the capabilities approach and human rights can be distinguished from each other, I concur with Nussbaum that the capabilities and human rights have a very close relationship as understood in contemporary international discussion.[140] The author argues that they cover the terrain covered by both the so-called first-generation rights (political and civil liberties) and the so-called second generation rights (economic and social rights). The author underscores the point:[141]

> And they play a similar role, providing the philosophical underpinning for basic constitutional principles. Because the language of rights is well established, the defender of capabilities needs to show what is added by this new language.

The author reiterates the obscurity of taking rights as a starting point arguing that rights have been understood in different ways, and that difficult theoretical questions are frequently obscured by the use of rights language.[142] Nussbaum then persuasively suggests that the best way of thinking about rights is to see them as *combined capabilities*.[143] Within this context, Nussbaum lists elements of what she calls combined capabilities for poor women as entailing

[140] Nussbaum: 2000, 97.

[141] Nussbaum: 2000, 97.

[142] Nussbaum: 2000, 97.

[143] Nussbaum: 2000, 98. My emphasis.

life,[144] bodily health,[145] bodily integrity,[146]senses, imagination, thought,[147] emotions,[148] practical reason,[149] affiliation,[150] other species,[151] play, [152] and control over one's environment.[153]

---

[144] Which entails being able to live to the end of a human life of normal length . . . not dying prematurely. See Nussbaum: 2000, 78.

[145] Which entails being able to have good health, including reproductive health; being adequately nourished . . . ; being able to have adequate shelter. See Nussbaum: 2000, 78.

[146] Which entails being able to move freely from place to place; being able to be secure against violent assault, including sexual assault . . . ; having opportunities for sexual satisfaction and for choice in matters of reproduction. See Nussbaum: 2000, 78.

[147] Which entails being able to use the senses; being able to imagine, to think, and to reason--and to do these things in . . . a way informed and cultivated by an adequate education . . . ; being able to use imagination and thought in connection with experiencing, and producing expressive works and events of one's own choice . . . ; being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise; being able to have pleasurable experiences and to avoid nonbeneficial pain. See Nussbaum: 2000, 78.

[148] Which entails being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us; being able to grieve at their absence, to experience longing, gratitude, and justified anger; not having one's emotional developing blighted by fear or anxiety. See Nussbaum: 2000, 79.

[149] Which entails being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. (This entails protection for liberty of conscience). See Nussbaum: 2000, 79.

[150] Which entails being able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship. . . . Being able to be treated as a dignified being whose worth is equal to that of others. See Nussbaum: 2000, 79.

[151] Which entails being able to live with concern for and in relation to animals, plants, and the world of nature. See Nussbaum: 2000, 80.

[152] Which entails being able to laugh, to play, to enjoy recreational activities. See Nussbaum: 2000, 80.

It follows that women's well-being is only possible if all conditions of combined capabilities are met, within themselves, the family, the community and the larger environment. I wish to argue that within the context of HIV and AIDS, the state should undertake to create enabling environments for women to see the combination of these capabilities, especially as they can deal with the barriers, be they social, economic or political. More so in the areas of socio-economic inequality as expressed through access to health services and resources (including food, housing and water as determinants of health), access to adequate housing, freedom from gender-based violence and laws and practices affecting access to property. These are the areas providing avenues for the realisation of women's rights in the context of HIV and AIDS – as argued in this thesis.[154]

The capabilities approach, therefore, comes in to augment legislative and human rights approaches. Moreover, Sen has appositely argued that this approach transcends legislation:[155]

> The implementation of human rights can go well beyond legislation, and a theory of human rights cannot be sensibly confined within the juridical model within which it is frequently confined. For

---

[153] This is political and material. The political entails being able to participate effectively in political choices that govern one's life; having the rights of political participation, free speech and freedom of association. …and the material entails being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others . . . See Nussbaum: 2000, 80.

[154] These areas are further developed in chapter four of this thesis.

[155] Sen, A., 'Elements of a theory of human rights' (2004) 32 *Philosophy and Public Affairs* 319-320.

> example, public recognition and agitation can be part of the obligations…generated by the acknowledgement of human rights.

Furthermore, the idea of human rights may be interpreted as implying the moral principle that capabilities of human beings should not be permitted to fall below a certain level, so far as nation-states and the international community are able to produce that minimum threshold for everyone. This argument resonates with the minimum core concept which is evaluated in chapter five of this thesis.[156] What women are actually capable of doing is primarily a matter of combined capabilities, which depend in turn upon internal capabilities and basic capabilities, but internal capabilities and combined capabilities depend in different ways upon external conditions, and it is these that political and public action can modify or improve.[157] Hence, badly chosen government action can degrade these conditions and thus degrade combined capabilities.

Accordingly, producing capabilities requires material and institutional support, and the approach thus takes issue with the simplistic distinction of rights as 'first generation' (political and civil) and 'second-generation' (economic and social). All rights, understood as entitlements to capabilities, have material and social preconditions, and all require government action. Within this argument, the capability approach has pushed forward the analysis of women's human rights.[158] It is clear that it is the socio-economic realities of women that influence their existence within the milieu of HIV and AIDS. The approach is a

[156] See chapter four, section 5.7.1.

[157] For more on this, see Nussbaum: 2000, 96–101.

[158] Nussbaum, MC., 'Human rights and human capabilities (2007) 20 *Harvard Human Rights Journal* 1–4.

broad normative framework for the evaluation of individual well-being and social arrangements, the design of policies and proposals about social change in society.[159]

Using the example of shelter and housing, Nussbaum argues that this kind of right can be analysed in a number of distinct ways: in terms of resources, or utility (satisfaction), or capabilities.[160] The author aptly explains:[161]

> If we think of the right to shelter as a right to a certain amount of resources, then we get into the very problem...giving resources to people does not always bring differently situated people up to the same level of capability to function. The utility-based analysis also encounters a problem: traditionally deprived people may be satisfied with a very low living standard, believing that this is all they have any hope of getting. A capabilities analysis, by contrast, looks at how people are actually enabled to live. Analysing economic and material rights in terms of capabilities thus enables us to set forth clearly a rationale we have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capacity.

It is undoubted that the relationship between the capabilities approach and human rights is symbiotic. In this thesis, they are applied synergistically. This closeness presents a framework that can be utilised to demand from the state certain types of actions in relation to women, HIV and AIDS. This provides a platform to demand for resources, and I thus also argue that it

---

[159] Robeyns, I., 'The capability approach: An interdisciplinary introduction' (2003).

[160] Nussbaum: 2000, 98–99.

[161] Nussbaum: 2000, 98–99. On the rights language, the author concludes that where we disagree about the proper analysis of rights talk – where the claims of utility, resources, and capabilities are still being worked out – the language of rights preserves a sense of the terrain of agreement, while we continue to deliberate about the proper type of analysis at the more specific level.

provides a basis for accountability. The capabilities approach, however, is not impeccable as the analysis below shows.

3.4.4 Criticism of the capabilities approach

Fredman, for instance, has criticised the capabilities approach[162] and argues that it operates at a level of minima and that it tends to give too much emphasis to personal choice.[163] Fredman further opines that Nussbaum asserts that the capabilities approach is a basic minimum, and is not concerned with the distribution above the minimum.[164] Thus, Fredman states that on the whole the capabilities approach holds that the question we need to ask is what is adequate – what basic justice requires.[165] In essence, Fredman asserts that the capabilities approach employs the notion of a threshold, and does not comment that some rights must be distributed equally.[166]

[162] For more on this, see, generally, Fredman, F., 'Engendering socio-economic rights' (2009) *SAJHR* 424 [hereafter Fredman: 2009].

[163] Fredman: 2009, 424.

[164] Fredman: 2009, 424.

[165] Fredman: 2009, 424.

[166] Fredman points out that Nussbaum argues that inequalities which track traditional sources of discrimination, such as race or sex, will be impermissible because they affect the equal dignity of citizens – see Fredman: 2009, 424.

Fredman has also justifiably asserts that especially in the context of gender, the capabilities approach places too much emphasis on choice.[167] The author reasonably states that Sen's normative framework places its highest value the individual ability to do or to be what she has reason to value.[168] Fredman further points out that this risks focusing too much attention on what individuals can achieve, thereby giving the impression that the only function of positive duties is to facilitate the ability of individuals to realise their own goals.[169] The author thus validly condemns this approach as one that does not speak to the context of women and their interpersonal relationships and interdependence which is not attached to choice. [170]

I nevertheless, hereby argue that the capabilities approach provides one of the obligatory avenues for the realisation of women's socio-economic rights. Moreover, combining the capabilities approach with human rights principles provides the means to engender women's socio-economic rights in the context of HIV and AIDS. More so, the emphasis of the capabilities approach on the imperative to improve women's material conditions resonates with the state duty to ensure the realisation of women's socio-economic rights progressively and within available resources. Furthermore, if women have to 'function' within the context of HIV and AIDS, the state overlapping imperatives rests on the state to enable women's access health, access toadequate housing, access to property and protection from gender-based

[167] See, generally, Fredman, S., Human rights transformed: Positive rights and positive duties (2009) 72 *The Modern Law Review* 1044–1048.

[168] Fredman: 2009, 424.

[169] Fredman: 2009, 424.

[170] Fredman: 2009, 424.

violence. Together, these four rights form the basis of legal obligations arising within the context of this thesis.[171]

The preceding analysis has revealed that at the centre of the feminist capabilities approach, is the notion of equality and women's material condition. Accordingly, I examine the place of equality and socio-economic rights in the next section of this work.

3.5 EQUALITY AND SOCIO-ECONOMIC RIGHTS

The centrality of equality to the philosophy of the feminist capabilities approach deserves no further highlighting. However, on its own, the capabilities approach is not sufficient to realise women's socio-economic rights. Rather, it should be allied with a substantive concept of equality which incorporates the values of interdependence and indivisibility of rights.[172] This indivisibility suggests that rights are 'interactive in that each depends to a greater or lesser degree on the observance of others', and that 'separately expressed rights are not insulated from others, but interact dynamically with and inform other rights'.[173] This is especially so in

[171] These rights are evaluated in chapters four, five and six of this work.

[172] Fredman: 2009, 411.

[173] Cook et al., *Reproductive health and human rights: Integrating medicine, ethics and the law* (2003) 158–159. See also Scott, C., 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall LJ* 769–878; Scott, L., 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81;The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' E/CN.4/1987/17, paras 2 and 3;The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (reprinted in (1998) 20 *Human Rights Quarterly* 691. See also Memorandum of the Panel of Constitutional Experts 'The meaning of "progressive" (ss 25 and 26), dated 5 February 1996, where the 'interrelationship and indivisibility' of the different rights are accepted by the advisers

relation to socio-economic rights which cut across several aspects of women's socio-economic circumstances. At both the regional and international level, there is room for interpreting equality either as an add-on to right, or as a means of engendering socio-economic rights. I therefore, agree with Fredman that the latter gives a richer and more effective way of taking equality and socio-economic rights forward.[174] Nussbaum's core argument is that socio-economic rights are not valued as commodities, but because of what they enable human beings to do and to be.[175]

Equality and non-discrimination is central in regard to women's existence and wellbeing. Principles of equality and discrimination represent the cornerstone upon which the structure of human rights law is established.[176] It has been asserted that '[p]rinciples of equality should be seen as the thread that draws together human rights, and the values of a democratic society, which flows from them'.[177] The notion of equality as an embodiment of such 'prized public

---

to the drafters of the South African Constitution; De Vos, P., 'Pious wishes of directly enforceable human rights: Social and economic rights in South Africa's Constitution' (1997) 13 *SAJHR* 67; De Vos, P., '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258.

[174] Fredman: 2009, 411.

[175] See generally, Nussbaum: 2000.

[176] Heinze, E., *The logic of equality: A formal analysis of non-discrimination* (2003); McColgan, A., 'Principles of equality and protection from discrimination in international human rights law' (2003) 2 *European Human Rights Law Review* 157–175; MacEwen, M., 'Comparative non-discrimination law: An overview' in Loenen, T., & Rodrigues, P., *Non-discrimination law: Comparative perspectives* (1999) 427–435; Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), Art. 1; Convention on the Elimination of Discrimination against Women (CEDAW), U.N. Doc. A/34/46, preamble, para 7; Fredman, S., *Discrimination law* (2002) [hereafter Fredman: 2002].

[177] Monaghan, K et al., *Race, religion and ethnicity discrimination: Using international human rights law* (2003) 9.

goods' or values dictates the distribution of those prized social values, not least individual dignity and worth, to everyone at equal measure.[178] It has been observed:[179]

> The distinction between the two is worth noting. As a value, equality gives substance to the vision of the Constitution. As a right, it provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this.

The fact that there is a relationship between value and right – the value is used to interpret and apply the right – means that the right is infused with the substantive content of the value. In the next section, I examine equality as a right and as a value.

3.6 EQUALITY AS A VALUE AND A RIGHT

Equality plays a vital role both as a value and as a concrete right. As a value, Fredman accurately identified four intricately related categories: the first stresses individual dignity and worth (individual justice); the second based on remedial justice seeking to redress past discrimination; the third articulating redistributive objectives; and the fourth grounded in democratic concerns.[180] The individual justice model emphasises the achievement of

---

[178] McCrudden, C., & Kountouros, H., 'Human rights and European equality law' in Meenan,H., (ed), *Equality Law in an enlarged European Union: Understanding the Article 13 Directives* (2007) 73.

[179] Albertyn, C., & Goldblatt, B., 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 249.

[180] Fredman: 2002, 21-22.

individual dignity as an autonomous being as the most central element of the notion of substantive equality. This view is endorsed by Dworkin:[181]

> What does it mean for the government to treat its citizens as equals? That is…the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity.

In *Miron v Trudel,* [182] the Canadian Supreme court stressed that the purpose of the equality clause is to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens, through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstances.[183] Several South African cases have underscored this understanding of equality.[184]

The second value that underlies the equality guarantee focuses on remedy or restitution. This approach usually responds to historical injustices that have been committed against a group - an ethnic group, religious, linguistic group or otherwise - with the specific aim of remedying

---

[181] Dworkin, R., *A matter of principle (*1985) 19.

[182] [1995] 2 S.C.R. 418.

[183] [1995] 2 S.C.R. 418 489.

[184] *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) [hereafter *Brink v Kitshoff*]; *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC)[hereafter *Prinsloo*]; *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC)[hereafter *Hugo*]; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) [hereafter *Harksen v Lane]*; *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC) [hereafter *Larbi-Odam and Others*]; *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC) [hereafter *Pretoria City Council*] and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) [hereafter *National Coalition for Gay and Lesbian Equality*].

past ills and the resultant disadvantages in which such groups find themselves.[185] Such an approach is therefore tailored towards addressing specifically targeted historical wrongs and their consequences on the present generation.

The third value underlying equality is the notion of distributive justice that aims at redistribution of the social goods the access to which the groups in focus have been denied and/or disproportionately excluded.[186] This entails a states' positive duty to ensure the proportional representation of previously disadvantaged groups in political power, employment, social services and other major sectors.[187] The fourth fundamental value underlying the equality guarantee looks at the broader context of group equality and locates the idea of participatory democracy as the litmus test of the realisations of the equality guarantee. In this logic, equality looks beyond individuals' positions in relation to each other and focus on social equality. While it partly seeks to ensure equitable distribution of social goods, its primary aim is to ensure the full participation and inclusion of everyone in major social institutions while at the same time stressing the need to valuing differences among the different groups.[188]

The content of the concept of equality and non-discrimination under international law has been summarised to include the following: the idea that a distinction is discriminatory if it has no objective and reasonable justification or if there is not a reasonable relationship of

[185] Fredman: 2002, 21.

[186] Fredman: 2002, 21.

[187] Fredman: 2002, 21.

[188] Fredman: 2002, 22.

proportionality between the aim and the means employed to attain it.[189] Further, that traditional outlooks or local prejudice will not count as reasonable justification for differential treatment.[190] Even more, that preferences may still be discriminatory if they have the effect of impairing equality.[191] Additionally, that non-discrimination applies to all state action regardless of whether such action is itself required by international law.[192] Also, that positive state action is sometimes required by the state in order to fulfill its duty to respect equality; and that positive state action may extend to protecting individuals from impediments of equality imposed by private parties.[193] It also extends to the duty to provide.[194]

On equality and socio-economic rights, Fredman persuasively argues that to address the gendered nature of social institutions, it is not enough to treat women in the same way as men.[195] I am in agreement with Fredman on the point that a much more substantive approach

[189] See Fredman, S., 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 163-190 [hereafter Fredman: 2005].

[190] See Fredman: 2005, 163–190.

[191] Fredman: 2005.

[192] Fredman: 2005.

[193] Bayefsky, AF., 'The principle of equality or non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 1 34.

[194] See Fredman: 2005. Fredman argues that one of the key insights of substantive equality is the recognition that it is not color, gender or some other group characteristic per se which is at issue, but the attendant disadvantage. Fredman elucidates that this focus on disadvantage means that, for substantive equality to be effective, it should include a positive duty to provide. This in turn moves the anti-discrimination agenda onto the uncertain frontier between policy and law.

[195] Fredman: 2009, 417.

to equality is required, which demands restructuring institutions. A substantive approach to equality in turn, entails a reconceptualisation of the rights themselves.[196] Fredman further correctly argues that rather than regarding socio-economic rights as bundles of goods to be distributed in different ways, engendered socio-economic rights should take into account the ways in which goods and opportunities can in fact be enjoyed in the context of actual relationships in which women live. Moreover, it is in resonance with Nussbaum's capabilities theory. In addition to equality is the concept of dignity. Dignity is central to discourses on equality, feminism and the capabilities approach, as evaluated below.

3.7. DIGNITY

The position of dignity within the feminist capabilities approach warrants no further accentuation. Dignity has roots in Kantian moral philosophy that affirms the inherent worth of human beings. According to the Kantian imperative, human beings should be treated 'never simply as a means, but always at the same time as an end'.[197] In the Canadian Supreme Court case of *Egan v Canada,*[198] Madame Justice L' Heureux-Dube employed the concept. The court rejected a formal equality approach and located dignity at the centre of the equality principle. The Canadian Supreme Court stressed that the purpose of the equality guarantee in the Canadian Charter is to prevent the violation of essential human dignity and freedom

[196] Fredman: 2009, 417.

[197] Kant, I., *The moral law: Kant's groundwork of the metaphysics of morals* (1963) 96. See also Ackermann, L., 'Equality and the South African Constitution: The role of dignity' (2000) 60 *Heidelberg Journal of Int L* 537, 540–2.

[198] 1995 2 S.C.R. 513, 1995 SCC 49.

through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of the Canadian society, equally capable of and equally deserving of concern, respect and consideration.[199]

Hence, the notion of dignity affords the treatment of women seeking medical and other services as worthy of concern, respect and consideration as first expressed in the Canadian Supreme Court in *Andrews v Law Society of British Columbia.*[200] Also, in countries, such as Australia, the idea of human dignity has been relied on to support recognition of related reproductive rights claims, such the freedom to be free from involuntary sterilisation.[201] Similarly, therefore, I wish to argue that claims related to access to health services for women affected by HIV and AIDS is a matter of dignity. Moreover, the South African Constitutional Court (the Constitutional Court) has pronounced its position on dignity in a number of cases.[202]

[199] *Law v Canada* [1999] 1 SCR 497 (Supreme Court of Canada) para 51.

[200] [1989] 1 SCR 143 at 171, the court notes:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised as human beings deserving of concern, respect, and consideration.

[201] See *Department of Health v JWB* (Marions's case) (1992) 175 C.L.R. 218.

[202] *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) [hereafter *Grootboom*]; *S v Makwanyane* 1995 (3) SA 391; *August v Electoral Commission* 1999 (3) SA 1 (CC); *National Coalition for Gay and Lesbian Equality ,* paras 15-18. *Hugo*; *Prinsloo; S v Mamabolo* 2001 (3) SA 409 (CC) para 41; In *Dawood v Minister of Home Affairs* 2000(3) SA 939 at para 35, the South African Constitutional Court described the role of the constitutional value of human dignity in constituting post-apartheid society:

> The Constitution asserts dignity to contradict our past in which human dignity for Black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.

Dignity is one element of the capabilities approach theory, but all its notions are seen as interconnected, deriving illumination and clarity from one another.[203] Relating dignity to the capabilities approach, Nussbaum compellingly states:[204]

> Surely we do not want to altogether to close off voluntary choices citizens may make to abase themselves or to choose relationships involving humiliation in their personal lives, however unfortunate we may think those choices; in that sense, capability remains the appropriate political goal. But it seems important for government to focus on policies that will actually treat people with dignity as citizens and express actual respect for them, rather than policies (whatever that would be) that would extend to citizens a mere option to be treated with dignity (for example, by purchasing that right at a low cost), but allow them also option to be treated with humiliation (say, by refusing to purchase the right). In general, the more a crucial function is to attaining and maintaining other capabilities, the more entitled we may be to promote actual functioning in some cases, within limits set by an appropriate respect for citizens' choices.

Furthermore, the basic idea is that some living conditions deliver to people a life that is worthy of the human dignity they possess, and others do not.[205] In the latter circumstance, they retain dignity, but it is like a promissory note whose claims have not been met.[206] Hence, as Martin Luther King, Jr. said: dignity can be like a 'check that has come back marked "insufficient funds."'[207]

---

[203] Nussbaum, MC., 'Human dignity and political entitlements' in Schulman, A., & Nussbaum, M., *Human dignity and bioethics: Essays commissioned by the President's Council on Bioethics* (2008) 351

[204] Nussbaum: 2002, 91–92.

[205] Dixon & Nussbaum: 2011, 4.

[206] Dixon & Nussbaum: 2011, 4.

[207] As cited in Dixon & Nussbaum: 2011, 4.

To demonstrate how the focus on dignity could dictate policy choices, Dixon and Nussbaum compellingly use the example of a child with Down syndrome:[208]

> We do not treat a child with Down syndrome in a manner commensurate with that child's dignity if we fail to develop the child's powers of mind through suitable education. In a wide range of areas, moreover, a focus on dignity will dictate policy choices that protect and support agency, rather than choices that infantilise people and treat them as passive recipients of benefit.

In the above vein, I assert that women affected by HIV and AIDS deserve to be treated with dignity – in a measure corresponding to their needs. This treatment requires the realisation of their conditions of access to the appropriate health services, housing conditions, access to property and freedom from gender-based violence. Policy choices must, therefore, pay regard to their unique needs. Viewed and implemented in this light, women's capacities to live with dignity in the face of HIV and AIDS could be enhanced.

Liebenberg convincingly argues that dignity is core to the interpretation of socio-economic rights.[209] The Constitutional Court has invoked dignity as the central value informing its approach to the interpretation of socio-economic rights, particularly the reasonableness standard review for positive duties imposed by these rights. In the illustrious case of

[208] Dixon & Nussbaum: 2011, 4.

[209] See, generally, Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1–31. See also, Nedelsky, J., Reconceiving rights as relationship (1993) 1 *Review of Constitutional Studies* 1 8.

Government of the Republic of South Africa v Grootboom,[210] the Constitutional Court stated:[211]

> It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity... In short, I emphasise that human beings are required to be treated as human beings.

I am also in accord with Fraser and Honneth that including dignity as a facet of substantive equality means that, as well as socio-economic disadvantage and distributive wrongs, account is taken of 'recognition' wrongs, or inequality in the mutual respect and concern which people feel for one another in society.[212] It includes stigma, stereotyping, humiliation, and violence on grounds of gender. Fredman further rightly argues that dignity is useful in establishing that recognition wrongs are wrongs in themselves, regardless of a male comparator: treating everyone equally badly is no answer to a claim under this heading.

However, critics have justifiably pointed out that human dignity is an abstract and subjective notion that has proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.[213] It is also argued that dignity as a value is

[210] 2000 (1) SA 46 (CC).

[211] See para 83.

[212] Fraser, N., & Honneth, A., *Redistribution or recognition? A Political-philosophical exchange* (2003) as cited in Fredman: 2009, 421.

[213] See *R v Kapp* 2008 SCC 41 (Supreme Court of Canada) paras 21,22; Davis, DM., 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398, 413; Davis, DM., *Democracy and deliberation* (1999) 69–95.

irrevocably linked with the protection of freedom and autonomy. As such, serving to discourage the positive, redistributive measures required to remedy conditions such as material inequality and disadvantage.[214] Albertyn and Goldblatt validly argue that the reliance on the value of dignity in the test for unfair discrimination promotes a narrow focus on individual personality issues as opposed to a 'group-based understanding of material disadvantage and disadvantage'.[215]

It is, nevertheless, imperative that an analysis of women, HIV and AIDS pays due regard to the value and ethos of dignity. HIV and AIDS inherently place women in situation that requires state action aimed at ensuring conditions of dignity in disease. This dignity can be ensured in enabling women's access to both material and non-material needs relating to access to health services, adequate housing, property and protection from violence. Applied together, principles of substantive equality, the feminist capabilities approach and dignity could thus provide a framework for the realisation of women's socio-economic rights within the context of HIV and AIDS.

3.8. CONCLUSION

This chapter has demonstrated the inextricable need to consider the philosophy of the feminist capabilities approach as a useful framework in addressing women's vulnerability in the context of HIV and AIDS. The chapter has argued that the feminist capabilities approach,

---

[214] Cowen, S., 'Can "dignity" guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34, 51–8.

[215] Albertyn & Goldblatt: 1998, 257–258, 272. See also, Albertyn, C., 'Equality' in Cheadle, MH et al., (eds) *South African Constitutional Law: The Bill of Rights* (2002) 51, 60.

supported by the dominance theory of the radical feminism, principles of substantive equality, socio-economic rights and dignity – provides a framework that presents opportunities for implementation of law in such a manner that seeks to eradicate deep-rooted gender inequalities with the goal of realising women's capabilities. The main thesis being that within the context of a sexed and gendered HIV and AIDS, approaches should strive to strengthen women's abilities to live amidst the epidemic through the realisation of socio-economic rights. Against this background, the next chapter presents an analysis of the rights implicated in the context of women, HIV and AIDS.

CHAPTER FOUR

WOMEN'S RIGHTS TO HEALTH, HOUSING, PROPERTY AND FREEDOM FROM VIOLENCE IN THE CONTEXT OF HIV AND AIDS

> The conditions in which people *live and die* are, in turn, shaped by political, social, and economic forces... The development of a society, rich or poor, can be judged by the quality of its population's health, how fairly health is distributed across the social spectrum, and the degree of protection provided from disadvantage as a result of ill-health.[1]

> Gender-based violence and marginalisation clearly increase the vulnerability of both women and men to HIV infection. The consequences of gender inequalities in terms of low socioeconomic and political status, unequal access to education, and fear of violence, add to the greater biological vulnerability of women and girls being infected with HIV. Too often they have little capacity to negotiate safer sex, access the services they need, and utilize opportunities for empowerment.[2]

4.1 INTRODUCTION

The previous chapter analysed the relationship between the feminist capabilities approach and socio-economic rights.[3] On the strength of the above analysis, this chapter will seek to present the link between HIV and AIDS and women's rights. The first part of this chapter argues the relationship between women's socio-economic rights and other rights. The second part of this chapter examines the link between HIV and AIDS and women to access to health services

[1] WHO, 'Closing the gap in a generation: Health equity through action on the social determinants of health' Geneva, 2008 [hereafter: WHO 2008] introductory remarks to the report.

[2] UNAIDS, *Global Report on HIV and AIDS* 2009 [hereafter UNAIDS: 2009] 130.

[3] See chapter three, section 3.5.

(and and its underlying determinants),[4] access to adequate housing,[5] access to property (including succession, inheritance and marriage)[6] and freedom from gender-based violence.[7] Illustrations are drawn widely from sub-Saharan Africa to argue these themes.

4.2 WOMEN'S SOCIO-ECONOMIC AND OTHER RIGHTS

The role of poverty in increasing women's vulnerability to HIV and AIDS is undoubted. Poverty forces both women and men into precarious economic and social lifestyles that shape their vulnerability to HIV/AIDS.[8] Poverty, therefore, constrains the choices that women and men are able to make in relation to their lives, including their sexual lives.[9] Women's particular vulnerability, therefore, emerges from their greater economic vulnerability.[10] In this milieu, improving women's economic conditions is of essence. It is the above scenario that hereby necessitates the argument for the realisation of women's rights to the highest attainable

[4] Section 4.3.

[5] Section 4.4.

[6] Section 4.6

[7] Section 4.5.

[8] Albertyn, C., 'Prevention, treatment and care in the context of human rights', Centre for Applied Legal Studies, University of Witswatersrand, South Africa. Available at http://www.un.org/womenwatch/daw/csw/hivaids/albertyn.html. (Accessed 12 January 2010] [hereafter Albertyn: 2000].

[9] Albertyn: 2000.

[10] Albertyn: 2000.

health and adequate housing, Furthermore, I herein argue that it requires that women's access to property should be enhanced, and that women should be from gender-based violence.

Moreover, women's access to socio-economic rights such as the right to health and housing is shaped by the gendered nature of social institutions, including legal, cultural, customary and traditional factors.[11] Social and economic rights, gender equality and women's human rights, as well as men's responsibilities and rights, are developing within the international discourse of human rights and HIV and AIDS.[12] Albertyn fittingly argues that these provide new weapons in the fight against the pandemic at the same time as they raise new conceptual and practical challenges.[13] Additionally, sexual inequality cannot be understood in isolation from socio-economic equality as HIV and AIDS highlight the indivisibility and interdependence of rights such as dignity, privacy and autonomy in relation to one's bodies and sexual lives, and the economic and social needs that constrain choices in relation to this.[14] Also, for example, the gendered nature of social and economic relations within and outside the household means that women experience discrimination and inequality in virtually every aspect of housing.[15]

[11] Albertyn: 2000.

[12] Albertyn: 2000.

[13] Albertyn: 2000.

[14] Albertyn: 2000.

[15] Farha, L., 'Is there a woman in the house? Re/conceiving the human right to housing' (2002) 14 *Canadian Journal of Women and the Law* 118, 121.

The Committee on Economic, Social and Cultural Rights (CESCR) has rightly pointed out that gender affects the equal right of men and women to the enjoyment of their rights.[16] The CESCR has also taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing,[17] the right to adequate food,[18] the right to education,[19] the right to the highest attainable standard of health,[20] and the right to water.[21]

Generally, it is argued that the adjudication of socio-economic rights claims is enriching in several ways.[22] First, that it can provide a forum where the impact of legislation and policies on the lives of the poor receives serious and reasoned consideration in light of the values and commitments of the Constitution. Second, that it can facilitate meaningful participation by civil society and communities in the formulation and implementation of social programmes by requiring such participation as a component of the relevant rights, third, and by requiring

[16] See CESCR General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005), para 14.

[17] See CESCR General Comment 4: The right to adequate housing (1991), para. 6; CESCR General Comment 7 The right to adequate housing: Forced evictions (1997), para 10.

[18] See CESCR General Comment 12: The right to adequate food (1999), para. 26.

[19] CESCR General Comment 11: Plans for primary education (1999), para. 3; CESCR General Comment 13: The right to education (1999), paras 6 (b), 31 and 32.

[20] CESCR General Comment 14: The right to the highest attainable standard of health (2000), paras 18-22.

[21] CESCR General Comment 15: The right to water (2000), paras 13 and 14.

[22] Liebenberg, S., *Socio-economic rights adjudication under a transformative constitution* (2010) 37.

transparency in the formulation of social policies and programmes.[23] These three strands are particularly relevant within the context of this study in that they allow for room to consider how laws and policies impact women, HIV and AIDS. They also allow for the involvement of women themselves in matters pertaining to their health. Furthermore, it gives forum for the demand of transparency in matters pertaining to women's rights in this context. This was manifested in the celebrated case of *Minister of Health and Others v Treatment Action Campaign and Others* (*Treatment Action Campaign* case),[24] where the government was called upon to account for its policies on antiretroviral treatment (ARVs). The case is discussed later in this work.[25] What role therefore does litigation play in this context?

On socio-economic rights litigation, concerns have emerged in relation to institutional and political factors.[26] In this regard, Gloppen developed an instructive framework which examines the efficacy of social rights litigation in providing an institutional voice for the poor.[27] The author identifies four major stages: 'voice', 'responsiveness', 'capability' and 'compliance'. The author explains:[28]

[23] See for example, Brand, D., 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in Van der Walt, AJ., (ed) *Theories of social and economic justice* (2005) 17–36 24; Scott, C., & Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *U Pa L Rev* 1 27–31; Liebenberg, S., 'Needs, rights and transformation: Adjudicating social rights' (2006) 1 *Stell LR* 5 17–19; 34–35.

[24] 2002 5 SA 721 CC.

[25] See chapter seven, section 7.8.2.

[26] Liebenberg, S., *Socio-Economic Rights adjudication under a transformative constitution* (2010) [hereafter Liebenberg: 2010] 38.

[27] Gloppen, S., 'Courts and social transformation: An analytical framework' in Gargarella, R et al., (eds) *Courts and social transformation in new democracies* (2006) 35–59 [hereafter Gloppen: 2006] 37.

> *Voice* concerns the ability of marginalised groups effectively to voice their claims or have them voiced on their behalf. Court *responsiveness* refers to the willingness of the courts to respond to the concerns of the marginalised groups. *Capability* refers to judges' ability to give legal effect to social (and other) rights in ways that significantly affect the situation of marginalised groups, while *compliance* concerns the extent to which these judgments are politically authoritative, and whether the political branches comply with them and implement and reflect them in legislation and policies.

Gloppen's framework is useful in the context of this study, in the sense that it envisions, for example, a situation in which women affected by HIV and AIDS, are able to utilise socio-economic rights guarantees to make their concerns heard. This in effect deals with the broad feminist argument for equality. This framework also allows for the demand to be made – requiring state action to comply with court decisions. These decisions include those entrenching socio-economic rights. As such, going by the feminist capabilities imperative of enabling women to achieve their capabilities, this framework presents socio-economic rights as a worthwhile avenue to pursue in the context of women, HIV and AIDS in South Africa.

However, I am in agreement with the view that the adjudication of socio-economic rights may have regressive tendencies.[29] It is reasonably contended that while the adjudication of socio-economic rights claims can enhance deliberative democracy, it also has the potential to undermine the participatory, deliberative model of democratic transformation promoted by the

---

[28] Gloppen: 2006, 37. Emphasis in the original.

[29] Liebenberg, S., *Socio-Economic Rights adjudication under a transformative constitution* (2010) [hereafter Liebenberg: 2010] 39. See also Both, H., 'Democracy and rights: Constitutional interpretation in a postrealist world' (2000) 63 *THRHR* 561–581; Dixon, R., 'Creating dialogue about socio-economic rights – Strong-form versus weak-form judicial review revisited' (2007) (5) *I.Con* 391–418 at 402–403.

Constitution.[30] This is the case in the following ways: First, that by interpreting socio-economic rights narrowly and excluding certain needs from the scope of the relevant provisions, the judiciary can undermine popular struggles to have these needs recognised and affirmed in broader political discourse.[31] A related danger is that adjudicative culture and practices operate to reinforce the public/private dichotomy by imposing strong duties of accountability on public actors for meeting socio-economic rights claims, while imposing weak or non-existent standards of accountability on private institutions.[32] Furthermore, that adjudication can operate to prevent a serious consideration of alternative interpretations of socio-economic rights in wider political discourse that may better advance the transformation purpose of the Constitutions.[33] These criticisms are justifiable.

Aware of the above arguments, the next section of this work draws the link between women and health, housing, property and freedom from gender-based violence.

4.3. ACCESS TO HEALTH SERVICES

Women generally experience structural difficulties in accessing health care services, more so in the area of sexual and reproductive health. The World Health Organisation has noted that 'women's *health* is linked to status in society. It *benefits* from equality and *suffers* from

[30] See Liebenberg: 2010, 39.

[31] Pieterse, M., 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796–822. See also, Liebenberg: 2010, 39.

[32] See Liebenberg: 2010, 39.

[33] See Liebenberg: 2010, 39–40.

discrimination'.[34] Moreover, women also bear the global burden of disease, particularly HIV and AIDS.[35] Furthermore, because women are still being denied equal status in many societies, their health suffers – and through them – the health of their families and communities. Also, access to services like ARV rollout programmes are inhibited by gender inequities.[36]

Sexual and reproductive rights are crucial to women's health in the context of HIV and AIDS.[37] However, women still face stigma and discrimination in health services. This is linked to inequities in access to health services mainly caused by their poverty (lack of training of health care providers).[38] I wish to restate that respect, dignity, privacy and confidentiality are crucial to the clinical management of women and HIV/AIDS. Applied together, these are supposed to provide a congenial environment in which women are supported in decision-making regarding treatment thereby improving the quality of care.

[34] WHO, 'The world health report' WHO, Geneva, 1998, 6. Emphasis in the original.

[35] Murray, JL., & Lopez, AD., 'The global burden of disease: A comprehensive assessment of mortality and disability from diseases, injuries and risk factors in 1990 and projected to 2020' (1996).

[36] Nattrass, N., 'Gender and access to antiretroviral treatment in South Africa' (2008) 14 *Feminist Economics* 19–36.

[37] UNFPA, 'The Right to Reproductive and Sexual Health.' Statement by Dr. Nafis Sadik Executive Director, United Nations Population Fund at the Inter-Agency Symposium on Reproductive Health in Refugee Situations Geneva, 28 June 1995 [hereafter UN Population Fund: 1995]; Hunt, P., & De Mesquita, JB., 'The rights to sexual and reproductive Health' UNFPA, 2007, 7; CESCR General Comment 14: The Right to the Highest Attainable Standard of Health, 2000, para 34 is to the effect that the right to health includes reproductive health; *Programme of Action of the International Conference on Population and Development*. Available at http://www.unfpa.org/icpd/icpd-programme.cfm; Beijing Declaration and Platform for Action. Available at http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF.(Accessed 12 Ocotober 2009).

[38] See Greene, ME., & Merrick, T., 'Poverty reduction: Does reproductive health matter? HNP discussion paper, *World Bank*, Washington DC: 2005.

Women living with HIV and AIDS face problems in accessing appropriate services which meet their specific health needs, which needs are rarely understood or addressed by health service providers.[39] In addition, in the midst of HIV and AIDS, women are beset with issues relating to disclosure, privacy, confidentiality and involuntary abortions. The next section is an analysis of these issues and how they affect women's access to health.

4.3.1 Disclosure, privacy and confidentiality issues

It is acknowledged that antiretroviral therapy significantly reduces morbidity and mortality among people living with HIV.[40] In relation to disclosure, testing for HIV is an important element of an effective state response to HIV and AIDS. According to Jurgens, testing is 'never a goal in itself, but clearly linked to larger prevention and care, treatment and support goals'.[41] Hence enabling women to know their status means they can access treatment, care and support if they test positive, or take further steps to protect themselves against infection if negative.[42] It also means that those living with HIV can protect sexual partners from HIV infection and themselves from reinfection with another strain of the virus. For pregnant

---

[39] UNAIDS, *'Report on the global AIDS epidemic'* Geneva: 2004. See also Coovadia, HM., & Hadingham, J., 'HIV/AIDS: global trends, global funds and delivery bottlenecks' (2005) 1 *Globalization and Health* 1–13.

[40] Braitstein, P et al., 'Mortality of HIV-1-infected patients in the first year of antiretroviral therapy: Comparison between low income and high-income countries' (2006) 367 *Lancet* 817–824.

[41] Jurgens, R., 'Increasing access to HIV testing and counselling while respecting human rights.' Background paper (2007) [hereafter Jurgens: 2007].

[42] Jurgens: 2007.

women, there is an additional benefit from testing for HIV. Where there is a prevention of mother-to-child transmission programme available, a woman with access to such treatment can dramatically reduce the chances of passing HIV to her baby.[43]

Hence, there must be a careful balancing between health-related goals and protection of the rights of those being tested. In this light, the right to privacy and confidentiality are pivotal.[44] Pregnant women can benefit from testing in order to address their own future health and that of their growing foetus. It should, however, be noted that testing should be carried out with particular attention to counselling and confidentiality. There is need for a confidential environment and facilities that allows for calm and informed discussion, including how a woman will deal with telling a spouse or partner about a negative outcome of testing (in this case an HIV positive result).This would be interfered with by, for example, overcrowding in health facilities and lack of trained personnel. Research shows that where people think that the benefits of knowing their HIV status outweigh the risks, and where levels of stigma and discrimination are low, people are more likely to take an HIV test.[45]

Furthermore, according to a review by WHO, the fear of negative social outcomes is a related consideration and a major barrier to disclosing status.[46] For women, disclosure could also

[43] Jurgens: 2007.

[44] For more on confidentiality within the context of HIV and AIDS, see generally, Seidel, G., 'Confidentiality and HIV status in Kwazulu-Natal, South Africa: Implications, resistances and challenges' (1996) 11 *Health Policy Planning* 418–427.

[45] Kalichman, SC., & Simbayi, LC., 'HIV testing attitudes, AIDS stigma and voluntary counselling and testing in a black township in Cape Town' (2003) 79 *Journal for Sexually Transmitted Infections* 442–447.

[46] WHO, 'Gender dimensions of HIV status disclosure to sexual partners: Rates, barriers and outcomes.' Geneva: WHO, 2004 [hereafter WHO: 2004].

result in violence, especially in sub-Saharan Africa. The most common fears then include fear of abandonment, fear of rejection/discrimination, fear of violence, fear of upsetting family members and fear of accusations of infidelity.[47] Hence, a proper clinical management should include a training and orientation on protocol for violence against women.[48]

4.3.2 Involuntary (forced) abortions

Women are also usually confronted with fear and judgmental attitudes from some health workers, who may pressure them to undergo abortions, be sterilised, or use contraception because they think that people with HIV should not have children due to the possibility of vertical transmission.[49] This violates women's right to the choice and autonomy to have children.[50] In this regard, one of the key areas of debate relates to pre-and post-abortion rights and care. One of the criticisms levelled against scaling up of HIV and AIDS treatment and

[47] WHO: 2004.

[48] For example, in Bangladesh, Woman Friendly Hospital Initiative (WFHI) was set up in 1998 to make health care facilities more friendly to women. For details on this, see, Harcourt, W., 'The capabilities approach for poor women: empowering strategies towards gender equality, health and well-being (2001), Paper presented at "Justice and Poverty: examining Sen's Capability Approach" Von Hugel Inst., Cambridge University, 5–7 June 2001 [hereafter Harcourt: 2001].

[49] See Literature written by Griffin on universal access to sexual and reproductive health services. Available at http://www.realising-rights.org/docs/SRH%20Literature%20review.pdf. (Accessed 12 January 2010).

[50] Bailey, C., & O'Sullivan, M., (eds) 'Reproductive rights' in Woolman, S et al., *Constitutional law of South Africa* (2002) 16–18.

care relates to the disconnect in polices on reproductive health rights and AIDS.[51] It has, however, been found that a comprehensive approach to HIV and AIDS should deal with both aspects.[52] Research shows that women are not being properly counselled on the choices they have when they are pregnant. Many of them are also coerced into abortions.[53] Going by their numbers, in terms of who bears the greater brunt of HIV and AIDS, an approach that integrates these two aspects would serve a gender-responsive approach. This is also augmented by the finding that women shoulder the bigger responsibility in reproductive and sexual health for both biological and social reasons.[54]

4.3.4 The necessity for food and nutrition

The right to food is an underlying determinant of health and is particularly important for women living with HIV and AIDS. Page rightly argues that women are generally less well nourished.[55] Page underlines the fact that given African women's roles as mothers and

[51] De Bruyn, M., 'HIV/AIDS and reproductive health: Sensitive and neglected issues', Ipas, 2005 [hereafter De Bruyn:2005]

[52] Harcourt: 2001; De Bruyn: 2005.

[53] ICW, 'HIV positive women and human rights.' ICW Vision Paper 4. 2004 London, International Community of Women Living with HIV/AIDS; Anonymous. 2007. Report of the meeting. UNAIDS Reference Group on HIV and Human Rights. Seventh meeting. 12-14 February 2007. Geneva, Switzerland. Geneva, UNAIDS. Available at http://data.unaids.org/pub/Report/2007/20070703_rghr7_meetingreport_en.pdfs. (Accessed 10 January 2010). De Bruyn, M., 'Gender, adolescents and the HIV/AIDS epidemic: The need for comprehensive sexual and reproductive health responses', Ipas. Available at http://www.un.org/womenwatch/daw/csw/hivaids/De%20bruyn.htm. (Accessed 12 February 2010).

[54] De Bruyn: 2005.

[55] Page, S., 'Promoting the survival of rural mothers with HIV/AIDS: A development strategy for Southern Africa' (2001) 44 *Development* 40–46 [hereafter Page: 2001].

farmers, the household food security and family survival of millions of Africans are under serious threat with the HIV and AIDS pandemic.[56] Hence, nutrition is the pivotal interface between food security and health security.[57] An individual's capacity to fight any disease depends on the strength of their immune system, which among other factors is affected by nutrition.[58] Malnutrition, particularly involving vitamin A deficiency is associated with increased risk of genital ulcers and cervical HSV (herpes simplex virus) shedding [59] which in turn has been found to increase the risk of HIV transmission.[60]

---

[56] Page: 2001.

[57] Gillespie, S., 'Poverty, food insecurity, HIV vulnerability, and the impacts of AIDS in sub-Saharan Africa, July 2008. Paper prepared for the Joint Learning Initiative on Children and AIDS (JLICA) [hereafter Gillespie: 2008]. Available at http://www.jlica.org/userfiles/file/JLICA%20Gillespie%20IDS%20poverty%203%20July.pdf. (Accessed 12 November 2009). See also, generally, Engh, IE., *Developing capacity to realise socio-economic rights. The example of the right to food in the context of HIV/AIDS in South Africa and Uganda* (2008). Engh conceptualises the right to food in the light of HIV/AIDS, by identifying States' obligations, and the required capacity to meet these obligations. The book deals with issues such as authority and mandate, commitment to obligations, access to resources, communication capacity, and capacity to monitor and evaluate. It suggests a set of indicators representing ideal standards of fully-fledged obligations and capacity. The indicators are considered key to the understanding, implementation and monitoring of the right to food of people who are infected with, and affected by, HIV and AIDS.

[58] Stillwagon, E., 'The ecology of poverty, nutrition, parasites and vulnerability to HIV/AIDS' in Gillespie, S., (ed) *AIDS, poverty, and hunger: Challenges and responses*, 2006. Washington , DC: International Food Policy Research Institute.

[59] Mostad, SB et al., 'Cervical shedding of herpes simplex virus in human immunodeficiency virus-infected women: Effects of hormonal contraception, pregnancy, and vitamin A deficiency' (2003) 181 *Journal of Acquired Immune Deficiency Syndrome* 58–63.

[60] Galvin, SR & Cohen, MS., 'The Role of Sexually Transmitted Diseases in HIV Transmission' (2004) 2 *Nature Reviews: Microbiology* 33–42 as cited in Gillespie 'Poverty, food insecurity, HIV vulnerability, and the impacts of AIDS in sub-Saharan Africa, July 2008. Paper prepared for the Joint Learning Initiative on Children and AIDS (JLICA) 4.

HIV and food insufficiency (lacking adequate food supply to meet daily needs) are two leading causes of morbidity and mortality in sub-Saharan Africa. Research shows that the two are inextricably linked.[61] There are two links argued, between HIV and nutrition. The first relates to nutritional consequences of HIV and the other to the growing realisation that food insecurity may increase HIV risk transmission behaviours and susceptibility to HIV once exposed.[62] In respect to the first aspect, access to adequate food daily is essential for coping

---

[61] Gillespie, S., & Kadiyala, S., 'HIV/AIDS and food and nutrition security: From evidence to action. 2005. Washington (D.C): International Food Policy Research Institute [hereafter Gillespie et al: 2005] 149; FAO, 'The state of food insecurity in the world: monitoring progress towards the world food summit and millennium development goals.' 2003 Rome (Italy): Food and Agricultural Organisation. United Nations; See also, Adato, M., & Bassett, L., 'Social protection to support vulnerable children and families: The potential of cash transfers to protect education, health and nutrition' (2009) 21 *AIDS Care* 60-75; Drimie, S., & Casale, M., 'Multiple stressors in Southern Africa: the link between HIV/AIDS, food insecurity, poverty and children's vulnerability now and in the future' (2009) 21 *AIDS Care* 28-33; Wairimu Mwangi, E., 'Exploring linkages between agriculture and HIV/AIDS: A multilevel study of the impact of agricultural consumption regimes on women's vulnerability to HIV/AIDS in Kenya'. July 2009. Available at http://programs.ifpri.org/renewal/pdf/KenyaWomen.pdf. (Accessed 27 November 2009) ; Gillespie, S., & Drimie, S., 'Seasonal dimensions of the HIV-hunger nexus in eastern and southern Africa.' Working paper prepared for the Seasonality Revisited Conference at the Institute of Development Studies, Brighton, UK, 8 July 2009. Available at http://programs.ifpri.org/renewal/pdf/idsseasonality200907.pdf. (Accessed 27 November 2009) ; Gillespie, S., & Drimie, S., 'Hyperendemic AIDS, food insecurity and vulnerability in southern Africa: a conceptual evolution
Working paper prepared for the Global Environmental Change and Human Security Conference, Oslo, Norway, 23 June 2009. Available at http://programs.ifpri.org/renewal/pdf/gechoslo200906.pdf. (Accessed 28 November 2009); Vearey, J et al., 'HIV, migration and urban food security: exploring the linkages in Johannesburg, South Africa'May 2009. Available at http://programs.ifpri.org/renewal/pdf/JohannesburgFinal.pdf. (Accessed 28 November 2009); Ashton, D et al., 'The Inter-Relationships and Linkages among Migration, Food Security and HIV/AIDS in Windhoek, Namibia'.
April 2009. Available at http://programs.ifpri.org/renewal/pdf/WindhoekFinal.pdf. (Accessed 28 November 2009); Kassie, GT et al., 'The nexus of migration, HIV/AIDS and food security in Addis Ababa, Ethiopia March 2009. Available at http://programs.ifpri.org/renewal/pdf/AddisFinal.pdf.(Accessed 28 November 2009); Bond, V et al., 'The Converging Impact of Tuberculosis, HIV/AIDS, and Food Insecurity in Zambia and South Africa February 2009. Final Working Report. Available at http://programs.ifpri.org/renewal/pdf/ZambiaSAFinalReport.pdf.(Accessed 20 January 2010).

with the side effects of antiretroviral medication. The energy requirements of HIV-infected individuals increase by about 20 to 30 percent when chronic opportunistic infections or HIV-specific conditions begin to be felt.[63] Consequently, the WHO recommends that infected individuals should be assured of at least one recommended daily allowance of most vitamins. Rollins rightly argues that 'in the absence of an adequate diet, this often means that HIV care and treatment programmes must apply multiple micronutrient preparations'.[64] In addition, there are further considerations for an HIV-infected person who has progressed to the stage where he/she needs to be placed on an ART programme. Anti-retroviral medication, which has strong effects on the user and may in some cases be serious, needs to be taken at regular intervals - mostly twice a day – for the rest of that person's life.[65]

The second aspect of high-risk behaviour, particularly as it relates to HIV, AIDS and nutrition, is that women exchange sex for food.[66] For example, a study in Botswana and Swaziland revealed that 32 percent of the women and 22 percent of the men who participated

---

[62] Weiser, SD et al., 'Food insufficiency is associated with high-risk sexual behaviours among women in Botswana and Swaziland. (2007) 4 *PLoSs Med* 260 [hereafter Weiser et al: 2007].

[63] Rollins, N., 'Food insecurity-A risk factor for HIV infection (2007) 4 *PLoS Medicine* 1576, citing WHO standards [hereafter Rollins:2007]; Scrimshaw, N et al., *Interactions of Nutrition and Infection* (1968) Geneva: World Health Organisation; WHO, 'Nutrient requirements for People Living with HIV/AIDS: Report of a Technical Consultation', Geneva, 13–15 May 2003.

[64] Rollins: 2007, 1576.

[65] Amnesty International 'I am at the lowest end of all: Rural women living with HIV face human rights abuses in South Africa' (2008) 77. Available at http://www.amnesty.org/en/library/info/AFR53/001/2008/en. (Accessed 16 October 2009) [Hereafter Amnesty International: 2008].

[66] Weiser et al: 2007, 260

in the study had experienced food insecurity in the previous 12 months.[67] Risk behaviour in the above countries was found to include inconsistent condom use, sex exchange for food, increased intergenerational sex and lack of control over sexual relationships.[68] This is exacerbated by the women's additional burden of caring for children, elder household members and ill family members.[69] It is, therefore, clear that in relation to women and access to food, an interaction exists that reemphasises the link between HIV/AIDS and nutrition from both biological and socio-economic perspectives.[70]

In times of distress and conflict, women also resort to transactional sex as a coping mechanism. Research conducted in Uganda has shown that women living in camps set up for internally displaced people in the war affected towns of Gulu and Katakwi exchanged sex (for money) in order to buy food.[71] This they did with the clear knowledge that they were at risk of HIV and AIDS. For example, one of the women interviewed, despondently had this to say:[72]

[67] Weiser et al: 2007, 260.

[68] Weiser et al: 2007, 260.

[69] Gillespie et al: 2005, 149; Kadiyala, S., & Gillespie, S., 'Rethinking food AIDS to fight AIDS.' Washington (D.C): International Food Policy Research Institute (2003) 65; Rajaraman, D et al., 'HIV/AIDS, income loss and economic survival in Botswana.'(2006) 18 *AIDS Care* 656-662; Buseh, AG et al., 'Cultural and gender issues related to HIV/AIDS prevention in rural Swaziland: a focus group analysis.' (2002) 23 *Health Care Women Int.* 173-184.

[70] Egal, F & Vlastar, A., 'HIV/AIDS and nutrition: Helping families and communities to cope.' 1999 FAO, Food, Nutrition, and Agriculture 25.

[71] See generally, Bukuluki, P et al., 'Gender dimensions, food security, and HIV and AIDS in Internally Displaced People's (IDPs) camps in Uganda: Implications for HIV-responsive policy and programming'. Department of Social Work and Social Administration, Makerere University. November 2008 [hereafter

> Lack of food forces me to have multiple partners. Now I am even HIV positive. If I had food I needed I would have not suffered like I am doing now…my teenage girls are at high risk of contracting HIV/AIDS because I am not able to meet their needs. Men are always willing to give gifts that can lure them to fall in love.

The above survey also revealed that sexual violence, especially against women and girls was exacerbated by food insecurity. The research showed that there is a relationship between persons perceived to be vulnerable to forced sex and those perceived to have sex in exchange for food.[73] This is further exacerbated by the care burden borne by women in situations of conflict as sadly expressed by one of the women:[74]

> My condition regarding access to food in my household is really bad. Currently, I am HIV-positive and also 8 months pregnant, and I am taking care of 8 orphans. The only way I get food is by providing casual labour to get 1000/= shillings (0.5 USD) per day to buy food. We normally depend on wild greens and once in a while beans (if bought). Some days I and my household members eat once a day or even sleep hungry. We do not have land for crop cultivation, and we also have no oxen for ploughing, as well as income for buying food.

The same woman dejectedly added:[75]

Bukuluki et al: 2008]. The report is available at http://programs.ifpri.org/renewal/renewalpub.asp. (Accessed 27 November 2009).

[72] Interviews conducted by Bukuluki et al: 2008, 29.

[73] Interviews conducted by Bukuluki et al: 2008, 33–37.

[74] Interviews conducted by Bukuluki et al: 2008, 35–36.

[75] Interviews conducted by Bukuluki et al: 2008, 36.

> At times I have nothing to give to the orphans. This sometimes forces me to send them for casual labour, selling water or firewood. I sometimes give in to men for sex so that I can get some money. But now I am pregnant and no man can sleep with me. It is the lack of food that forced me to have many sexual partners where I ended up getting infected with HIV. I now take care of 8 orphans. I have to eat less food and sacrifice to the children. Yet I am an expecting mother and at the same time HIV positive. HIV/AIDS is a big problem and is going to finish everybody in this place.

The accounts of the women quoted above demonstrate the inextricable link between food insecurity and women's vulnerability to HIV and AIDS. This fatal link should not be ignored in HIV and AIDS interventions and programmes. As will be shown later in this chapter,[76] women also lack access to property and land which further prejudices their access to food in the context of HIV and AIDS.

4.4 ACCESS TO ADEQUATE HOUSING

Without adequate housing, women are incapable of enjoying all other rights, both in the public and private domain.[77] Access to housing is closely linked with the right to health.[78] Moreover, there is increasing research showing that poorly housed and homeless women are

[76] See section 4.6.

[77] On the women and housing, see generally, Farha, L., 'Women and housing' in Askin, KD., & Koenig, DM (eds) *Women and International Law* (1999) [hereafter Farha:1999] 483 See also, Moser, C., 'Women, human settlements, and housing: a conceptual framework for analysis and policy-making' in Moser, C., & Peake, L., (eds) *Women, human settlements, and housing* (1987) [hereafter Moser: 1987] 12.

[78] CESCR General Comment 14, paras 3, 8 and 11.

more prone to HIV and AIDS.[79] For example, inadequate space can limit women's capacity to undertake income-generating activities from home, and has been shown as a contributing variable to increased levels of sexual violence.[80]

Women also face rejection which usually ends in homelessness upon disclosure of HIV status. Furthermore, women and child headed households is a phenomenon arising from HIV and AIDS related deaths of family members.[81] Within the context of HIV and AIDS, housing, therefore, presents a situation of special needs for women. In this regard, Moser crucially explained: [82]

> Social relations are constructed within the household and that it results in differential experiences of housing for men and women…hence, to assist women, it is first necessary to understand women's particular housing needs.

Moser persuasively argues that women's housing needs are distinct from those of men – in terms of 'practical' and 'strategic' needs.[83] The author argues that practical needs are those that arise from the concrete conditions of women's positioning, by virtue of their gender,

---

[79] See Liebenberg, S., & Pillay, K., 'Poverty and human rights report of the national "Speak Out on Poverty".'Hearings, March to June 1998, convened by SANGOCO, the CGE and the SAHRC, SANGOCO: Johannesburg 15.

[80] Farha: 1999; Moser: 1987.

[81] Moser: 1987.

[82] Moser: 1987, 12.

[83] Moser: 1987, 29.

within the sexual division of labour.[84] Hence, within these positions, women formulate their needs in response to their living conditions. This argument, as applied to the situation of women living with HIV and AIDS, means that their practical needs relate to, for example, the reality of domestic violence. This is supported by a report of the UN Special Rapporteur on Adequate Housing which revealed that women living in situations of domestic violence inherently lived in inadequate housing.[85] The Special Rapporteur pointed out that there were different groups of women who were particularly vulnerable to discrimination and, due to a combination of factors, faced additional obstacles in accessing adequate housing.[86] In this category, the Special Rapporteur mentioned women who, *inter alia*, become widows as a result of HIV and AIDS.[87] The Special Rapporteur aptly noted:[88]

> Highlighting the violations of the right to adequate housing experienced by different groups of women in vulnerable situations brings to the fore front the impact of multiple discrimination women face in relation to adequate housing, due to their gender, race, caste, ethnicity, age and other factors, but in many cases, also due to their relative impoverishment and lack of access to social and economic resources.

[84] Moser: 1987, 29.

[85] UN Special Rapporteur on Adequate Housing, 'Women and adequate housing.' UN Doc. E/CN.4/2006/118 [hereafter Special Rapporteur on Adequate Housing: 2006].

[86] Special Rapporteur on Adequate Housing: 2006.

[87] Special Rapporteur on Adequate Housing: 2006.

[88] Special Rapporteur on Adequate Housing: 2006.

Furthermore, as part of the right to housing, access to affordable, accessible and reliable water and sanitation is crucial for people living with HIV/AIDS, and for providing home based care. Research shows that women are responsible for making water available in most homes in sub-Saharan Africa.[89] Women and children walk long distances to find water in both rural and urban areas.[90] Research shows that water reform policy may increase social and gender differentiation, inequality and ill health.[91] Water is needed for taking ARV medication, bathing patients, washing soiled clothing and linen; and for essential hygiene, which reduces exposure to infection. Toilets should also be accessible for weak patients.[92] Within this context, access to water and sanitation, therefore, defines the context of care women have to work in. Accordingly, Annan rightly accepted:[93]

> We shall not finally defeat AIDS, tuberculosis, malaria, or any other infectious diseases that plague the developing world until we have won the battle for safe drinking water, sanitation and basic health care.

[89] Ferguson, A., 'Water reform, gender, and HIV/AIDS: Perspectives from Malawi.' Paper delivered at the Society for Applied Anthropology Meetings, Portland. 2003 [hereafter Ferguson: 2003]; Page: 2001; Henry Kaiser Family Foundation, 'Hitting home: How households cope with the impact of the HIV/AIDS epidemic.' A survey of households affected by HIV/AIDS in South Africa (2002); Desmond, C et al., 'The hidden battle: HIV/AIDS in the household and community' (2000) 7 *South African Journal of International Affairs* 39–58.

[90] See Ferguson: 2003; Page: 2001.

[91] Ferguson: 2003.

[92] Clacherty, A., & Potter, A., 'Water Services and HIV / AIDS: Integrating health and hygiene education in the water and sanitation sector in the context of HIV/AIDS'. 2007/10/18; Research Report No.TT 316/07. South African Water Research Commission [hereafter Clacherty et al: 2007]. See also, Clacherty, A., & Potter, A., 'Water services and HIV/AIDS: A guide for local government councillors and officials responsible for water, sanitation and municipal health services.' 2007/08/01; Research Report No.TT 317/07. South African Water Research Commission.

[93] Kofi Annan, Former UN Secretary-General of the United Nations to the fifty-fourth World Health Assembly held in Geneva: 2001.

Women render most of the home based care which involves fetching water, bathing patients, washing laundry, digging pits for solid waste disposal, cleaning households and yards, assisting with access to social, health and other services, and providing counselling, information and support. In this regard, Clacherty and Potter rightly argue that controlled water supply, as is the case in most urban and peri-urban areas, makes it difficult for home-based caregivers to carry out their activities, and compromises the impact of health and hygiene education and promotion carried out by community health workers.[94]

Challenges surrounding the water and HIV/AIDS matrix are sharpened by the fact that affected communities and donors working in the developing world do not make an immediate connection between water availability and slowing down infections, especially in urban and peri-urban areas.[95] This is despite the fact that water supply is problematic in most of the sub-continent. A large part of urban populations live in informal and unplanned areas with inadequate water supplies and sanitation services.[96]

[94] Clacherty et al: 2007.

[95] Ferguson: 2003.

[96] Ferguson: 2003.

4.5 GENDER-BASED VIOLENCE

An overabundance of literature illustrates the mutual existence between HIV and AIDS and violence.[97] Moreover violence against women has become a universal phenomenon with rape in most cases being denied and viewed as 'normal'.[98] According to the WHO, violence against women in its many forms, especially from an intimate partner, has an impact on their reproductive and sexual health.[99] The links between violence and sexual health are both direct and indirect. Violence can be an important in acquiring a sexually transmitted disease.[100] Forced sex can increase the risk of HIV transmission through abrasions and cuts if the partner

[97] ActionAid USA's Women's Rights Program: Demanding Positive Change for a Better World. Available at http://www.actionaidusa.org/aai_womans_rights.php. Accesesd 13 July 2007. See also, Taylor, NM., 'Cry the beloved continent…' Exploring the impact of HIV/AIDS and violence in women's sexual rights in Southern Africa (2006) 30 *Journal for Juridical Science* (2006) 52–79; UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Intersections of Violence Against Women and HIV/AIDS (17 January 2005); Amnesty International , 'Women, HIV/AIDS and human rights' (24 November 2004) AI Index: ACT 77/084/2004 (hereafter Amnesty International: 2004). Bellamy, C., 'Facing the future together' Report of the Secretary General's task force on women, girls and HIV/AIDS in Southern Africa, UNAIDS, 2004; Wellesley Center for Research on Women, 'Unsafe schools: Gender-based violence and its impact on girls' education and health: A literature review and analysis' USAID, 2003.

[97] States should therefore pursue all means to eliminate and eliminate violence as a means to combat HIV/AIDS among women.

[98] Levinson, JH., & Levinson, SP., 'Women's health and human Rights ' in Agostin, M., (ed) *Women, gender, and human rights: A global perspective* (2001) [hereafter Levinson et al:2001] 135; Levinson, D., *Family violence in cross-cultural perspective* (1989); Sanday, PR., 'The socio-cultural context of rape: A cross-cultural study' (1981) 37 *Journal of Social Issues* 5-27; Holmstrom, LL., & Burgers, WA., *The Victim of rape: Institutional reactions* (1983) ; Scully, D., & Marolla J., 'Convicted rapists' construction of reality: The denial of rape.' Paper presented at the American Sociological Association meetings, San Francisco, September, 1982; Sanday, PR., *Female power and male dominance: On the origins of sexual inequality* (1981).

[99] WHO, 'Sexual health – a new focus for WHO' WHO: 2004 [hereafter WHO: 2004].

[100] WHO: 2004.

is infected with HIV. Gender-based violence can take many forms: domestic violence; forced sex and other forms of sexual violence; trafficking in women and civil strife; among others. The circumstances underlying the correlation between violence against women and HIV/AIDS are a complex weave of social, cultural, and biological conditions. Amnesty International has pointed out that violence against women is one of the most central, profound, and brutal ways in which gender inequality is produced, expressed, and reproduced.[101] The UN Secretary-General rightly observed that:[102]

> For many women worldwide, the threat of violence exacerbates their risk of contracting HIV...Studies show the increasing links between violence against women and HIV and demonstrate that HIV-infected women are more likely to have experienced violence, and...women who have experienced violence are at a higher risk for HIV.

The UN Secretary-General's study noted the patterns and consequences of violence against women as a global phenomenon which is both a violation of women's human rights and prevents women from enjoying other human rights and fundamental freedoms, including the right to the highest attainable standard of health.[103] Coomaraswamy accurately noted:[104]

---

[101] Amnesty International: 2004. According to World Health Organisation (Human Rights Watch Report 2003), violence against girls and women throughout the world causes more death and disability among women in the 15 to 44 age group than cancer, malaria, traffic accidents and even war.

[102] UN Secretary – general's study on violence against women, background documentation for 61st session of the General Assembly Item 60(a) on advancement of women, UN Document A/61/122/Add.1 para 160.

[103] UN Secretary-General (2006). UN Secretary – general's study on violence against women, background documentation for 61st session of the General Assembly Item 60(a) on advancement of women, UN Document A/61/122/Add.1 para 156; Marmot, M., 'Achieving Health Equity: from root causes to fair outcomes' (20070 370 *Lancet* 1153–63.

> Many forms of violence against women result in violations of women's reproductive rights because such violence affects their reproductive capacity or prevents them from exercising reproductive capacity or prevents them from exercising reproductive and sexual choices. Many reproductive rights violations similarly constitute violence against women.

Violence reduces the autonomy of women and destroys their sense of personal safety and quality of life.[105] Within the specific context of HIV and AIDS, violence against women fuels the epidemic which exacerbates the impact of violence against women. For many girls and women in Africa, violence, HIV/AIDS and human rights abuses are experienced as strands of the same traumatic reality.[106]

Most violence against women is perpetrated by intimate male partners. A WHO study in 11 countries found that between 15 percent and 71 percent of women, depending on the country, had experienced physical or sexual violence by a husband or partner in their lifetime, and 4

[104] Commission on Human Rights, Report by Special Rapporteur on Violence Against Women; Policies and Procedures that impact women's reproductive rights and contribute to, cause or constitute violence against women, Ms. Radhika Coomaraswamy E/CN 4./1999/68/Add.4, 21 January 1999; Garcia Moreno, C., 'Violence against women' *Global Health Equity Initiative Working Paper no 15*, 1999. Harvard Centre for Population and Development Studies.

[105] Naylor: 2006; Manuh, T., 'Women in Africa's development: Overcoming obstacles, pushing for progress.'1998. Available at http://www.un.org/ecosocdev/geninfo/afrec/bpaper/maineng.htm. (Accessed 14 September 2009); Vetten, L., & Bhana, K., *Violence, vengeance and gender: a preliminary investigation into the links between HIV/AIDS and violence against women in South Africa*. 2001. Johannesburg: The Centre for the Study of Violence & Reconciliation; Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2002) 5 *Law, Democracy and Development* 179–194; Dunkle, KL et al., 'Gender-based violence, relationship power and risk of prevalent HIV infection among women attending antenatal clinics in Soweto, South Africa' (2004) 363 *The Lancet* 1415.

[106] Naylor: 2005. The most pervasive form is that committed against a woman by her intimate partner, often connected to marital rape, coerced sex or other forms of abuse that lead to HIV transmission. Gender-based violence is particularly prevalent in armed conflict. The main perpetrators are military personnel, who tend to have much higher rates of STIs – which can increase the risk of HIV infection – than the civilian population.

percent to 54 percent had experienced it within the previous year.[107] Partner violence may also be fatal. Studies in South Africa show that between 40 percent and 70 percent of female murders were carried out by intimate partners.[108] Sexual violence, whether by partners, acquaintances or strangers, also affects primarily women and girls. [109] Below is an analysis of sexual violence, HIV and AIDS.

4.5.1 Rape and sexual coercion

Sexual violence occurs in sexual encounters between spouses and other sexual partners involving unprotected, rough, or forced sex, or through rape by relatives and acquaintances, strangers, government officials, military and political party personnel.[110] The link between

[107] Garcia-Moreno, C et al., 'Prevalence of intimate partner violence: findings from the WHO multi-country study on women's health and domestic violence against women, (2006) 368 *Lancet* 1260–1269.

[108] Krug, EG et al., 'World report on violence and health' Geneva: World Health Organization. 2002; For more on gender-based violence in South Africa, see generally, Combrinck, H., 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' in Murray, C., & O'Sullivan, M., (eds) *Advancing women's rights* (2005) 171. See also Kistner, U., *Gender-based violence and HIV/AIDS in South Africa: A Literature Review*, 2003. Centre for AIDS Development, Research and Evaluation (CADRE), Johannesburg, South Africa; Govender, M., 'Domestic violence: Is South Africa meeting its obligations in terms of the Women's Convention?' (2003) 16 *SAJHR* 663 676; Leclerc-Madlala, S., 'Crime in an epidemic: The case of rape and AIDS' (1996) 9 *Acta Criminologica* 31–38.

[109] In conflict and post-conflict situations sexual violence is increasingly recognised as a tactic of war. Other forms of violence against women include sexual harassment and abuse by authoritative figures (such as teachers, police officers or employers), trafficking for forced labour or sex, and traditional practices such as forced or child marriages and dowry-related violence. For more on this, see generally, WHO, 'World report on violence and health.' Geneva: WHO 2002 [hereafter WHO: 2002].

[110] WHO: 2002.

gender-based violence and HIV is most apparent in respect to the crime of rape, which can lead to direct HIV transmission.[111] The likelihood of transmission during an incident of rape can be exacerbated by a number of factors. These include that perpetrators rarely use a condom and the 'high rate of multiple perpetrator' rapes.[112] Gender-related violence is increasingly being implicated in the transmission of HIV through coercive sexual encounters.[113] There are increasing reports of the rape of young women by older men in HIV incidence countries.[114] A recent survey carried out in South Africa revealed that one in four men in South Africa admitted to rape and many confessed to attacking more than one victim.[115] Of those surveyed, 28 percent said they had raped a woman or girl, and 3 percent said they had raped a man or boy.[116] Almost half who said they had carried out a rape

[111] WHO: 2002.

[112] Multiple perpetrator rape is rape by two or more perpetrators. It is also called 'gang rape' or 'group rape'. For more on this, see Christofides, N et al., 'Including Post-Exposure Prophylaxis to prevent HIV/AIDS in South Africa: Costs and cost effectiveness to user preferred approaches to provision. Pretoria: Medical Research Council, 2006) 37; Albertyn, C et al., 'Women's freedom and security of the person' in Bonthuys, E., & Albertyn, C., (eds), *Gender, law and justice* (2007); Artz, L., 'The legal landscape: sexual offences legislation (the example of South Africa) and obstacles to justice for rape survivors' in Amnesty International (2004).

[113] Gordon, P., & Crehan, K., 'Dying of sadness: Gender, sexual violence and the HIV epidemic.' (1999) UNDP Issues Paper; Dunkle, KL et al., Jewkes 'Gender-based violence, relationship power and risk of prevalent HIV infection among women attending antenatal clinics in Soweto, South Africa' (2004) 363 *The Lancet* 1415–1421.

[114] Rwezaura, B., 'Protecting the rights of the girl child in Commonwealth Jurisdictions' in Brynes, A et al., (eds.) *Advancing the human rights of women: Using international human rights standards in domestic litigation* (1997) 144. See also CEDAW General Recommendation 24: Women and health (1999) para 12 (b).

[115] MRC, 'Understanding men's health and use of violence: interface of rape and violence in South Africa'. June 2009 [hereafter MRC: 2009].

[116] MRC: 2009.

admitted they had done so more than once, with 73 percent saying they had carried out their first assault before the age of 20.[117]

In this context, rape has assumed a new meaning for those men who believe that women are the transmitters of the virus, for example, the prevailing falsehoods that if a man rapes a virgin (the younger the better), he will be cured of the HIV.[118] In South Africa, there are reports of male school teachers sexually abusing their female pupils. The young girls are being infected with the virus through the perpetuation of male sexual myths.[119] This particularly becomes crucial in a gendered analysis of HIV and AIDS in the sense that the myth serves to expose young women and girls to the epidemic, thereby calling for urgent measures to stall the practice by highlighting its contribution to the spread rather than the cure of HIV and AIDS.

A strong correlation exists between HIV infection and a history of intimate partner violence, particularly among young women.[120] In a research conducted in Tanzania, participants described complex interactions among violence, forced sex and infidelity in their sexual

[117] MRC: 2009.

[118] In 2001, a South African Police report showed that children were the victims of 41 percent of all rapes and attempted rapes reported in the country. Over 15 percent of all reported rapes are against children under 11, and another 26 percent against children 12-17. For the year 2000, some 58 children were raped or the victims of rape attempts in South Africa every single day. See also, Mike, ET.,'The Phenomenon of Infant Rape in South Africa, MTN Centre for Crime Prevention, Department of Psychology, Rhodes University [unpublished paper].

[119] See Leclerc-Madlala, S., & Jewkes, R., 'Child sexual abuse and HIV infection' in Richter, L et al., (eds) *Sexual abuse of young children in southern Africa* (2004).

[120] Lary, H et al., 'Exploring the association between HIV and violence: Young people's experiences with infidelity, violence and forced sex in Dar es Salaam, Tanzania. International' (2004) 30 *Family Planning Perspectives* 200–206 [hereafter: Lary et al: 2004].

relationships.[121] Men who were violent toward female partners also frequently described forced sex and sexual infidelity in these partnerships.[122] In the research, men with multiple concurrent sexual partners reported becoming violent when their female partners questioned their fidelity, and reported forcing regular partners to have sex when these partners resisted their sexual advances.

4.5.2 Harmful cultural practices

The vulnerability of women is increased by the extent to which they are subjected, not only to male control, but also to violence against the person and to women's bodies through cultural modifications to the genitals from various forms of circumcision, the practice of virginity testing[123] and the use of intravaginal substances to 'dry' and 'tighten' the vagina prior to sexual intercourse, for example, may cause damage to tissues and facilitate the transmission of HIV.[124]

[121] Lary et al: 2004, 200–206.

[122] Lary et al: 2004, 200–206.

[123] For more on the role of cultural practices, including virginity testing on women, HIV and AIDS, see generally, Mswela, M., 'Cultural practices and HIV in South Africa: A legal perspective' (2009) 12 *Potchefstroom Electronic Law Journal* 21.

[124] Akeroyd, A., 'Coercion, constraints and 'cultural entrapments': A further look at gendered and occupational factors pertinent to the Transmission of HIV in Africa' in Kalipeni, E et al., (eds) *HIV&AIDS in Africa:Beyond epidemiology* (2004) 89 [hereafter Akeroyd: 2004] 94; For more on how dry sex increases women's vulnerability, see generally, Davis, AJ., & Tschunin, V., *Essentials of teaching and learning in nursing ethics* (2006)*;* Baleka, A., 'Concern voiced over 'dry sex' practices in South Africa' (1998) 352 *The Lancet* 1292;

Cultural practices affecting the genitals are not, however, the only forms of violence to the body that may facilitate the transmission of HIV. Young girls are also at increased risk through sexual intercourse because of the immaturity of their genital tract while physical and sexual violence also has a major impact on the physical and mental health of women and children.[125]

The other link between violence, HIV and AIDS relates to access to information and treatment. Fear of violence prevents women from accessing HIV/AIDS information, being tested, disclosing their HIV status, accessing services for the prevention of HIV transmission to infants, and receiving treatment and counselling, even when they know they have been infected.[126] Reports from around the world show that men respond with beatings to women who try to protect themselves from HIV infection.[127] Unsurprisingly therefore, many women will prefer to have unsafe sex in the face of immediate threats to their physical well being.[128]

Alcamo, E ., *AIDS* (2003), Van der Poll, L., 'The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective' (2009) 13 *Law, Democracy & Development* 1–21.

[125] Gordon, G., & Kanstrup, C., 'Sexuality - the missing link in women's health,' (1992) 23 *AIDS Bulletin* 29-37; Heise, L., & Elias, C., 'Transforming AIDS prevention to meet women's needs: A focus on developing countries.' (1995) 40 *Social Science and Medicine* 933–943. See also, AIDS Law Project, Regional Audit on HIV/AIDS, Human Rights and Other Relevant Issues 18.

[126] The Info Project, 'End violence against women: information and Resources. Available at http://www.endvaw.org/resources/violence_hivaids.php. (Accessed 05 May 2007). See also, "Women and AIDS" chapter of the AIDS Epidemic Update 2004 (UNAIDS, WHO). http://www.unaids.org/wad2004/EPI_1204_pdf_en/Chapter2_women+aids_en.pdf. (Accessed 05 May 2007).

[127] In a 2005 study on women's health and domestic violence, the WHO found that 50 percent of women in Tanzania and 71 percent of women in Ethiopia's rural areas reported beatings or other forms of violence by husbands or other intimate partners. For physical violence, women were asked whether a current or former partner had ever: slapped her, or thrown something at her that could hurt her; pushed or shoved her; hit her with a fist or something else that could hurt; kicked, dragged or beaten her up; choked or burnt her on purpose; threatened her with , or actually used a gun, knife or other weapon against her. Sexual violence was defined by

Research also shows that for some women, withholding sex could also lead to rape and other forms of sexual abuse.[129] This may heighten the danger of infection as lacerations or bleeding make it easier for the HIV virus to enter a woman's bloodstream. Going by the earlier analysis of the biological nature of the disease in women, such violence, therefore, further exposes women to infection with the AIDS virus.

4.6 ACCESS TO PROPERTY AND INHERITANCE IN FAMILY RELATIONS

There is a close link between access to property, HIV and AIDS. Property and land rights are essential to women's economic survival and yet women own less than 15 percent of land worldwide.[130] Insecure land tenure and property rights for women contribute to the spread of HIV and AIDS and weaken women's ability to cope with the consequences of AIDS.[131]

---

the following three behaviours: Being physically forced to have a sexual intercourse against her will; having sexual intercourse because she was afraid of what her partner might do; being forced to do something sexual she found degrading or humiliating. For more, see WHO, 'Multi-country study on women's health and domestic violence against women' Geneva, 2005. Available at http://www.who.int/gender/violence/who_multicountry_study/summary_report/en/index.html. (Accessed 12 December 2010) [hereafter WHO: 2005].

[128] WHO: 2005; Amnesty International Report: 2008.

[129] Seidel, G., 'The competing discourses of HIV/AIDS in sub-Saharan Africa: Discourses of rights and empowerment vs. Discourses of control and exclusion' (1993) 36 *Social Science and Medicine* 175 179; See also Naylor: 2006.

[130] ICRW, 'Reducing women's and girls' vulnerability to HIV/AIDS by strengthening their property and inheritance rights' Information Bulletin May 2006 [hereafter ICRW: 2006].

[131] USAID, 'Land tenure, property and HIV/AIDS: Approaches for reducing infection and enhancing economic security.' Available at www.unaids.org. (Accessed 15 July 2009); ICRW: 2006; Drimie, S., 'The impact of HIV/AIDS on land: Case studies from Kenya, Lesotho, and South Africa.' 2002. Southern African Regional

Several studies have unearthed the correlation between women's control over assets and the level of investment made in health care and other basic needs.[132] Hence, the violation of women's right to property is one of the most hidden and most serious.

The rationale for promoting women's property and inheritance rights is that improving women's property rights increases efficiency in food production and as a result, enhances family food security.[133] Furthermore, as noted by the UN Commission on Human Rights, the growing prevalence of HIV/AIDS in women is linked to laws inhibiting the full enjoyment of women's rights to land, ownership and inheritance.[134] The right to property can be considered within the same context as housing in the sense that it empowers women. This relates to issues and practices around inheritance, male primogeniture[135] and patriarchy. For many

---

Office of the Food and Agricultural Organization of the United Nations. http://www.sarpn.org.za/documents/d0000147/P143_Impact_of_HIVAIDS.pdf. (Accessed 15 July 2009).

[132] Agarwal, B., 'Are we not peasants too? Land rights and women's Claims in India' (2002) Seeds No. 21 Population Council, New York.; Beegle, K., & Ozler, B., 'Young women, rich(er) men, and the spread of HIV',2007. World Bank, Washington, DC; Katz, E., & Chamorro, J., 'Gender, land rights, and the Household Economy in Rural Nicaragua and Honduras.' 2003 Paper presented at the annual conference of the Latin American and Caribbean Economics Association, Pueblo, Mexico, October; Quisumbing, AR., & Maluccio, J., 'Resources at marriage and intrahousehold allocation: Evidence from Bangladesh, Ethiopia, Indonesia, and South Africa' (2003) 65 *Oxford Bulletin of Economics and Statistics* 283–327.

[133] FAO, 'FAO Focus: Women and food security: Women hold the key to food security' FAO 1996. Available at http://www.fao.org/FOCUS/E/Women/WoHm-e.htm. (Accessed 15 November 2009).

[134] Resolution 2005/25: 'Women equal ownership, access to land and control over land and the equal rights to own property and to adequate housing'. Adopted 15 April 2005.

[135] Male primogeniture is inheritance by the eldest surviving male child. Women (and extra-marital male children) are excluded. The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line. See Olivier, NJJ et al., *Indigenous law* (1995) 147.

societies in Africa, customary law controls marriage, property and inheritance (succession). Generally speaking, many customary practices make women vulnerable to HIV/AIDS.[136] Moreover such practices have existed without being challenged over a long period of time and continues to unfairly discriminate between family members on the basis of their status in the family and their gender.[137] For example, in September 2008, an impact assessment of support for women's property rights in Kenya and Tanzania confirmed linkages between the disinheritance of widows and AIDS-related deaths. In such contexts, women have less power than men.[138]

Another problem compounding women's situation in this context is the mix of customary, religious laws and formal laws in defining access to property. These multiple frameworks can create contradictions and confusion in what women's rights are and which ones should be recognised. These are the rules that in turn exacerbate gender inequality.[139] Historically, both statutory and customary law govern women's right to land. As described by Mbilinyi:[140]

---

[136] ALP, 'HIV/AIDS and the Law: A Resource Manual.' 1997, 210. Aids Law Project. Available at http://www.alp.org.za/index.php?option=com_content&task=view&id=46&Itemid=4. (Accessed 15 November 2010) [hereafter ALP: 1997].

[137] ALP: 1997.

[138] See USAID, 'Land tenure, property and HIV/AIDS: Approaches for reducing infection and enhancing economic security.' Available at www.unaids.org. (Accessed 15 July 2009) [hereafter USAID: 2010]; ICRW: 2006.

[139] ICRW 'Connecting rights to reality: A progressive framework of core legal protections for Women's Property Rights'; Walsh, J., 'Double standards: Women's property rights violations in Kenya' Human Rights Watch 2003; See generally, Tripp, AM., 'Women's movements, customary law, and land rights in Africa: The case of Uganda' (2004) 7 *African Studies Quarterly* 1–19; Vanessa, VS., 'The Domestic Relations Bill in Uganda:

> It has confined the majority (both male and female) to an arbitrary and contradictory world, governed at one moment by universal laws which apply to all citizens, and at another moment by laws, which apply solely to members of a given gender, tribe, clan and ethnic group.

Furthermore, within the context of marriage, women continue to suffer the impact of patriarchal definitions of male control in marriage. In the case of *Gumede v President of the Republic of South Africa and Others* (*Gumede* case),[141] Moseneke, DCJ noted that in South Africa, historically, African (indigenous) marriages were those in which humiliation and exclusion was meted out to spouses.[142] Moseneke correctly argues that the grudging recognition of customary marriages immeasurably prejudiced the evolution of the rules governing these marriages:[143]

> For instance, a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.

Potential for addressing polygamy, bride price, cohabitation, marital rape, widow inheritance, and female genital mutilation'. 2008. Available at http://www.preventgbvafrica.org/content/domestic-relations-bill-uganda-addressing-polygamy-bride-price-cohabitation-marital-rape-and. (Accessed 15 November 2009).

[140] Mbilinyi, M., 'Women workers and self employed in the rural sector. Paper prepared for ILO Workshop on Women's Employment Promotion in the Context of Structural Adjustment Programme in Tanzania, Dar-es-Salaam,' July 1997 as quoted in ICRW, HSRC, AfD, 'Women's property rights, HIV and AIDS and domestic violence: Research findings from two districts in South Africa and Uganda' (2008) [hereafter ICRW: 2008) 87.

[141] 2009 (3) BCLR 243 (CC).

[142] *Gumede* case, para 16.

[143] *Gumede* case, para 17.

Moseneke, DCJ fittingly pointed out that past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary unions.[144] Agreeing with Nhlapo, Moseneke, DCJ said: [145]

> Legislating these misconstructions of African life had the affect of placing women "outside the law". The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became "outlaws".

The above dichotomies mean women are always caught in the middle as claims for women's property rights are sometimes resisted by vacillating between the two systems and successfully neutralising any reforms that may be instituted.[146]

Furthermore, in relation to land, for example, many women in sub-Saharan Africa merely have usufruct rights;[147] this means that their rights are only 'secondary', subservient and

[144] Mbatha, L et al., 'Culture and religion' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) 159–64; see also Mamashela, M., 'New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act' (2004) 20 *SAJHR* 616 628; Pieterse, M., 'It's a 'black thing': Upholding culture and customary law in a society founded on non-racialism" (2001) 17 *SAJHR* 364 373 and 381 as cited by Moseneke, DCJ in *Gumede* case.

[145] See para 17 of the *Gumede* case; Nhlapo, T., 'African customary law in the interim Constitution' in Liebenberg, S., (ed) *The Constitution of South Africa from a gender perspective* (1995) 162.

[146] ICRW: 2008: 87.

vulnerable.[148] In many sub-Saharan African countries, widowed women are expected to leave husband's village after his death and in most cases they lose control over land and other assets that the family could have been relying on for livelihood. Moreover, titling of land *per se* does not guarantee for women any secure rights as it tends to benefit the elites and is most often used to consolidate their position at the expense of vulnerable categories including women.[149] Hence, Okoth-Ogendo aptly asserts:[150]

> Empirical evidence now show that whether regarded as "law" or not, indigenous norms and structures, particularly in respect to land relations, continue to operate as sets of social and cultural facts which provide an environment for the operation of state law.

Because women are often financially or practically unable to purchase land, housing and other major assets in their own right, inheritance becomes an important way for women to obtain property.[151] Laws governing the disposition of property when the deceased has not left a will

---

[147] Usufruct is the legal right to use and derive profit or benefit from property that belongs to another person, in this case male family members.

[148] See generally, Claassens, A., 'Women, customary law and discrimination: The impact of the Communal Land Rights Act' in Murray, C., & O'Sullivan, M., *Advancing women's rights: The first decade of democracy* (2005) [hereafter Claassens: 2005] 42 55. See also, Okoth-Ogendo, H., 'The tragic African commons: A century of expropriation, suppression and subversion' PLAAS Occassional Paper No 24 (2002) [hereafter Okoth-Ogendo: 2002].

[149] Claassens: 2005, 61. See also Berry, S., 'Social institutions and access to resources' (1989) 59 *Africa* 41–55; Gray, L., & Kevane, M., 'Land tenure status of African women' (1996) World Bank Project on Gender and property Rights in Africa; Lastarria-Cornhiel, S., 'Impact of privatization on gender and property rights in Africa' (1997) 25 *World Development* 1317–33.

[150] Claassens: 2005, 61.

[151] COHRE, 'Women and housing rights.' Centre on Housing and Evictions. COHRE: 2000.

(intestate laws) are particularly important in poor rural areas where will writing is barely practised. Research shows that a significant number of countries in sub-Saharan Africa refer generally to the inheritance rights of 'children' and make no specifications about gender equality.[152] This scenario was exemplified in the notorious Zimbabwean case of *Magaya v Magaya*.[153]

Widows and orphans continue to be prevented from inheriting property following the death of a male family member. For the larger part, they are not respected or adequately protected under the law.[154] The stigma and overwhelming mortality due to HIV and AIDS are overlaid on a legal system that in many countries has long disadvantaged women through unequal

---

[152] ICRW 'Connecting rights to reality: A progressive framework of core legal protections for Women's Property Rights' 5. Available at www.icrw.org. (Accessed 12 December 2009).

[153] (1999) 3 L.R.C 35. In this case, upon the demise of Shonhiwa Magaya without a legal will, a local court in Zimbabwe designated his eldest daughter, Venia Magaya, heir to his estate. On appeal, Ms Magaya's younger half-brother claimed heirship contending that under African customary law a woman cannot be appointed heir to her father's estate when there is a man in the family who is entitled to claim it. An appellate magistrate agreed with the argument and Ms Magaya's heirship was reversed. The newly appointed heir took his position as head of the household, removed Ms Magaya from her family home, and placed her in a shack in a neighbour's backyard. On further appeal, the Supreme Court of Zimbabwe upheld the appellate decision, stating that, despite constitutional protections against discrimination, the fact that this case arose under the customary law exempted its discriminatory aspects from scrutiny. The court explained that the constitution permits this type of discrimination against women as within 'the nature of African society'. See also discussions in Knobelsdorf, V.,'Zimbabwe's Magaya decision revisited: Women's rights and land succession in the international context' (2006) 16 *Columbia Journal of Gender and the Law* 749; Himonga, C., 'Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice' (2001) 9 *The International Journal of Children's Rights* 89–122 [hereafter Himonga: 2001].

[154] Human Rights Watch, 'Policy Paralysis: A call for action on HIV/AIDS-related human rights abuses against women and girls in Africa' 2003. The report is Available at http://www.hrw.org/en/reports/2003/12/01/policy-paralysis. (Accessed 15 February 2010) [hereafter Human Rights Watch: 2003].

property and inheritance laws. The unlawful appropriation of the property of AIDS widows and orphans by relatives or others in the 'community' is rife in Africa.[155]

To the degree that their surviving mothers are disadvantaged by law and practice in keeping the property associated with their marriages, children are disadvantaged too, and then even more if their mothers die. Although widows and orphans from other causes may also experience the loss of their property and inheritance rights, studies suggest that these abuses are much more severe and frequent when HIV and AIDS is in the picture.[156] For example, research in Namibia on HIV/AIDS and agriculture found that 44 percent of widows interviewed lost cattle, 28 percent lost small livestock livestock and 41 percent lost farm equipment to in-laws after their husbands died, 32% of these deaths were attributed to HIV/AIDS-related illnesses.[157] Dispossession of widows from family land is exacerbated by the stigma associated with HIV and AIDS. Widows are also frequently blamed for causing the deaths of their husbands. Research in Kenya revealed a common belief that HIV positive women should not be entitled to land 'because they will die anyway'.[158] This is also informed

[155] Human Rights Watch: 2003.

[156] Richard, S., 'To have and to hold: Women's property and inheritance rights in the context of HIV/AIDS in sub-Saharan Africa' 2004, ICRW [hereafter Richard: 2004]; FAO., 'Reclaiming our lives: HIV and AIDS, women's land and property rights, and livelihoods in southern and East Africa' 2006, FAO [hereafter FAO: 2006].

[157] FAO, ' HIV/AIDS and agriculture: Impacts and responses – Case studies from Namibia, Uganda and Zambia' 2003. Available at ftp://ftp.fao.org/sd/SDW/SDWW/ip summary 2003-webversion.pdf. (Accessed 17 March 2010) [hereafter FAO: 2003].

[158] Richard: 2004; FAO: 2006.

by stigma, for example in northern Uganda where women living with HIV and AIDS face barriers in accessing land provided through resettlement distributions.[159]

For the majority of people in sub-Saharan Africa, access to land is mediated through customary tenure institutions, which typically provide for women to access land through men.[160] Under most customary systems, a woman is expected to marry and give up land previously accessed from her father or brother in her natal village to acquire use rights to land owned by her husband in his village.[161] Women, therefore, rarely inherit land from their fathers, while the primary rights to the land they access when they are married remain in the hands of their husbands. Men decide what land women are given and how much, and oftentimes control the proceeds that women earn from working their land.[162]

Furthermore, the practice of polygyny throughout most of Africa is not accompanied by equitable means for justly allocating the respective interests of a man's several wives.[163] Von Struensee persuasively argues that this leads to problems in administration of estate laws effectively impeding a widow's right to administer her deceased husband's estate.[164] The

[159] USAID, 'Conflict, property rights and natural resource management in Northern Uganda'. Memo prepared by Peter Hetz and Renee Giovarelli for USAID. April 14. 2007.

[160] For more on customary tenure institutions and how they affect women, see, Claassens: 2005, 42–107.

[161] Research conducted in Namibia, Zambia and Uganda revealed that women derived ownership from their husbands. See FAO: 2003.

[162] FAO: 2003.

[163] For more on this, see generally, von Struensee, V., 'The contribution of polygamy to women's oppression: An argument for its prohibition' (2005) *Murdoch Elecronic Journal of Law.* Available at www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#fn100. (Accessed 16 October 2009) [hereafter Von Struensee: 2005].

[164] Von Struensee: 2005.

author further rightly argues that this is compounded by a general lack of interest on the part of the police, the administration and the judiciary;[165] the absence of any law specifically addressing the problems of widows;[166] and the avoidance of drafting wills together with lack of an effective means for enforcing wills.[167] Moreover, when women are widowed, only a few attempt to use the formal, legal or judicial system.[168] In the end, many women continue to hold mere usufruct rights.[169]

Moreover, women's property rights also affect their sexual autonomy and nutrition as succinctly noted by the UNAIDS:[170]

> Strategies to increase women's economic independence and legal reforms to recognise women's property and inheritance rights, should be prioritised by national governments and international donors. According to a recent study in Botswana and Swaziland, women who lack sufficient food are 70 percent less likely to perceive personal control in sexual relationships, 50 percent more likely to engage in intergenerational sex, 80 percent more likely

---

[165] Von Struensee: 2005.

[166] Von Struensee: 2005.

[167] Ewelukwa, UU., 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 424 446 [hereafter Ewelukwa: 2002]; For more on this, see also, Ewelukwa, UU.,'Caught between tradition, the courts and survival: Widows in contemporary African societies', in Nnaemeka, O., & Ezeilo, J., (eds) *Women's rights are human rights: Cultural and socioeconomic realities in Africa* (2005); Chanock, M., *Law, custom, and the social order: The colonial experience in Malawi and Zambia* (1985).

[168] Ewelukwa: 2002.

[169] Ewelukwa: 2002.

[170] UNAIDS Executive Summary 'Report on the global AIDS epidemic' 2008, UNAIDS.

> to engage in survival sex, and 70 percent more likely to have unprotected sex than women receiving adequate nutrition.

In many parts of sub-Saharan Africa, when a woman's husband dies from AIDS, she might lose her home and land, inheritance and livelihood. For example, research in Uganda found that a husband's death decreased household land cultivation area by 26 percent compared to an 11 percent reduction for male headed households where the wife had died.[171] In the context of South Africa, women's already weak legal and economic status is exacerbated by unlawful eviction and resulting homelessness.[172]

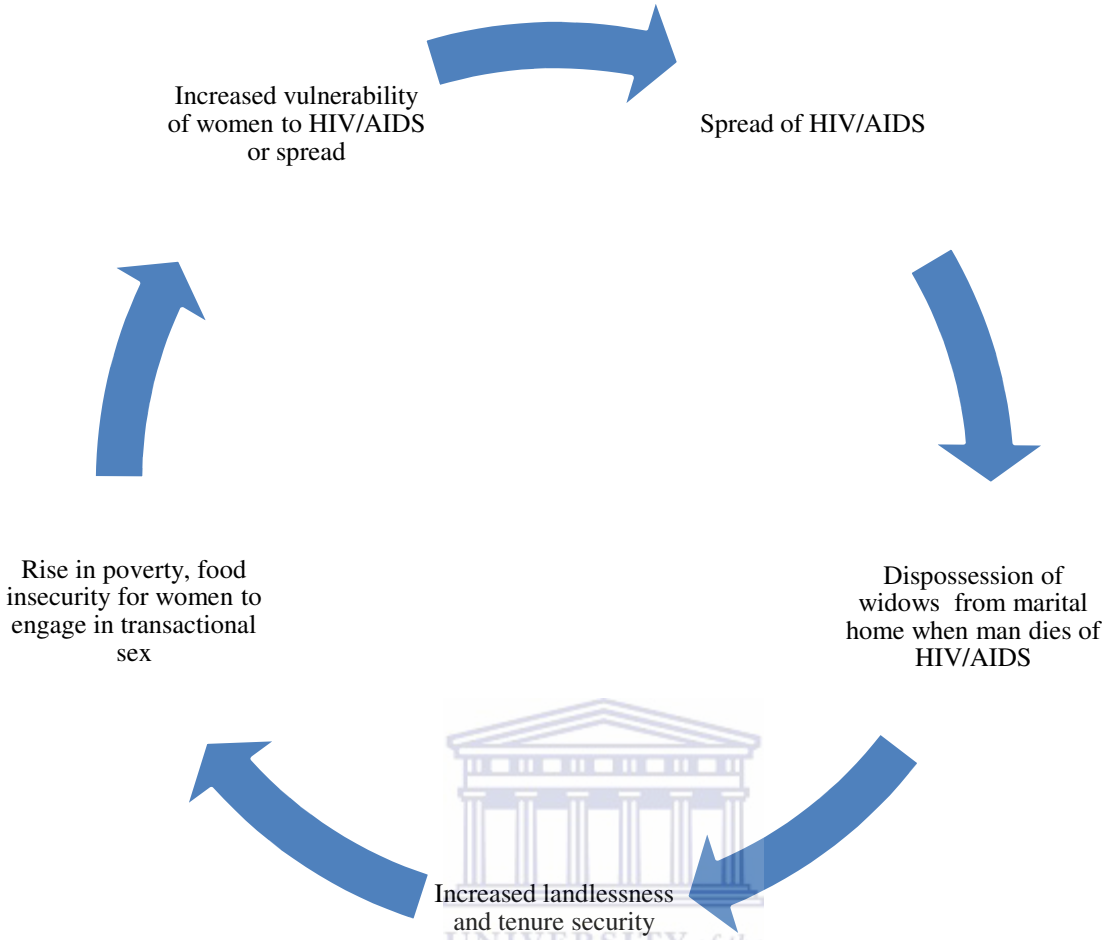
Ultimately, the above illustrations set in motion a series of impacts leading to the spread of infection, that is, diminished agricultural production and food security, resorting to transactional sex to cope with the resulting poverty, and finally increase HIV and AIDS.[173] This therefore operates like a vicious circle as illustrated below:[174]

[171] FAO: 2003.

[172] This is explored in chapter seven of this thesis. See section 7.9.

[173] USAID: 2010.

[174] Adopted from an illustration by USAID in USAID: 2010.



On the strength of the above illustrations, I hereby wish to argue that if women are to avoid HIV infection, laws on inheritance and property rights should thus be revisited, revised or simply enforced. Lack of equal rights for women and property clearly excludes women from accessing resources that would help reduce their vulnerability to HIV and improve their ability to cope with the consequences of the epidemic. For as a meeting of the UN correctly argued, when women have enhanced access to ownership and control of land and property

rights, they have a greater range of choices, are far more able to exercise autonomy and, ultimately, are better able to protect themselves.[175]

4.7 CONCLUSION

This chapter has highlighted the importance of improving women's material conditions as a means to achieving their human capacities. The analysis in this chapter makes it obvious that the realisation of women's socio-economic rights is pivotal to the fight against HIV and AIDS. The chapter has also demonstrated the importance of the indivisibility and inter-relatedness of rights. This chapter has highlighted the key areas in which women's socio-economic inequality and inequities relating to access to health services and resources (including food and housing as determinants of health), gender-based violence and laws and practices affecting access to property, (including succession, inheritance and marriage) affect women in the face of the epidemic. It is clear from the discussion that if women are to live and survive through the epidemic, legal and policy reform in the above areas have to be given serious consideration. The next chapter examines the general normative framework on women's rights to equality, access to health, access to housing, access to property and protection against gender-based violence.

[175] See UNAIDS Meeting on women's inheritance, land and housing rights in the context of HIV/AIDS. The meeting took place at the 53rd session of the Commission on the Status on women on 12 March 2009, New York. Available at ww.unaids.org; UNAIDS, Land tenure, property and HIV/AIDS: Approaches for reducing infection and enhancing economic security – Available at www.unaids.org. (Accessed 10 April 2011).

CHAPTER FIVE

INTERNATIONAL AND REGIONAL NORMATIVE STANDARDS ON WOMEN'S RIGHTS IN THE CONTEXT OF HIV AND AIDS: GENERAL OBLIGATIONS

5.1 INTRODUCTION

The previous chapter demonstrated the importance of socio-economic rights within the context of women, HIV and AIDS. The previous also highlighted the link between gender based violence and HIV and AIDS. On this basis, and against the background of the feminist capabilities approach, the first part of this chapter generally examines the legal provisions on the right to equality,[1] the right to the highest attainable standard of health,[2] the right to adequate housing,[3] the rights relating to property and inheritance[4] and freedom from gender-based violence.[5] The second part of this chapter presents the general normative standards in relation to the realisation of socio-economic rights. Here, the thesis examines the concepts of minimum core,[6] the reasonableness test,[7] the obligations to respect protect and fulfil,[8]

[1] Section 5.2

[2] Section 5.3.

[3] Section 5.4

[4] Section 5.5.

[5] Section 5.6.

[6] Section 5.7.1.

[7] Section 5.7.1.

progressive realisation and available resources,[9] and violations.[10] In presenting the above, the author utilises the international and regional legal regime as espoused in the relevant treaties, declarations, consensus documents and court cases. Although these will sometimes cut across both civil and political rights and socio-economic rights, I shall focus on the latter. Below is an examination of the right to equality.

5.2. Right to equality and non-discrimination

I examined the centrality of the right to equality within the feminist capabilities approach in chapter three.[11] Despite separate provisions on equality and non-discrimination in human rights treaties, legal scholars and UN treaty bodies alike use the term interchangeably, or conflate it. It is beyond the scope and object of this thesis to delve into this debate. I use the terms interchangeably in this thesis. Suffice to say that various relationships exist between equality rights and socio-economic rights.[12]

[8] Section 5.7.3.

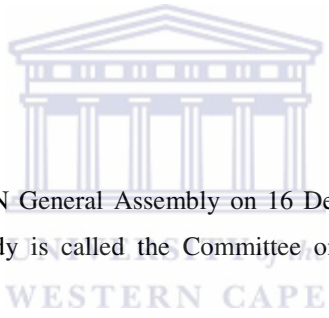
[9] Section 5.7.4.

[10] Section 5.7.5.

[11] Chapter three, Section 3.6.

[12] See, for example, UN Human Rights Committee (HRC), CESCR General Comment 18: Non-discrimination (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. No.HRI/GEN/1/Rev.6 (2003), 146.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[13] obliges each state party 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[14] In addition to the common provision on equality and non-discrimination in both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR),[15] the ICCPR contains an independent guarantee of equal and effective protection before and of the law.[16] The Universal Declaration of Human Rights (UDHR)[17] prohibits discrimination in the enjoyment of economic, social and cultural rights.[18] Non-discrimination is also provided for in the International Convention on the Elimination of All Forms of Racial Discrimination



[13] The ICESCR was adopted by the UN General Assembly on 16 December 1966. It entered into force on 3 January 1976. It treaty monitoring body is called the Committee on Economic and Social Cultural Rights (CESCR).

[14] Article 2(2). The principles of non-discrimination and equality are recognised throughout the Covenant. The preamble stresses the 'equal and inalienable rights of all' and the Covenant expressly recognises the rights of "everyone" to the various Covenant rights such as, *inter alia*, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

[15] The ICCPR was adopted the UN General Assembly on 16 December 1966. It entered into force on 23 March 1976. Its treaty monitoring body is called the Human Rights Committee (HRC).

[16] Article 26. See also, HRC General Comment 18: Non-discrimination (1989).

[17] The UDHR was adopted and proclaimed by the UN General Assembly in resolution 217 A (III) of 10 December 1948 in Paris.

[18] Articles 1 and 2(1) of the UDHR. See also the preamble, articles 1(3) and 55, of the Charter of the United Nations.

(ICERD),[19] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[20] the Convention relating to the Status of Refugees (Refugee Convention),[21] the Convention on the Rights of the Child (CRC),[22] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),[23] and the Convention on the Rights of Persons with Disabilities (CRPD),[24] The African Charter on Human and Peoples' Rights (African Charter),[25] the Protocol to the African Charter on the Rights of Women in Africa (African Women Protocol),[26] and the African Charter on the Rights and Welfare of the Child (African Children Charter).[27]

[19] The ICERD was adopted on 21 December 1965. It entered into force on 4 January 1969. See article 2 thereof.

[20] The CEDAW was adopted in December 1979. It entered into force on 3 September 1981. See article 2, 3 and 4. Its monitoring body is called the Committee on the Elimination of Discrimination Against Women (CEDAW Committee).

[21] The Refugee Convention was adopted on 28 July 1951. It entered into force on 22 April 1954. See article 3.

[22] The CRC was adopted on 20 November 1989. It entered into force on 26 January 1990. See article 2.

[23] The CMW was adopted on 18 December 1990. It entered into force on 1 July 2003. See article 7.

[24] The CRPD was adopted on 13 December 2006. It entered into force on 3 May 2008. See articles 5 and 6.

[25] The African Charter was adopted on 27 June 1981. It entered into force on 21 October 1986. See articles 2 and 3.

[26] The African Women Protocol was adopted on 11 July 2003. It entered into force on 25 November 2005. See article 2.

[27] The African Children Charter was adopted on 11 July 1990. It entered into force on 29 November 1999. See articles 3 and 4.

5.3 Right to the highest attainable standard of health

Different terms have been used to describe rights concerning health care.[28] The terms 'right to health', 'right to health protection' or 'right to health care' have all been advanced as sufficiently conveying the notion of entitlement to the protection of health and the provision of heath care under international law and domestic legal systems.[29] There is no serious conflict between the terms 'right to health', 'right to health protection' or 'right to health care'. Proponents of the terms 'right to health' or 'right to health care' or 'right to health protection' have argued that these terms are more accurate and more realistic than 'right to health' in that health itself cannot be guaranteed.[30] They argue that at best, the state can provide diagnostic, preventive, curative and rehabilitative services for the attainment of health.[31] The ultimate protection behind these normative terms is the realisation of the highest attainable standard of health. However, depending on the context, there may be good reasons

---

[28] Toebes, B., *The right to health as a human right in international law* (1998) [hereafter Toebes: 1998]; Toebes, B., 'Towards an improved understanding of the international human right to health' (1999) 21 *Human Rights Quarterly* [hereafter Toebes: 1999] 661–663. See also Ngwena, C., & Cook, RJ., 'Rights concerning health' in Brand, D., & Heyns, C., (eds) (2005) *Socio- economic rights in South Africa* (2005) [hereafter Ngwena & Cook: 2005] 107.

[29] Ngwena & Cook: 2005, 107.

[30] Roemer, R., 'The right to health care' in Fuenzalida-Puelma, HL., & Connor, SS., (eds) *The right to health in the Americas: A comparative constitutional study* (1989) 17–23 [hereafter Roemer: 1989].

[31] Roemer; 1989; Hannum, H., 'The UDHR in national and international law" (1998) 3 *Health and Human Rights* 145 153; Chapman, R., 'Core obligations related to the right to health and their relevance for South Africa' in Brand, D., & Russell, S (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) [hereafter Chapman: 2002] 35 38.

why a particular term is used.[32] I use the 'right to health' as it is more suitable to cover the detailed language and references to fundamental rights principles that are found in international treaties.

The Declaration of Alma-Ata proclaims that the attainment of the highest possible level of health is a 'most important worldwide social goal.'[33] Also, the Constitution of the WHO[34] provides for the right to health in its preamble.[35] The WHO definition has been justifiably

[32] Ngwena & Cook: 2005, 107. The authors argue that at an international level, there is a tendency to use the term ' the right to health' for the reason that it is more inclusive than ' the right to health care' or ' right to health protection', and has acquired more common usage. Leary concedes that the term 'right to health' might seem strange and absurd to the extent that no government, international organisation or individual can muster the capacity to guarantee a person's good health. See also Leary, V., 'The right to health in international human rights law' (1994) 1 *Health and Human Rights* 25 28–34.

[33] Para I. The Declaration was adopted at the International Conference on Primary Health Care, held in Alma-Alta, USSR (6-12 September 1978).

[34] The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wld Hlth Org*., 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.

[35] The States Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
>
> The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.
>
> The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

criticised as practically unfeasible.[36] Also, the UDHR proclaims the right to health.[37] However, the UDHR is not binding although it does lay a foundation for later core treaties. The ICESCR provides for the right to health.[38] The ICESCR provision on health deserves

---

> The achievement of any State in the promotion and protection of health is of value to all.
>
> Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.
>
> Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.
>
> The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.
>
> Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.
>
> Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

[36] See Chirwa, D., 'The right of access to essential medicine in international law: Its implications for the obligations of states and non-state actors' (2003) 19 *South African Journal on Human Rights* 541 545.

[37] Article 25 thereof.

[38] Article 12 of the ICESCR provides:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> (b) The improvement of all aspects of environmental and industrial hygiene;
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

particular mention as the most important provision for the realisation of the right to health.[39] The list in this provision is considered to be 'illustrative, non-exhaustive examples', rather than a complete statement of parties' obligations.[40]

The CEDAW also provides for the right to health.[41] It has a narrower focus than the health rights in the ICESCR as it only refers to health care services and not underlying health determinants.[42] Nevertheless, its provisions provide a regime that can be utilised to address structural inequalities that make women vulnerable to HIV and AIDS. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has interpreted and elucidated the content of this provision.[43] The CEDAW also provides for the particular problems faced by rural women.[44]

---

[39] Chapman: 2002, 40.

[40] Article 12(2).

[41] Article 12 provides:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
> 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

[42] Toebes: 1999, 55.

[43] Se, CEDAW General Recommendation 24: Women and health (1999).

[44] Article 14 provides:

> 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the

The CRC also contains a comprehensive provision on health.[45] The CRC enjoins states parties to strive to ensure that no child is deprived of his or her right of access to such health care services.[46]

---

non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels; b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications

[45] Article 24. The CRC was adopted by the UN General Assembly on 20 November 1989. It entered into force on 2 September 1990.

[46] The CRC emphasises that state parties should pursue full implementation of the right and to take measures to at *inter alia*, diminish infant and child mortality; ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; combating disease and

The African Charter espouses the right to health.[47] There is, however, no jurisprudence on women and HIV/AIDS from the African Commission on Human and Peoples' Rights (African Commission). In the absence of any jurisprudence on the subject, there is no point of reference in terms of interpretation by the African Commission on state obligation to women in this context. The African Commission, however, has found that states have an obligation to ensure that health care facilities and commodities including medicines are made available to citizens in the case of *Purohit and Moore v The Gambia* (*Purohit*). [48] Here, the applicants alleged, amongst other things, that the legislative regime in Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health[49] and the right of the disabled to special measures of protection in keeping with their physical and moral needs.[50] The African Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.[51] The Commission reiterated that mental health patients should be accorded special

malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water; ensure appropriate pre-natal and post-natal health care for mothers, and to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. See article 24 thereof.

[47] See article 16 of the African Charter. The African Charter, also known as the 'Banjul Charter', was adopted by the African Union in Nairobi, Kenya, in June 1981 and entered into force in October 1986.

[48] See Communication 241/2001 (2003) AHRLR 96 (ACHPR 2003). Decided at the 33rd ordinary session of the African Commission (15–29 May 2003).

[49] This was based on article 16 of the African Charter. See para 79 of *Purohit.*

[50] This was based on article 18(4) of the African Charter. See para 79 of *Purohit.*

[51] See para 80 of *Purohit.*

treatment to enable them to attain and sustain their optimum level of independence and performance.[52]

On the high levels of poverty in Africa, in *Purohit*, the African Commission correctly affirmed:[53]

> The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to *read into article 16* the obligation on part of states party to the African Charter should take *concrete and targeted steps*, while taking full advantage of its available resources, to ensure that the right to health is full realised in all aspects without discrimination of any kind.

The above position in *Purohit* provides a basis for the promotion of women's right to health in the context of HIV and AIDS in Africa. Moreover the African Commission was also emphatic of the obligation on the state to provide for analysis, diagnosis, treatment and rehabilitation.[54]

---

[52] See para 81 of *Purohit.*

[53] See para 84 of *Purohit.* My emphasis.

[54] See para 82 of *Purohit.*

The African Women Protocol[55] became the first document to provide for binding obligations on the right to health, which specifically mention HIV/AIDS.[56] The African Women Protocol has been hailed as a beacon of hope for women in Africa, especially in so far as it explicitly addresses HIV and AIDS.[57] The African Children Charter also provides for the right to health.[58]

---

[55] Adopted in Maputo in July 2003 and entered into force 25 November 2005. Available at http://www.africa-union.org. (Accessed 10 March 2006).

[56] Article 14 provides:

> 1. States Parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted. This includes:
>
> a) the right to control their fertility;
>
> b) the right to decide whether to have children, the number of children and the spacing of children;
>
> c) the right to choose any method of contraception;
>
> d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
>
> e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
>
> f) the right to have family planning education.
>
> 2. States Parties shall take all appropriate measures to:
>
> a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
>
> b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.

[57] For more on the African Women Protocol, see generally, Banda, F., *Women, law and human rights: An African perspective* (2005) Chapter three; Karugonjo-Segawa, R., 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2005) Research Partnership, Danish Research Institute for Human Rights; Kaniye-Ebeku, SA 'A new hope for African women: Overview of Africa's Protocol on Women's Rights (2004) 13 *Nordic Journal of African Studies* 264; Banda, F., 'Blazing a trail: The African Women's Protocol comes into force' (2006) 50 *Journal of African Law* 72; Amollo, R., 'A critical reflection on the African Women's Protocol as a means to Combat HIV/AIDS among Women in Africa.' *Unpublished master's thesis, University of Pretoria, 2006* [hereafter Amollo: 2006]*;* Amollo, R., 'The Protocol on Women's

5.3.1 International Guidelines on HIV/AIDS and human rights

More specifically on HIV/AIDS, the office of the UN High Commission for Human Rights (OHCHR) and The Joint United Nations Programme on HIV/AIDS (UNAIDS) formulated the *International Guidelines on HIV/AIDS and human rights* (Guidelines).[59] The guidelines build on expert advice to integrate the principles and standards of international human rights law

---

Rights in Africa: What does it say about gender-based violence and HIV/AIDS?' (2007) 2 *Iminyango Quarterly* 2.

[58] Article 14 provides:

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
   (a) to reduce infant and child morality rate;
   (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
   (c) to ensure the provision of adequate nutrition and safe drinking water;
   (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
   (e) to ensure appropriate health care for expectant and nursing mothers;
   (f) to develop preventive health care and family life education and provision of service;
   (g) to integrate basic health service programmes in national development plans;
   (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
   (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;
   (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

[59] UNAIDS & OHCHR *International Guidelines on HIV/AIDS and human rights*, 1997.

into the HIV/AIDS response.[60] They are non-binding but have been argued to form a 'soft law' bridge between 'hard law' international obligations and the practice of States.[61] The guidelines provide, *inter alia*, that states should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, and people living with HIV and AIDS.[62] It also provides that collaborations with and through the community should promote a supportive enabling environment for women, *inter alia*.[63]

In 2002, the OHCHR and the UNAIDS updated the Guidelines following the revision of the United Nations Declaration of Commitment on HIV/AIDS and the Doha Declaration on the TRIPS Agreement and Public health (Doha Declaration),[64] a year earlier. The revision was also meant to take into account the obligation of countries to provide antiretroviral treatment (ARVs) as part of the right to health as interpreted by the CESCR.[65] This resulted in the *Revised Guideline 6* (Revision) which specifically refers to HIV/AIDS treatment and

[60] Watchirs, H., 'A human rights approach to HIV/AIDS: Transforming international obligations into national laws' (2002) 22 *Australian Yearbook of International Law* 77 [hereafter Watchirs: 2002) 79–80

[61] Watchirs: 2002.

[62] Para 5.

[63] Para 8.

[64] Doha Declaration on the TRIPS Agreement and Public health, WTO Ministerial Declaration on the TRIPS Agreement and public health, WTO/MIN (01)/DEC/2, adopted on 14 November 2001.

[65] See CESCR General Comment 14: The right to the highest attainable standard ofhealth (2000) [hereafter CESCR General Comment 14].

recommends that countries enact legislation to provide for HIV-related goods, safe services and information to ensure, among other things, safe and effective medication.[66]

The Revision requires countries to ensure access to essential medications at affordable prices, and on a non-discriminatory, sustainable basis.[67] It further requires countries to take measures to ensure that all persons have access to continued and equitably distributed HIV-related goods, including ARVs and other safe effective medicines. It calls upon countries to pay a particular attention to vulnerable individuals and populations.[68] The Revision further recommends that countries increase their budgetary allocation in order to provide sustainable access to ARVs and other HIV/AIDS related goods.[69] Despite the framing of the Guidelines which recognises that the right to health must be achieved progressively over time, it states that countries have an immediate obligation to take steps as quickly as possible to ensure, among other things, access to treatment.[70]

5.3.2 Cairo and Beijing processes

The 1994 International Conference on Population and Development (ICPD) [71] set the stage for the implementation and consideration of women's health. One hundred and seventy nine states agreed to achieve a number of health-related goals by 2004, marked for the first time by

[66] UNAIDS & OHCHR *International guidelines on HIV/AIDS: Revised Guideline 6* (2002).

[67] As above.

[68] As above.

[69] As above, para (c).

[70] See preface to Revised Guideline 6.

[71] Held in Cairo, Egypt, 5–13 September 1994.

global indicators.[72] Treading in the steps of ICPD, in 1995, the world gathered for the Fourth World Conference on Women in Beijing.[73] Here, 189 states endorsed the Beijing Declaration and Programme of Action, which also focused on women's health.[74] Together, the Cairo and Beijing Processes continue to provide a framework for action on women's health including HIV and AIDS. For example, building on ICPD, states commit to increase women's access to appropriate, affordable and quality health care and services through specific measures.[75]

5.3.3 Millennium Development Goals

Millennium Development Goal 6 aims to halt and begin reversing 'the spread of HIV/AIDS' by 2015.[76] Although the Millennium Development Goals are not contained in a binding treaty format, it is argued that at least some of them - including goal 6 - have attained the status of

---

[72] Report of the International Conference on Population and Development (Cairo, 5-13 September 1994), U.N. Doc. A/CONF.171/13, 18 October 1994, UN G.A. Res. 49/128, 49 U.N. GAOR Supp. (No. 49) at 149, U.N. Doc.A/49/49 (1994), at chapter VII, objective 8.3.a. [ICPD]. ICPD also made critical normative strides by indicating that primary health care should include reproductive health care and that states should increase the accessibility, availability, acceptability and affordability of health-care services and facilities for all.

[73] 15 September 1995.

[74] Some of the issues targeted are inequalities and inadequacies in and unequal access to health care and related services and violence against women. Some of the participating African countries include: South Africa, Uganda, Ghana, Namibia, Tanzania, Togo, Zambia, Zimbabwe and Senegal. Most of these governments and civil society made statements and commitments that are available at http://www.un.org/womenwatch/daw/beijing/govstatements.html (Accessed 20 March 2011).

[75] Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, U.N. Doc. A/CONF.177/20 (1995) and U.N. Doc. A/CONF.177/20/Add.1 (1995), para. 106.

[76] See Goal 6. UN Millennium Development Goals, available at www.un.org/milleniumgoals (accessed 11 March 2008).

customary international law.[77] However, as it is formulated in brief terms, goal 6 does not provide enough guidance to states intent on adopting a human rights-based approach. In 2001, the UN General Assembly Special Session (UNGASS) went further by adopting the Declaration of Commitment on HIV/AIDS (Declaration), which provides for time-bound targets. Quantifiable targets have been set. For example, the Declaration states that by 2003, countries should have enacted, strengthened or enforced, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV and AIDS and members of vulnerable groups.[78]

Despite the fact that only one regional document – the African Women Protocol – expressly provides for women's right to sexual and reproductive health within the context of HIV/AIDS, the above analysis shows that there exists a sufficient normative basis to hold

[77] Alston, P., 'A human rights perspective on the Millennium Development Goals, Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development,' 2004; Dairiam, S., 'The relevance of the links between human rights, The Beijing Platform for Action and The Millennium Development Goals, paper prepared for the Expert Group Meeting on the achievements, gaps and challenges in linking the implementation of the Beijing Platform for Action and the Millennium Declaration and Millennium Development Goals,' 2005 ; Alston, P., 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 6 *Human Rights Quarterly* 755–829.

[78] Para 58 of the Declaration of Commitment on HIV/AIDS, UNGA Res S-62/2, 27 June 2001. Within the context of women and HIV/AIDS, in para 4, The Declaration also affirms that:

> Noting with grave concern that all people, rich and poor, without distinction of age, gender or race are affected by the HIV/AIDS epidemic, further noting that people in developing countries are the most affected and that women, young adults and children, in particular girls, are the most vulnerable.

states accountable on what they have done to enable women live in the midst of the epidemic. The next section examines the right to adequate housing.

5.4 Right to adequate housing

The CESCR has elucidated that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity.[79] The CESCR further highlighted that the right to adequate housing should be seen as the right to live somewhere in security, peace and dignity.[80] There is an inextricable linkage of this right with other human rights such as right to health,[81] safe environment,[82] land rights,[83] right not to be arbitrarily deprived of property,[84] right to non-discrimination[85] and right to gender equality.[86] The right

[79] See CESCR General Comment 4: Right to adequate housing (1991) [hereafter CESCR General Comment 4] para 7.

[80] CESCR General Comment 4, para 7.

[81] CESCR General Comment 4, para 8 (b).

[82] CESCR General Comment 4, para 8 (d).

[83] CESCR General Comment 4, para 8 (a).

[84] CESCR General Comment 4, para 8 (a).

[85] CESCR General Comment 4, para 9.

[86] CESCR General Comment 4, para 6.

to adequate housing is provided for in several instruments including; the UDHR,[87] the CERD,[88] the ICESCR,[89] the ICCPR,[90] the CEDAW, [91] and the CRC.[92] At the regional level,

[87] Article 25.1 states that 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

[88] Article 5(e) (iii) obliges States "to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of … (e) … (iii) the right to housing".

[89] Article 11.1 states that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.'

[90] Article 17 states that: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful atttacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.'

[91] Article 14.2(h) states that: 'States Parties shall undertake all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right … (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.'

[92] Article 16.1 states that: 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.' Also, article 27.3 states that: 'States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.'

the right to housing is also protected in the African Charter,[93] the African Women Protocol,[94] and the African Children Charter.[95]

Furthermore, the UN organised two world conferences in 1976 in Vancouver,[96] and in 1996 in Istanbul, on human settlements[97] during which declarations and action plans were adopted

[93] The African Charter of Human and Peoples Rights does not explicitly recognise the right to adequate housing, but several other recognized rights, such as the right to health (article 16) and the right of peoples to a general satisfactory environment favorable to their development (Article 24), can be interpreted as protecting the right to adequate housing. The African Charter of Human and Peoples Rights also provides that African states should realise the right to adequate housing that they have recognised at the international level, including by accepting the International Covenant on Economic, Social and Cultural Rights (article 60)The African Commission on Human and Peoples' Rights (ACHR) has interpreted the right to housing in the *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria (SERAC Case)* (155/96) (2003) 10 IHRR 282 (ACmHPR) – see para 60.

[94] The Protocol of the African Charter of Human and Peoples' Rights on the Rights of Women in Africa is explicit. Article 16 provides that:

> 'Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.'

[95] The African Charter of the Rights and Welfare of the Child is more explicit. The states that have accepted it commit themselves to taking all appropriate measures, according to their means, to assist parents and other person responsible for the child, and to provide, in case of need, programs of material assistance and support, in particular regarding housing (article 20).

[96] Section III, §8 of the Vancouver Declaration, adopted by the United Nations Conference on Human Settlements, the governments declared that:

> Adequate shelter and services are a basic human right which places an obligation on Governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programs of self-help and community action. Governments should endeavour to remove all impediments hindering attainments of these goals. Of special importance is the elimination of social and racial segregation, inter alia, through the creation of better balanced communities, which blend different social groups, occupation, housing and amenities.

with the purpose of solving the problems of access to adequate housing in the world. Many other international declarations have also denounced the practice of forced evictions.[98]

5.5 Rights to property and inheritance

Women's right to property and inheritance can be linked with the right to housing. This means that the legal provisions above, relating to housing, apply when elucidating women's right to property and inheritance especially in respect of the ICESCR, ICCPR and CRC. The CEDAW provides a more express position.[99] The African Charter also provides for the right

---

[97] The heads of state and of government, assembled at Istanbul (Turkey) in 1996, on the occasion.

of the second United Nations Conference on Human Settlements (Habitat II), adopted a declaration in which they committed themselves, inter alia, to:

> ensuring adequate shelter for all and making human settlements safer, healthier and more livable, equitable, sustainable and productive,(§ 1)

And they promised:

> the full and progressive realization of the right to adequate housing as provided for in international instruments. To that end, we shall seek the active participation of our public, private and non governmental partners at all levels to ensure legal security of tenure, protection from discrimination and equal access to affordable, adequate housing for all persons and their families (§ 8)

[98] For example, Chapters 7, 6 and 9(b) of Agenda 21, adopted at the 1992 United Nations Conference on Environment and Development, speaks of:

> Right to adequate housing as a basic human right declaring that people should be protected by law against unfair eviction from their homes or land.

[99] Article 16(1)(h) requires signatories to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a basis of equality

to property.[100] The African Women Protocol is explicit on inheritance.[101] Other relevant standards are found in the Platform for Action adopted at the 1995 Fourth World Conference on Women.[102]

In a review by UN Habitat of numerous international declarations and documents, several aspects related to property and inheritance rights were identified, including women's rights to be free from discrimination, have an adequate standard of living and adequate housing, maintain financial independence; earn a livelihood, and own, manage, and dispose of property.[103]

---

of men and women. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property…"

[100] Article 14.

[101] Article 21(1) protects the right to inheritance in these terms:

> A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

[102] United Nations Commission on Human Rights Resolution 2002/49 on Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing. Available at http://ww2.unhabitat.org/programmes/landtenure/49.asp. (Accessed 12 January 2011).

[103] United Nations Centre for Human Settlements. Women's Rights to Land, Housing and Property in Post-conflict Situations and During Reconstruction: A Global Overview. Nairobi: UNCHS, 1999, 22.

5.6 Freedom from gender-based violence

I analysed the link between women, HIV, AIDS and gender-based violence in chapter four.[104] Various UN instruments espouse freedom from violence (generally) including the ICCPR,[105] the ICESCR,[106] and the CRC.[107] The CEDAW proscribes violence in its ban on discrimination.[108] Thus, the CEDAW defines gender-based violence as part of discrimination.[109] That is, violence that is directed against a woman because she is a woman or that affects women disproportionately.[110] It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[111] The CEDAW Committee has highlighted that gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.[112] At regional level, freedom from violence is espoused in the African Charter,[113]

[104] Chapter four, section 4.5.

[105] The right to life, and the right to liberty and security of persons in articles 6 and 9. It includes the ban on discrimination in articles 16 and 26.

[106] The right to just and favourable conditions of work in article 7.

[107] Articles 2, 3, 6, 16,19, 34 and 37.

[108] Articles 2, 3 and 4.

[109] Article 1 of CEDAW.

[110] Article 1 of CEDAW.

[111] Article 1 of CEDAW.

[112] CEDAW General Recommendation 19: Violence against Women (1992) para 6.

the African Women Protocol,[114] and the African Children Charter.[115] The next part of this chapter discusses the general obligations arising in respect of the rights mentioned above from a socio-economic rights perspective.

5.7 GENERAL OBLIGATIONS TO REALISE SOCIO-ECONOMIC RIGHTS

In this section, I shall examine the general legal obligations placed upon the state to realise socio-economic rights. I intend to inspect the concepts of minimum core content (and the reasonableness test), the obligations to 'respect', 'protect' and 'fulfil', available resources, progressive realisation and what amounts to a violation.[116]

5.7.1 Minimum core obligations

The core content of a right, also called the 'minimum core', minimum threshold or 'essential content' entails a definition of the absolute minimum needed without which the right would be unrecognisable, meaningless and lose its *raison d'être*.[117] It is aimed at protecting

[113] Articles 2, 4 and 5.

[114] Articles 2,3, 4, 5,11 and 17.

[115] Articles 3, 4, 10, 16, 27 and 29.

[116] See Chapman, A., 'Monitoring socio-economic rights: A violations approach' (1998) 1 *ESR Review* 1.

[117] The term is borrowed from CESCR General Comment 3: Nature of States parties obligations (1990) [hereafter CESCR General Comment 3] paras 9 and 10. See also Guideline 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (reprinted in (1998) 20 *Human Rights Quarterly* 691 [hereafter Maastricht Guidelines]. For more on the minimum core on health, see, Chapman, A., 'Core obligations related to the right to health and their relevance for South Africa' in Brand et al: 2002, 35 37; De Vos, P., 'The economic and social rights of children and South Africa's transitional Constitution' (1995) 10 *SA Public Law* 233 251; Leckie, S., 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights (1998) 20 *Human Rights Quarterly* 81 101–102; Bilchitz, D., 'Towards a reasonable

vulnerable groups into which women fall. Thus, minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights rests with the state.[118] Hence, a state in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, *inter alia*, is considered as failing to discharge its obligations under the ICESCR.[119] Here, a state pleading resource constraints to meet a minimum core, must demonstrate that every effort was made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those obligations.[120] Bilchitz rightly argues that the minimum core obligation protects people's

approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1[hereafter Bilchitz: 2003]; Pieterse, M., 'Resuscitating socio-economic rights: Constitutional entitlements to health care services' (2006) 22 *South African Journal on Human Rights* 473; Bilchitz, D., 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands (2006) 7 *ESR Review* 2; Bollyky, TJ., 'R if C > B + P: A paradigm for judicial remedies of socio-economic rights violations' (2002) 18 *SAJHR* 161 184; Dankwa, V et al., 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 717–718 [hereafter Maastricht Guidelines]; Nicholson, C., 'The right to health care, the best interests of the child and AIDS in South Africa and Malawi' (2002) 35 *CILSA* 351 360; Liebenberg, S., 'Socio-economic rights' in Chaskalson, M et al (eds) *Constitutional law of South Africa* (1999) ch 41 43; Russell, S., 'Minimum state obligations: International dimensions' in Brand et al: 2002, 19; Scott, C., & Alston, P., 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *SAJHR* 206 250; Currie, I., 'Bill of Rights jurisprudence' (2000) *Annual Survey of SA Law* 24 57; Toebes, B., 'Towards an improved understanding of the international human right to health' (1999) 21 *Human Rights Quarterly* 661 676–677.

[118] CESCR General Comment 3, para 9.

[119] CESCR General Comment 3, para 43.

[120] CESCR General Comment 3, para 10.

urgent threshold interests in survival, 'as the inability to survive wipes out all possibility for realising the sources of value in the life of a being'.[121]

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights espouses the ideal that state parties be obligated to ensure respect for minimum subsistence rights for all regardless of their level of economic development.[122] This position was extended in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which argued that failure to satisfy minimum core obligations violated the ICESCR, and that states had minimum core obligations irrespective of the national availability of resources or other factors or difficulties.[123]

The minimum core within the context of health entails access to health facilities, goods and services on a non-discriminatory basis especially for vulnerable or marginalised groups.[124] It also includes access to the minimum essential food which is sufficient and nutritionally adequate and safe, to ensure freedom from hunger to everyone and access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water. [125] Furthermore, it entails the provision of essential drugs, the equitable distribution of all health facilities, goods and services and the adoption and implementation of a national public health strategy and

[121] Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) [hereafter Bilchitz: 2007]187.

[122] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' E/CN.4/1987/17 [hereafter Limburg Principles] paras 25 and 28.

[123] Maastricht Guidelines, para.9.

[124] CESCR General Comment 14, para 44.

[125] CESCR General Comment 14, para 44.

plan of action on the basis of epidemiological evidence.[126] It also includes related aspects 'of comparable priority'.[127] All these aspects are of direct and indirect application and relevance to women, HIV and AIDS. Within the context of South Africa, a new concept in contrast to the minimum core has emerged – the reasonableness test. I shall discuss this concept here below.

5.7.2 The reasonableness test – a South African approach

Although the minimum core concept is endorsed by the CESCR, it has been a source of contention within the context of South Africa. The South African Constitutional Court has rejected this approach in preference for the 'reasonableness' test. In both the cases of *Government of the Republic of South Africa v Grootboom* (*Grootboom*)[128] and *Minister of Health and Others v Treatment Action Campaign and Others* (*Treatment Action Campaign*)[129] the Constitutional Court was urged by the *amici curiae* [130] to adopt the concept of a 'minimum core obligation' in assessing the state's compliance with the positive duties

[126] See CESCR General Comment, para 43.

[127] See CESCR General Comment 14, para 44. These include access to reproductive, maternal (pre-natal as well as post-natal) and child health care; provision of immunisation against the community's major infectious diseases; measures to prevent, treat and control epidemic and endemic diseases; provision of education and access to information concerning the main health problems in the community, including methods of preventing and controlling them and provision of appropriate training for health personnel, including education on health and human rights.

[128] 2000 (1) SA 46 (CC).

[129] 2002 5 SA 721 CC.

[130] In *Grootboom*, the joint *amici* were the Community Law Centre (UWC) and the South African Human Rights Commission. In *Treatment Action Campaign*, the *amici* were the Community Law Centre (UWC) and the Institute for Democracy in South Africa.

imposed by sections 26 and 27 of the Constitution. In the *Grootboom* case, although the parties had based their arguments on the right of children to shelter in terms of section 28(1)(c) of the Constitution, the *amici* broadened the issues before the Constitutional Court to include a consideration of section 26 of the Constitution.[131] They argued that section 26(1) read with subsection (2) imposes a minimum core obligation on the state to ensure that those who are truly homeless and in crisis receive some rudimentary form of shelter. The *amici* located the minimum core obligation at one of a continuum of positive obligations imposed on the state by section 26(2) to realise progressively the right in section 26(1) of everyone to have access to adequate housing.[132] The Constitutional Court rejected this approach.

Following the Constitutional Court's rejection of the minimum core in the *Grootboom* case, the *amici* in the *Treatment Action Campaign* case located the minimum core in the first subsection of section 27(1) of the Constitution. They argued that every individual is entitled to a basic core of health care services comprising the minimum necessary for a dignified human existence. In the context of the *Treatment Action Campaign* case, it was argued that this minimum core should be interpreted in the light of the value of human dignity, and should include the provision of Nevirapine[133] to pregnant women with HIV and their newborn babies.

[131] *Grootboom*, para 18.

[132] See submissions on behalf of the Amici Curiae, 10 September 2002, para 27.

[133] Nevirapine, also marketed under the trade name Viramune (Boehringer Ingelheim), is a non-nucleoside reverse transcriptase inhibitor (NNRTI) used to treat HIV-1 infection and AIDS. It is a fast-acting and potent antiretroviral drug long since used worldwide in the treatment of HIV/AIDS and registered in South Africa since 1998. In January 2001 it was approved by the World Health Organization for use against intrapartum mother-to-child transmission of HIV, i.e. transmission of the virus from mother to child at birth. It was also approved for such use in South Africa.

In reaction to the arguments of the *amici* in *Grootboom* and *Treatment Action Campaign*, the Constitutional Court raised a number of principled, textual, pragmatic and institutional objections to the concept.[134] The major principled objection raised by the Constitutional Court's to the concept of a minimum core obligation is the fact that groups are differently situated and their socio-economic needs vary according to their different contexts.[135] As such, the court adopted the standard of 'reasonableness' as contrasted with the 'minimum core'. According to the South African Constitutional Court, therefore, the core inquiry was whether the measures taken by the State to realise socio-economic rights were reasonable.[136] The Constitutional Court added:[137]

> A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could have been adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do this, this requirement is met.

The Constitutional Court has indicated that it will assess the reasonableness of the state's conduct in light of the social, economic and historical context, and consideration will be given to the capacity of institutions responsible for implementing the programme.[138] According to

[134] Liebenberg, S., *Socio-economic rights adjudication under a transformative constitution* (2010) 149.

[135] *Grootboom,* paras 32–33. For more on this, see Liebenberg: 2010, 149–150.

[136] *Grootboom*, para 33.

[137] *Grootboom*, para 41.

[138] *Grootboom*, para 43.

the Constitutional Court therefore, a reasonable government programme in the context of socio-economic rights will have the following features:[139]

a) It must be capable of facilitating the realisation of the right;[140]
b) It must be comprehensive, coherent, co-ordinated;[141]
c) Appropriate financial and human resources must be made available for the programme;[142]
d) It must be balanced and flexible[143] and make appropriate provision for short-medium-and long-term needs;[144]
e) It must be reasonably conceived and implemented;[145]
f) It must be transparent, and its contents must be made known effectively to the public;[146] and
g) It must make short-term provision for those whose needs are urgent and who are living in intolerable conditions.[147]

The Constitutional Court's further elaborated:[148]

[139] *Grootboom*, para 41.

[140] *Grootboom*, para 41.

[141] *Grootboom*, paras 39,40.

[142] *Grootboom*, para 39.

[143] *Grootboom*, paras 68,78,95.

[144] *Grootboom*, para 43.

[145] *Grootboom*, paras 40–43.

[146] *Treatment Action Campaign*, para 123.

[147] *Grootboom*, paras 44,64,68,99; *Treatment Action Campaign*, para 78.

[148] *Grootboom*, para 44.

> To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving the realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

The Constitutional Court emphasised that human dignity is the animating value of the reasonableness standard of review in the context of socio-economic rights:[149]

> It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.

The above rejection of the concept of minimum core obligations has been validly criticised.[150] It has been questioned whether the Constitutional Court's 'reasonableness review' jurisprudence sufficiently defines the content of the relevant socio-economic rights,[151] and

[149] *Grootboom*, para 83.

[150] See, for example, Scott, C., & Alston, P., 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *SAJHR* 206 244–245; Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development* 159; Bilchitz, D., 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484; Bilchitz: 2003; Bilchitz: 2007.

[151] See for example, Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 410–411.

protects those who are experiencing a severe deprivation of minimum essential levels of basic socio-economic goods and services.[152]

More recently, in the case of *Mazibuko v City of Johannesburg and Others* (*Mazibuko*),[153] the Consitutional Court had to deal with the question of whether the City of Johannesburg acted reasonably by restricting the free basic water supply to all residents to the minimum standard of 25 litres per person per day.[154] The applicants[155] in this case argued that the policy was unreasonable.[156] The Constitutional Court dismissed the arguments of the Phiri residents that the free basic water supply of 25 litres per person per day was insufficient to meet their basic needs and thus inconsistent with section 27 of the Constitution.[157] On the subject of reasonableness, the Constitutional Court said:[158]

---

[152] For further reading, see Liebenberg, S., *Socio-Economic Rights adjudication under a transformative constitution* (2010) [hereafter Liebenberg: 2010] 163–165.

[153] *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* [2009] ZACC 28.

[154] *Mazibuko,* para 6.

[155] Five residents of Phiri in Soweto.

[156] They identifed the following considerations as supporting this submission: the fact that 6 kilolitres per month is allocated to both rich and poor; the fact that the amount is allocated per stand rather than per person; the fact that the 6 kilolitre free water policy was based on a misconception in that the City did not consider that it was bound to provide any free water to citizens; that the 6 kilolitre amount is insufficient for large households and finally that the 6 kilolitre amount is inflexible. See *Mazibuko* para 82.

[157] *Mazibuko,* para 169.

[158] *Mazibuko,* para 56.

> The applicants' argument that this Court should determine a quantity of water which would constitute the content of the section 27(1)(b) right is, in effect, an argument similar to a minimum core argument though it is more extensive because it goes beyond the minimum.46 The applicants' argument is that the proposed amount (50 litres per person per day) is what is necessary for dignified human life; they expressly reject the notion that it is the minimum core protection required by the right. Their argument is thus that the Court should adopt a quantified standard determining the content of the right not merely its minimum content. The argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*.

Liebenberg[159] compellingly attacks the Constitutional Court's treatment of the right of access to sufficient water.[160] The author appositely argues that the right to water was instead subsumed within the overarching qualification of unreasonableness in section 27(2).[161] I am in accord with Liebenberg on this argument. The Constitutional Court should have treated the right to water independently rather that simply lump it with other rights. This approach would have enhanced what reasonableness really means within the context of access to water in South Africa. Furthermore, the Constitutional Court abdicated its duty to interpret the right in a manner attentive to the needs of the most marginalised, which includes women. Moreover the Constitutional Court was alive to the inequality of access to water in South Africa, and further mentioned women:[162]

> While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, *especially women*, spend hours laboriously collecting their daily supply of water

[159] Liebenberg: 2010, 467.

[160] Section 27(1)(b) of the Constitution which provides that everyone has the right to have access to sufficient water.

[161] Liebenberg: 2010, 467.

[162] *Mazibuko,* para 2. My emphasis.

> from streams, pools and distant taps. In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water.

I, therefore, wish to state that the Constitutional Court's approach was not only deferential, but also cursory. Consequently, I share Liebenberg's view that the decision represents an avoidance of the special responsibility of the courts, particularly the Constitutional Court, to interpret the normative standards underpinning socio-economic rights.[163] In regard to the reasonableness standard, Liebenberg persuasively suggests that developing a concept of reasonableness which is integrally linked to a substantive conception of socio-economic rights can help avoid unnecessary litigation.[164] The connection between the feminist capabilities approach and substantive notions of socio-economic rights needs no further emphasis.

Nevertheless, as a threshold for assessing state action, the reasonableness standard still presents a crucial framework which resonates with feminist principles of substantive equality. It also speaks to a framework similar to that envisaged by the capabilities approach, that which seeks to enable women to achieve their capabilities through the provision of material and other needs. As applied to women, HIV and AIDS, the reasonableness standard enjoins the state to employ measures responsive to their needs. It also focuses on the state obligation to account. Furthermore, the reasonableness standard places dignity at its core, thereby complementing the feminist capabilities approach which also pitches dignity at its core. Against the above background, I here below examine the tripartite obligations placed on the state to realise socio-economic rights.

[163] Liebenberg: 2010, 467.

[164] Liebenberg: 2010, 480.

5.7.3 Obligations to 'respect', 'protect' and 'fulfil'

What is now referred to as the 'tripartite typology of interdependent duties' was originally conceived by Shue. Shue aptly argued that all rights impose obligations on states, first, to avoid depriving citizens of existing enjoyment of rights, secondly, to protect them from violations of their rights by third parties and, thirdly, to aid the deprived.[165] The tripartite obligations to 'respect', 'protect' and 'fulfil', therefore, form the levels of state obligations that every right, including health, must have. This interpretation of state obligations has been reflected by the CESCR and in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[166] The duty to respect focuses on preventing the state from unduly intervening in the enjoyment of a particular freedom or entitlement.[167] The duty to protect enjoins the state to prevent third parties from unduly interfering in the right-holders enjoyment of a particular freedom or entitlement. It therefore places emphasis on state action necessary to prevent, stop or obtain redress or punishment for third party interference.[168] The

---

[165] See Shue, H., *Basic rights: Subsistence, affluence and U.S Foreign Policy* (1980); Shue, H., 'The interdependence of duties' in Alston, P., & Tomasevski, K., (eds) *The Right to Food* (1984) [hereafter Alston et al: 1984] 83–95. The typology indicates unequivocally that socio-economic rights are capable of imposing concrete standards against which compliance may be measured. See also, Hunt, P., *Reclaiming social rights: International and comparative perspectives* (1996) 108 133; Scott, C., & Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *Univ Pennsylvania LR* 1 73; Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 110; Toebes: 1999, 677; Van Hoof, GJH., 'The legal nature of economic, social and cultural rights: A rebuttal of some traditional views' in Alston et al:1984, 107.

[166] CESCR General Comment 3; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (reprinted in (1998) 20 Human Rights Quarterly 691. Guideline 6.

[167] CESCR General Comment 3; Maastricht Guidelines para 6.

[168] CESCR General Comment 3. Maastricht Guidelines para 6.

duty to fulfil imposes obligations to facilitate, provide and promote access to rights. Here, the state is expected to be a proactive agent, capable of bringing about an increase in access to a range of economic and cultural rights.[169] The precise obligations of states vary from treaty to treaty, but in general, states parties can be regarded as obliged to 'respect', 'protect' and 'fulfil' the rights contained within the treaty.[170]

The obligations to respect and protect tend to focus on legislative measures, while the obligation to fulfill combines aspects of law and policy. I wish to argue that these obligations are significant in the context of women, HIV and AIDS because it enjoins the state not only to ensure the law *de jure* but also the law *de facto*. Furthermore, given the nature of the challenges presented by HIV and AIDS, for example, the provision of ARVs, law and policy should be seriously pursued by the state. However, this is imperative is always confronted by the lack of resources, especially in most African countries. Hence, I here below examine the concepts of progressive realisation and available resources.

5.7.4 Progressive realisation and available resources

Realising that states may be constrained by resources, necessitated the qualification of taking measures to the maximum of available resources. Thus, the state should take steps individually and through international assistance and co-operation (especially economic and technical) by all appropriate means, including particularly the adoption of legislative

[169] CESCR General Comment 3. Maastricht Guidelines para 6.

[170] See CESCR General Comment 14. paras 34, 35 and 36.

measures to the maximum of their available resources.[171] In essence, even where available resources are seen to be inadequate, a state is still obliged to ensure the widest possible enjoyment of rights under prevailing circumstances, and to ensure that resource constraints did not reduce obligations to monitor the realisation of economic rights and to devise strategies and programmes for their promotion.[172] Thus the CESCR succinctly explained:[173]

> [T]he fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'etre*, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in question.

In this regard, generally, states are required to 'take steps' with a view of achieving the full realisation of the right to health. The duty to 'take steps' is therefore an immediate one.[174] The principle is said to reflect the recognition by the drafters of the ICESCR that most state parties would not be able to realise fully all economic, social and cultural rights immediately upon ratification or even in a short period of time.[175] States are also required to 'undertake to

[171] See CESCR General Comment 3, para 10; Maastricht para 6.

[172], CESCR General Comment 3, para. 11.

[173] CESCR General Comment 3 at para 9.

[174] See CESCR General Comment 3. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (reprinted in (1998) 20 Human Rights Quarterly 691. Guideline 6.

[175] Chapman, A., & Russell, S., (eds) *Core obligations: Building a framework for economic, social and rultural Rights* (2002) [hereafter Chapman & Russell: 2002] 4.

guarantee' and to exercise rights 'without discrimination'.[176] The steps must be taken 'expeditiously' and 'effectively'.[177] The steps must also be 'appropriate' under the circumstances.[178] Also, any 'deliberate retrogressive measures' have to be fully justified in the context of full use of the 'maximum available resources'.[179] Hence, the discussion below is an analysis of what amounts to a violation in the context of socio-economic rights.

5.7.5 Violations

The analysis of what amounts to a violation is referenced against inability and unwillingness,[180] burden of justification,[181] retrogressive measures,[182] acts of commission [183] and acts of omission.[184] Violations of the obligation to respect would, therefore, include deliberately withholding or intentionally misrepresenting information vital to health

[176] See CESCR General Comment 3, para 1.

[177] See CESCR General Comment 3 para 9.

[178] See CESCR General Comment 3 para 9.

[179] See CESCR General Comment 3, para 9.

[180] CESCR General Comment 14, para 47.

[181] CESCR General Comment 14, para 47.

[182] CESCR General Comment 14, para 48.

[183] CESCR General Comment 14, para 48.

[184] CESCR General Comment 14, para 49.

protection or treatment,[185] adopting and maintaining laws and policies that interfere with reproductive rights,[186] imposing discriminatory measures as a state policy,[187] maintaining discriminatory practices related to women's health status and needs.[188] On this basis, I wish to argue that the following would amount to violations within the context of women, HIV and AIDS: failure to implement gender responsive laws and policies in health care provision, national health policies and plans, insufficient expenditure and disproportionate investment of public resources in ways which leave out women's concerns, failure to focus government initiatives on rectifying existing imbalances in the provision of health services and failure to undertake sufficient public health measures to protect against and combat HIV/AIDS.

5.8 CONCLUSION

This chapter examined the legal provisions on the rights to equality, access to health, access to adequate housing, access to property and freedom from gender-based violence. This chapter also presented the general obligations placed upon the state to realise socio-economic rights. Furthermore, the chapter evaluated the concepts of minimum core and the reasonabless test as developed in South African jurisprudence. The chapter also examined the tripartite obligations placed on the state to respect, protect and fulfil rights. The chapter further examined the concepts of progressive realisation, available resources and violations within the

[185] CESCR General Comment 14, para 50.

[186] CESCR General Comment 14, para 50.

[187] CESCR General Comment 14, para 50.

[188] CESCR General Comment 14, para 50.

context of socio-economic rights. In conclusion therefore, there exists general normative standards on realising women's rights in the context of HIV/AIDS. The next chapter examines the specific obligations arising within the context of women, HIV and AIDS using the above rights.

CHAPTER SIX

SPECIFIC OBLIGATIONS RELATING TO WOMEN, HIV AND AIDS: HEALTH, HOUSING, PROPERTY AND FREEDOM FROM GENDER-BASED VIOLENCE

6.1 INTRODUCTION

Against the background of chapter five, this chapter examines the specific obligations arising from respective treaty-bodies, interpretations in General Comments, General Recommendations and Concluding Observations. This chapter also utilises regional and international court decisions and Special Rapporteur reports. The evolving body of rights critical to the realisation of women's health in the context of HIV and AIDS can be summed up in the context of the freedoms and entitlements within sexual and reproductive rights.[1] Freedoms in this context would include freedom from all forms of violence, including protection from sexual violence, harmful cultural practices and non-consensual contraceptive methods (for example, forced sterilisation and forced abortions). Entitlements would include access to health care services and the underlying determinants of health such as access to essential medicines and treatment, access to adequate housing, adequate food and nutrition and access to property. Together, the realisation entitlements provide equality of opportunity for women to enjoy the highest standard of health. Thus, these entitlements provide the capabilities that women need in order to survive amidst the epidemic. On this basis, specific obligations arising upon the state are examined here below.

[1] Hunt, P & De Mesquita, JB., 'The rights to Sexual and Reproductive Health', 2007, UNFPA [hereafter Hunt & De Mesquita: 2007] 7; CESCR General Comment 14: The right to the highest attainable standard of health (2000) [hereafter CESCR General Comment 14] para 34 is to the effect that the right to health includes reproductive health.

6.2 SPECIFIC OBLIGATIONS

Quintessentially, for a state to be said to be responding to women's needs in the context of HIV and AIDS, the state should pay attention to the principle of substantive equality in the sense that all women's functions and capabilities must be nurtured. Furthermore, the state is under an obligation to use temporary measures (affirmative action) in all the four thematic areas I present in this thesis.[2] In that regard, the state must eliminate discrimination in the law (*de jure*) and in fact (*de facto*) as I argue below.

Generally, I wish to argue that for the state to eliminate discrimination in both fact and law, it must address accountability and have in place policy frameworks and health plans. I further argue that the state should enable access to 'free' health services, including sexual and reproductive health services and create access to confidential testing and counseling. Furthermore, the state must facilitate access to essential medicines and pay regard to the ethos of confidentiality, privacy and respect. Also, the state must eliminate harmful cultural practices, ensure the availability of skilled personnel and guarantee availability of adequate food and nutrition. Additionally, the state must enable access to information, education and communication and enable the use of community participation and advocacy.

Moreover, the state should enable women's access to adequate housing, facilitate women's access to property and inheritance rights in family relations and have express legal and implementation guarantees on freedom from sexual and domestic violence. Below are the explicit obligations within the ambit of equality, access to health services, access to adequate

[2] For more on temporary measures, see article 4 of CEDAW; CEDAW General Recommendation 25: Temporary special measures (2004). See also Boerefijn, I et al., 'Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women' (2003).

housing, guarantees of rights relating to property and inheritance in family relationships and freedom from gender-based violence.

6.2.1 Elimination of discrimination in law

The state must eliminate discrimination through, *inter alia*, legislation as a starting point. The definition of discrimination against women in CEDAW encompasses a broad range of issues.[3] All these issues have a bearing for women in the context of HIV and AIDS. Hence, the starting point would be that a state should do everything in its power to provide for both *de jure* and *de facto* equality.[4] Women and men have an equal right to enjoy the highest standard of health. The CESCR has emphasised that elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on the basis of equality.[5] Women by virtue of their lesser status ascribed by tradition and custom are often denied equal enjoyment

[3] Article 1 provides that the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

[4] See article 2 which provides that states parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

[5] General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) [hereafter CESCR General Comment 16] para 3.

of these rights.[6] My argument, therefore, is that before *de facto* equality can be realised, at the very least, there must be in place, express *de jure* equality. Moreover *de jure* guarantees also have the additional advantage as a basis for litigation.

6.2.2 Access to health services

It is important to note that the provision of health without discrimination is an immediate obligation [7] and non-derogable.[8] Hence, the state must eliminate discrimination in access to health care services.[9] Access to sexual and health services are key to women's health in the context of HIV and AIDS, because it provides an avenue to deal with other STIs like syphilis and gonorrhoea, both of which are co-efficient with HIV and AIDS, especially in women. In terms of discrimination in access to health, the ground of 'health status' now includes HIV and AIDS.[10] Within the context of HIV and AIDS, diseases like HIV and AIDS that were

---

[6] Para 5 of CESCR General Comment 16. The Committee further refers to *de facto* (substantive) and *de jure* (formal) equality(para 7) and the need for temporary measures as a way of realising substantive equality for women (para 15).

[7] CESCR General Comment 14, para 30.

[8] CESCR General Comment 14, para 43.

[9] Article 12(11). The Women's Convention reconceptualises and extends the scope of the right to health to cover women's reproductive needs, thereby eliminating a fundamental source of discrimination in the definition and scope of the right. CEDAW further mandates states parties 'to eliminate discrimination against women in the field of health care in order to ensure ... access to health care services.'

[10] CESCR General Comment 14. para 18.

formerly unknown, now have to be taken into account.[11] The prohibited ground of 'sex' has evolved to encompass the social construction of gender stereotypes, prejudices and expected roles that can and do create barriers to equality in economic, social and cultural spheres.[12] The state should, therefore, ensure equality and non-discrimination in fact. Principles of equality should inform all state actions in law, policy and practice regarding the status of women. In this context, it is to be applied substantively, that is, within the context of women's health, HIV and AIDS.

It is imperative on the state to ensure access to health services. The conditions prevailing in a state should bear the essential elements of availability, accessibility, acceptability and quality.[13] The right to health in all its forms and at all levels should contain the above interrelated and essential elements. This is underscored by Hassim et al who rightly argue that 'access to medicines can only be assured if a sustainable supply of affordable medicines can be guaranteed – that is, a regular ongoing supply of affordable medicines'.[14] Similarly, I am in accord with Yamin who points out that, from a public health perspective, access to

[11] CESCR General Comment 14, para 10.

[12] CESCR General Comment 20 on Non Discrimination in Economic, Social and Cultural Rights, 2009, para 20. Furthermore, the International Covenant Civil Political Rights (ICCPR) provides for equality and non-discrimination (Articles 2 and 3). It further provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26). The Human Rights Committee (the treaty monitoring body of the ICCPR) has elucidated what equality between men and women entails in CESCR General Comment 28: Equality of rights between men and women, 2000.

[13] See CESCR General Comment 14, para 12

[14] Hassim, et al., *Health and democracy: A guide to human rights, health law and policy in post-apartheid South Africa* (2007) 438.

essential drugs depends on (1) rational selection and use of medicines, (2) sustainable adequate financing, (3) affordable prices, and (4) reliable health and supply systems'.[15]

Thus, for women, the state must provide HIV and AIDS health care facilities such as testing centres and counselling services. The state must also accompany this with the provision of safe and portable water, given the place of water in HIV and AIDS treatment and in light of the fact that women are expected to provide it in homes.[16] The state must also ensure that the health services highlighted above are accessible.[17] These services must also be acceptable to

[15] Yamin, AE., ' Not just a tragedy: Access to medications as a right under international law' (2003) 21 *Boston University International Law Journal* 325 327.

[16] For more on availability, see CESCR General Comment 14, para 12(a) which provides that availability entails functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the state party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the state party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

[17] For more on accessibility, see CESCR General Comment 14, para 12(b) which provides that accessibility entials that health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions: (i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. (ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalised groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities. (iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households. (iv) Information accessibility: accessibility includes the right to seek, receive

women[18] and of good quality.[19] These four aspects overlap to ensure that state policies and programmes on HIV and AIDS, related to women, should be capable of these criteria. A policy or programme devoid of these elements should be considered not to meet the standards capable of ensuring women's health, especially in the context of HIV and AIDS. All obligations relating to access to health services should bear these four elements lest the right becomes merely notional. Women's access to HIV and AIDS-related goods and services should mean the actual ability to obtain relevant health care service or product, or physical access to the appropriate health care facility.[20]

Within the context of women's health, HIV and AIDS this entails, for example, access to ARVs at health care facilities and the attendant services of testing and counseling. In this way,

---

and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

[18] For more on acceptability, see CESCR General Comment 14, para 12(c) which provides that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

[19] For more on quality, see CESCR General Comment 14, para 12(d) which provides that as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

[20] See also, Pieterse, M., 'A Benefit-focused analysis of Constitutional health rights' *Unpublished doctorate thesis, University of Witwatersrand, 2005* [hereafter Pieterse: 2005] 70; Geldenhuys, M., 'The rights to health care and housing: Some aspects of constitutional interpretation' (2005) 17 *SA Mercantile LJ* 182 at 193; Giesen, D., 'Health care as a right: Some practical implications' (1994) 13 *Medicine & Law* 285 at 290; Hendriks, AC., 'Patients' rights and access to health care' (2001) 20 *Medicine & Law* 371 374 [hereafter Hendriks:2001]; Tranoy, KE., 'Vital needs, human rights, health care law' (1996) 15 *Medicine & Law* 183 186-188. Such an understanding of access is reflected by the SA Department of Health's recent *Draft Charter of the Private and Public Health Sectors of the Republic of South Africa* (2005) at 6, which defines 'access' to mean 'having the capacity and means to *obtain* and *use* an affordable package of health care services in South Africa in a manner that is equitable'.

access can be said to be meaningful. Hence, it can be argued that access to health care is considered inhibited where services are of inferior quality. Thus, for example, if service is delivered in a manner inattentive to caution, or with negligence, the services can be described as inaccessible.[21] The exercise of caution in the delivery of health services to women would entail respect for confidentiality, privacy and related health ethos.[22] These values are crucial to women's access to health care and clinical management.

6.2.3 Equality and non-discrimination in health systems

Chapter four highlighted the several forms of women's discrimination in access to health care services.[23] In this regard, it is thus imperative for the state to deal with inequalities in the broader health system. This is because inequalities in health care systems implicate the right to health.[24] In a report to the Human Rights Council, Hunt, the former UN Special Rapporteur on the right to health stated:[25]

[21] Carstens, P., & Kok, A., 'An assessment of the use of disclaimers by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations' (2003) 18 *SAPL* 430 442; Hendriks: 2001 377.

[22] See, generally, Ngwena, C., & Cook, RJ., 'HIV/AIDS, pregnancy and reproductive autonomy: Rights and duties' (2008) 8 *Developing World Bioethics* v [hereafter Ngwena & Cook: 2008].

[23] See chapter three, sections 4.3.1 and 4.3.2.

[24] MacNaughton, G., 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11 *Health and Human Rights: An International Journal* 47 [hereafter MacNaughton: 2009] 52.

[25] Paul Hunt, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Annual Report to the Human Rights Council, UN Doc. No. A/HRC/7/11 (2008) [hereafter Hunt: 2008] para 15.

> At the heart of the right to the highest attainable standard of health lies an effective and integrated health system encompassing health care and the underlying determinants of health, which is responsive to national and local priorities, and accessible to all. Without such a health system, the right to the highest attainable standard of health can never be realised.

Hunt also emphasised that equality and non-discrimination are core features of a health system.[26] In the same report, Hunt stated that governments have 'a legal obligation to ensure that a health system is accessible to all without discrimination', and 'that disadvantaged individuals and communities enjoy, in practice, the same access as those who are more advantaged.'[27] Hunt has often persuasively compared the health system to other core social institutions, such as the court system or the political system.[28] As Hunt explained, the 'right to a fair trial underpins a good court system', and 'the right to vote underpins a democratic political system.'[29] In the same way, he maintains, the right to health underpins an effective health system accessible to all.[30] On the strength of the above, I wish to argue that failure of the state to eliminate inequalities in national health care provision is a violation of the rights to non-discrimination and equality. I further wish to assert that the prohibition against

---

[26] Hunt: 2008, para 42. The Special Rapporteur understood the health concept of "equity" — meaning equal access to health care according to need — to be akin to equality and non-discrimination in human rights law. See para 43.

[27] Hunt: 2008, para 42.

[28] Paul Hunt, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Annual Report to the Commission on Human Rights, UN Doc. No. E/ CN.4/2006/48 (2006) [hereafter Hunt: 2006) para 20.

[29] Hunt: 2006, para 20.

[30] Hunt: 2006, para 20.

discrimination on the grounds of economic status,[31] provides a basis for the elimination of discrimination in relation to women who are most often economically inferior.

6.2.4 Respect for sexual and reproductive autonomy

Chapter four presented some of the challenges women living with HIV and AIDS face especially in dealing with pregnancy and forced abortions.[32] In this regard, the state must ensure respect for the sexual and reproductive autonomy of women living with HIV and AIDS. The CESCR has emphasised that the realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.[33] For example, in light of the challenges pregnant women living with HIV and AIDS face, Ngwena and Cook correctly argue that to understand how women make decisions about HIV and pregnancy, we cannot focus only on the woman without looking at the boarder environment.[34] This would include asking questions relating to whether the state has created sufficient conditions for enabling the exercise of reproductive autonomy such as through the provision of access to ARV and

---

[31] See also MacNaughton: 2009, 54. The author gives the example of South Africa where the two-tiered health care system was race-based in a similar fashion to the two-tiered school system in the Unites States case.

[32] See chapter three, section 4.3.2.

[33] The CESCR notes that it is important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights. See CESCR General Comment 14, para 21.

[34] Ngwena & Cook: 2008, v.

contraception. The authors rightly add that there is a need to be cognisant of broader societal factors like the role of health care providers in influencing reproductive decision-making.[35]

In a similar vein, I agree with London et al that leaving decisions on reproduction to the individual based on information and counselling begs a broader question around the obligations of government to create realistic conditions for autonomy in decision-making.[36] Hence, I wish to argue that the state should ensure, for example, health care providers are trained to respect women's autonomy in order to eliminate practices such as coercing pregnant women living with HIV and AIDS to have abortions or be sterilised as part of counselling. If the state fulfils this obligation, it gives women the agency to make decisions freely, and thereby enhancing their capability to live amidst the AIDS epidemic.

[35] As above.

[36] London, L et al., 'Even if you're positive, you still have rights because you are person': Human rights and the reproductive choice of HIV-positive persons' (2008) 8 *Developing World Ethics* 18.The authors urge that we have to be alive to the coercive pressures on reproductive choice emanating from 'hidden contextual factors', such as health providers, partners, the family and the broader society. The authors argue that no necessary contradiction between protecting human rights and optimizing public health responses. They add that interventions that support reproductive choices for people living with HIV concomitantly serve to advance human rights and public health, provided that a synergetic approach is consciously adopted. For more on rights and duties arising within the context of HIV/AIDS, pregnancy and reproductive autonomy, see also, Gruskin, S et al., 'Provider-initiated HIV testing and counseling in health facilities – What does this mean for the health and human rights of pregnant women?'(2008) 8 *Development World Bioethics* 25 [hereafter Gruskin et al; 2008]; Eyakuze, C et al., 'From PMTCT to a more comprehensive AIDS response for women: A much-needed shift' (2008)8 *Developing World Bioethics* 36 [hereafter Eyakuze et al: 2008].

6.2.5 Access to health-related information

I wish to argue that the state should provide health-related information as a key measure to address women's health, HIV and AIDS. Backman et al succinctly described health information as: [37]

> [T]he *life-blood of effective, accessible health systems and the right to health*. Information enables individuals and communities to promote their own health and allows governments to formulate *evidence-based* health plans. *Monitoring*, *accountability*, and *participation* depend upon access to information.... Health information systems include a range of data sources, such as censuses, household surveys, vital registration systems, and other health-facility data sources..... As part of their human-rights responsibility of international assistance and cooperation in health, donors should accelerate their coordinated efforts to provide training and technical assistance for sustainable data collection and processing and to make data available worldwide.

I submit that the above description of a health system enjoins the state to ensure the provision of information and evidence-based policy making.[38] These services thereby ensure monitoring and accountability within the context of women, HIV and AIDS. I further argue that impeding

---

[37] Backman, G et al; 'Health systems and the right to health: An assessment of 194 countries' (2008) 372 *Lancet Journal* 2047–2085. My emphasis.

[38] Evidence-based policy is a discourse or set of methods which informs the policy process, rather than aiming to directly affect the eventual goals of the policy. It advocates a more rational, rigorous and systematic approach. The pursuit of evidence-based policy is based on the premise that policy decisions should be better informed by available evidence and should include rational analysis. This is because policy which is based on systematic evidence is seen to produce better outcomes. The approach has also come to incorporate evidence-based practices – see Hornby, P., & Perera, HSR., 'A development framework for promoting evidence-based policy action: Drawing on experiences in Sri Lanka' (2002) 17 *The International Journal of Health Planning and Management* 165–183; Hyden, G, et al., *Making sense of governance: Empirical evidence from sixteen developing countries* (2004); Marston, G., & Watts, R., 'Tampering with the evidence: A critical appraisal of evidence-based policymaking' (2003) 3 *The Drawing Board: An Australian Review of Public Affairs* 143–163.

access to essential health services like sexual and reproductive information, would amount to a violation of women's right to health.[39] This includes the obligation not to withhold or misrepresent health-related information.[40]

6.2.6 Utilisation of TRIPS flexibilities

The state is obliged to utilise the flexibilities under the regime of the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).[41] The flexibilities exist in the forms of compulsory licensing and parallel importation.A compulsory license is a license granted by the government allowing the use of the invention without the patent holder's authorisation.[42] Parallel importation is a form of arbitrage in which countries seek the lowest priced patented products from other countries without the authorisation of the patent holder.[43] This is legally permissible under the legal doctrine of exhaustion of rights, which states that 'once the producer of a patented product or its agent have sold its product in good faith to an

[39] CESCR General Comment 14, paras 34 and 35.

[40] CESCR General Comment 14, para 34.

[41] The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

[42] See art.31 of the Agreement. Compulsory licensing is a policy tool that can be adopted to address situations where the price of drugs is beyond the reach of poor people, or where there is a need to promote technology transfer and establish a technological base, especially by countries that have insufficient or inadequate manufacturing capacity. See also the Doha Declaration on the TRIPS Agreement and Public health, WTO Ministerial Declaration on the TRIPS Agreement and public health, WTO/MIN (01)/DEC/2, adopted on 14 November 2001 (Doha Declaration).

[43] WHO, 'Globalization, TRIPS and access to pharmaceuticals' Policy Perspectives on Medicines Series No.3 March 2001 [hereafter WHO: 2001] 4.

independent party, the patent holder's right to determine the conditions under which the product is resold is exhausted'.[44] In this context, the UN has rightly stated: [45]

> Globally, trade policy provisions need to be used more effectively to increase access to care. The availability of low-cost generic drugs needs to be expanded, in accordance with national laws and international trade agreements and with a guarantee of their quality …We need to find ways of more effectively using trade policy provisions, such as compulsory licensing or parallel importation, to increase access to care. The availability of low cost generic drugs needs to be expanded, in accordance with national laws and international trade agreements and with guarantees of their quality.

In this light, the state should not abdicate its duty to the private sector which may have the effect of making the essentials of availability, accessibility, acceptability and quality elusive.[46] In this regard, prices of treatments like ARVs have to be provided by the state not only as a core obligation,[47] but as an imperative to control marketing of medicines which are critical to the treatment and prevention of HIV and AIDS among vulnerable groups like women. Here, the state should, for example, exercise control over pharmaceutical companies through its patent regime.[48] In light of these flexibilities the state can make ARV drugs more available

---

[44] Frederick, M et al., 'Post-TRIPS options for access to patented medicines in developing countries,' Commission on Macroeconomics and Health Working Paper WG 4, no.1 June 2001, 31.

[45] Report of the UN Secretary General to the UN General Assembly meeting issued on 16 February 2001, UN Doc.A/55/779.

[46] Para 35.

[47] Para 43.

[48] For more on the duty to procure ARVs under the TRIPS Agreement, see, generally, Amollo, R., 'Revisiting the TRIPS regime: Rwanda-Canadian ARV drug deal 'Tests' the WTO General Council Decision' (2009) 17 *African Journal of International and Comparative Law* 240; Forman, L., 'Trade rules, intellectual property and the right to health' (2007) 21 *Ethics and International Affairs* 337; Mushayavanhu, D., 'The realisation of access to HIV

and accessible by issuing compulsory licenses or importing from other markets where the medicines are cheaper.

6.2.7 HIV and AIDS-related legislation, plans and policies

The state is further charged with the obligation to adopt legislative measures on HIV and AIDS and to adopt HIV and AIDS related health policies and plans targeted towards realising women's health in this context. Here, for example, national plans on HIV/AIDS surveillance have to be well-designed paying attention to gender differences and it should have angles paying attention to ages 15–24, which are considered the most affected age group among women.[49] Further, the state is commanded to ensure access to underlying determinants like safe food, potable drinking water, basic sanitation and adequate housing.[50] These rights are

and AIDS-related medicines in Southern African countries: Possibilities and actual realisation of international law obligations' in Viljoen, F., & Precious, S., (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) 127; Forman, L.,'Trading health for profit: Bilateral and regional Free Trade Agreements affecting domestic property rules on pharmaceuticals' in Cohen., JC et al; (eds.) *The power of pills: Social, ethical, and legal issues in drug development, marketing, and pricing* (2006) (Cohen at al:2006); Pogge, T., 'Harnessing the power of pharmaceutical innovation,' in Cohen at al:2006, 142-149; Pogge, T et al., *Incentives for global public health: Patent law and access to essential medicines* (2010); Pogge, T., *Access to medicines*, special issue of (2008) 1 *Public Health Ethics*73-82; Durojaye, E., 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 187; Forman., L., 'A transformative power? The role of the human right to medicines in accessing AIDS medicines: International human rights law, TRIPS and the South African experience' *Unpublished doctorate thesis, University of Toronto, 2007* [hereafter Forman: 2007].

[49] UNAIDS, *Global Report on the AIDS Epidemic.* UNAIDS:2008 [hereafter UNAIDS:2008]; South African National HIV Prevalence, Incidence, Behaviour and Communication Survey, HSRC, 2008 [hereafter HSRC: 2008].

[50] CESCR General Comment 14, para 3.

considered an integral part of women's health in the context of HIV and AIDS as already demonstrated.[51]

6.2.8 Access to testing and counselling services

The state has the obligation to ensure that public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantities.[52] I argue that within the context of women, HIV and AIDS, the state should include the availability of sexual and reproductive information on HIV and AIDS like testing and counseling services, prevention of mother to child programmes, antiretroviral drug administration services and all other related services.[53] I further argue that the state should therefore, ensure accessibility to goods and services like sexual and reproductive information on HIV/AIDS like testing and counseling services, prevention of mother to child programmes, antiretroviral drug administration services and all other related services.[54]

---

[51] See discussion in chapter four. See also CESCR General Comment 14, para 3.

[52] CESCR General Comment 14, para 12(a). See also Article 14 of the African Women Protocol.

[53] See Ngwena & Cook: 2008; Gruskin et al: 2008.

[54] See generally, Ngwena & Cook: 2008; Eyakuze et al: 2008.

6.2.9 Provision of safe water

The centrality of water in the context of this work is discussed earlier in this work.[55] The state should ensure the availability of other relevant determinants of health, for instance, access to safe and potable water. For example, water is key in the administration of ARVs which places an obligation upon the state to avail accessible and safe water. This is especially so in rural settings where many HIV positive women in sub-Saharan live. Included in this, is the obligation to provide adequate sanitation services.[56] Within the context of HIV and AIDS, in light of the discrimination faced by women in health facilities, I wish to argue the state must take steps to ensure that women have access the relevant medical services. Special attention should also be paid to women living in rural areas.

6.2.10 Respect for privacy, dignity and confidentiality

Management of women living with HIV/AIDS entails training in several skills, including patient clinical management, adherence to gender differences and to ethos of privacy, dignity and confidentiality.[57] This should, for example include training on some of the challenges women face in health care facilities such as lack of respect from health care providers. In this

[55] See chapter four, section 4.4.

[56] CESCR General Comment 14, para 12(a).

[57] See generally Ngwena & Cook: 2008; Jurgens, R., 'Increasing access to HIV testing and counselling while respecting human rights.' Background paper (2007) [hereafter Jurgens: 2007].

regard, the state should ensure training of medical and professional personnel.[58] This would also cover services like methods of prevention, available treatment like Post Exposure Prophylaxis, counseling and testing.[59]

6.2.11 Access to essential medicines

The state also has the obligation to provide access to essential drugs. The WHO Model List includes, for example, Nevirapine as an essential medicine.[60] The administration of nevirapine is a certified method of reducing mother to child transmission. It, therefore, has the potential to reduce the burden on women that may come with mortality and morbidity of the child.[61] This in turn reduces care burden which is still largely borne by women. In this context, Nevirapine is an essential medicine that is also considered a core minimum obligation forming the floor below which the state should not sink.[62] The state is therefore obliged to

[58] Para 12 (2).

[59] Para 12(b).

[60] WHO Model List of Essential Medicines – March 2007. This list has gone though several modification in 1977,1983, 1999 and 2007. This is the 15th list.

[61] Braitstein, P et al., 'Mortality of HIV-1-infected patients in the first year of antiretroviral therapy: Comparison between low income and high-income countries' (2006) 367 *Lancet* 817–824; Jurgens: 2007.

[62] Khoza, S., 'Reducing Mother to Child Transmission of HIV: The Nevirapine case' (2002) 3 *ESR Review* 2; Chirwa, D., 'Minister of Health and Others v Treatment Action Campaign and Others: Its Implications for the combat against HIV/Aids and the protection of economic, social and cultural rights in Africa' (2003) *East African Journal of Peace and Human Rights* 174; Chirwa, D., 'The right to health in international Law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *SAJHR* 547.

provide essential drugs in a non-discriminatory manner, taking into account vulnerable or marginalised groups, here, women.[63] In this regard, De Vos has boldy argued that it does not matter how expensive the treatment is, as long as it is essential, the state is obliged to provide.[64]

6.2.12 Respect for adolescents

Also, the state has obligations in relation to female adolescents within the context of HIV and AIDS. Most adolescents represent the age group which is the most affected among women.[65] In this regard, the state must ensure *adolescent friendly*[66] services. The state must pay attention to girl children who suffer discriminatory treatment when they visit health facilities.[67] The CRC Committee has pointed out that this obligation extends to cover aspects

[63] Article 12 (c) of the ICESCR; CESCR General Comment 14, para 43(d).

[64] De Vos, P., 'So much to do, so little done? The right of access to anti-retroviral drugs post-*Grootboom* (2003) 7 *Law, Democracy and Development* 83. See also, Heywood, M., 'Preventing Mother-To-Child HIV Transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278.

[65] UNICEF, 2003, *Africa's Orphaned Generation*, New York, UNICEF,2; UNAIDS, 2006 *AIDS Epidemic Update*, Geneva, UNAIDS; Sloth-Nielsen, J., & Mezmur, B., 'HIV/Aids and children's rights in law and policy in Africa: Confronting hydra head on' in Sloth-Nielsen., J., (ed) *Children's rights in Africa: A legal perspective* (2008) [hereafter Sloth-Nielsen & Mezmur: 2008] 280.

[66] My emphasis.

[67] CRC General Comment 3: HIV/Aids and the rights of the child (2003) para 9; See also Amollo: 2006, 48; Sloth-Nielsen & Mezmur: 2008, 282–285.

of privacy and confidentiality of medical information and the need to have access to adequate information essential for adolescent health.[68]

6. 2.13 Free or low-cost medical care for women

Pertinently, the state should ensure that women can afford the medications, services and other forms of scientific progress made in medicine. This includes, for example, providing free basic HIV and AIDS care, treatment, prevention and management services. Evidence from several countries indicates that removing user fees increases access to essential services.[69] Alternatively, the state should provide low-cost drugs.[70] In this regard, it is strongly argued that socially disadvantaged groups like women should not bear the burden of health expenses compared to richer households. Women's economic status in most of sub-Saharan Africa cannot be more emphasised. This is especially so in light of the ethical health consideration of equity. In this regard, services should be affordable, whether publicly or privately provided. I

[68] See generally, the CRC General Comment 4: Adolescent health and development (2004).

[69] Chan, M., in Forward to 'Women and health: Today's evidence tomorrow's agenda' WHO, 2009. Available at http://whqlibdoc.who.int/publications/2009/9789241563857_eng.pdf. (Accessed 14 December 2009) xiv.

[70] Adopting a substantive approach to women's health, the CESCR stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information… even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes. See CESCR General Comment 14, para 18. See also Pieterse, M., 'A Benefit-focused analysis of constitutional health rights' *Unpublished doctorate dissertation. University of Witwatersrand*, *2005* [hereafter Pieterse: 2005] 27.

therefore submit that this means, for example, that the state should have a health system that is equitable.

6.2.14 Provision of 'appropriate' and 'gender-sensitive' services

The state is further under an obligation to provide HIV and AIDS related services in a manner respectful of women's cultures and to be attentive to gender and life cycle requirements. Given that women are already marginalised within the context of HIV and AIDS as vectors of disease,[71] it is imperative that clinical management of health facilities is conducted in a manner respective of this position.[72] HIV and AIDS related services to women should be of quality taking into account scientific and medical appropriateness, for example, that a contraindicated medication against an HIV infected pregnant woman cannot be used.[73]

The state should integrate a gender perspective into its HIV and AIDS and health-related policies, planning, programmes and research that recognises the important role of both biological and socio-cultural factors in influencing the health of women and men.[74] Within the context of HIV and AIDS, for example, pharmacological research should pay attention to the biological details of women and how these may interact with other conditions such as menstruation, pregnancy and the use of contraception.

---

[71] See chapter two, section 2.5.

[72] Para 12(c).

[73] Para 12(d).

[74] Para 21.

I hereby submit further, that the state is also enjoined to ensure that the steps described above are taken in a manner *deliberate*, *concrete* and *targeted* towards meeting women's needs. In this case, towards women affected by HIV and AIDS. Thus, for example, a programme on prevention of mother to child treatment should be well designed and have with *gender disaggregated* data. Furthermore, I argue that the state's plans should lead to the fulfillment of a safe programme for women as a marginalised group, and one that presents specific biological and physiological attributes.

6.2.15 Provision of adequate housing

I examined the link between housing, women, HIV and AIDS.[75] The state has the obligation to guarantee the right to housing.[76] All aspects of women's housing rights touches upon the themes of women's right to non-discrimination and equality.[77] It also relates to concerns around domestic violence – necessitating the need to treat women living with HIV and AIDS as a category requiring special attention.[78] Women's material conditions and experiences

[75] Chapter four, section 4.4.

[76] See article 11 of the ICESCR. The right to adequate housing is also set out in the Universal Declaration of Human Rights (1948) and emphasised by various international documents such as the Vancouver Declaration of 1976, the Global Strategy for Shelter to the year 2000 (1988), the Habitat Agenda (1996) and the Millennium Development Goals (2000).

[77] COHRE, Sources 5 'Women and housing rights – 2nd ed' Centre on Housing Rights and Evictions, 2008; Combrinck, C., 'Living in security, peace and dignity: The right to have access to housing of women who are victims of gender-based violence' [hereafter Combrinck: 2009] 17.

[78] On women and housing in the context of HIV and AIDS, See , Westendorp, I., *Women and housing: Gender makes a difference* (2007); Tomlinson, R., 'Housing policy in the context of HIV/AIDS and globalisation' (2001) 25 *International Journal of Urban and Regional Research* 649 650.

should be included in the definition of forced eviction and reflected in the conditions imposed on state actors to guarantee the right to freedom from forced evictions.[79] Moreover it is rightly argued that domestic violence is a form of forced eviction.[80] Therefore, the duty is imposed on the state to guarantee the right to housing of victims of domestic violence.[81] I hereby submit that the rights of women to adequate housing within the context of domestic violence, should be interpreted within the philosophy of the feminist capabilities approach. This interpretation would be to the effect that by fulfilling the above obligation, the state will be enhancing women's ability to live free from violence. Moreover, the absence of violence has the potential to ensure that women live in dignity, peace and security.[82]

Furthermore, the removal of violence against women in the above context, reasonates with the feminist principle of substantive equality. Liebenberg and Goldblatt accurately argue that such an equality perspective alerts us to the fact that socio-economic rights programmes may be implemented in such a way that they exclude or are practically inaccessible to disadvantaged groups.[83] On housing, Chenwi and McLean convincingly argue that a housing

[79] Farha, L., 'Is there a woman in the house?Re/conceiving the human right to housing?' (2002) 141 *Canadian Journal of Women and the Law* [hereafter Farha: 2002] 121–141.

[80] CESCR General Comment 7, para 8. See also, Paglione, G., 'Domestic violence and housing rights: A reinterpretation of the right to housing.' (2006) 28 *Human Rights Quarterly* 120; Westendorp, I., 'Haven or hell? The effect of domestic violence on women's housing rights' (2003) *Africa Legal Aid Squarely* 8; Charlton, S., 'An overview of the housing policy and debates, particularly in relation to women (or vulnerable groupings) (2004) A research report written for the Centre for the Study of Violence and Reconciliation.

[81] As above.

[82] See generally, Combrinck: 2009.

[83] Liebenberg, S., & Goldblatt, B., 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 351.

policy that claims to be gender neutral in fact perpetuates gender inequality in a myriad of ways.[84] The authors pertinently argue that not least is the linking of housing subsidies to households and household income, obscuring power relations within the household, as well as the practices of registering the home in the name of the male householder, of requiring claimants to be over 21, and of expecting the householder to upgrade the home.[85]

Within the above context, the term 'adequacy' is significant.[86] Adequacy of housing relates to legal security of tenure,[87] availability of services, materials, facilities and infrastructure,[88]

---

[84] Chenwi, L., & McLean, K., 'A Woman's home is her castle?' – Poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 517 [hereafter Chenwi & McLean: 2009].

[85] Chenwi & McLean: 2009, 527–528.

[86] See CESCR General Comment 4: The right to adequate housing (1991) [hereafter CESCR General Comment 4] para 8. Here, the CESCR said the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context.

[87] See CESCR General Comment 4, para 8 (a) which explains what legal security of tenure means. The Committee says that tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and group.

[88] See CESCR General Comment 4, para 8 (b) which explains that an adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

affordability,[89] habitability,[90] accessibility,[91] location[92] and cultural adequacy.[93] Together, these form the core minimum obligations on the right to adequate housing.[94] Thus, the state

[89] See CESCR General Comment 4, para 8 (c) which provides that personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials.

[90] See CESCR General Comment 4, para 8 (d) which explains that adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.

[91] See CESCR General Comment 4, para 8 (e) which explains that adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.

[92] See CESCR General Comment 4, para 8 (f)which explains that adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

should in light of women' lack of access to adequate housing, pay attention to its housing programmes and policies, making sure they adhere to issues of legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. Against this backdrop, the state has the obligation to provide special needs housing for women living with HIV and AIDS, and to protect them from forced evictions as I shall discuss below.

6.2.16 Provision of special needs housing

The state has the obligation to develop and provide special needs housing, given that the impact of forced evictions is lopsided towards women.[95] I subscribe to Wicht's definition of special needs housing:[96]

[93] See CESCR General Comment 4, para 8 (g)which explains that the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.

[94] Toebes: 1998.

[95] The CESCR has that women…are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. See CESCR General Comment 7, para 10.

[96] Wicht, A., 'A special needs housing: Developing an approach for policy guidelines (2006) A research paper prepared for rooftops Canada, 6.

> Special needs housing can be defined, on the one hand, as a facility provided for a temporary period for vulnerable groups in our society that have been rendered homeless through a range of circumstances, during which, as residents, they can be provided with secure accommodation and programmes by which they can 'rectify their vulnerability'; on the other hand it is housing for people who cannot live in a typical house without some form of physical adaptation or some level of assistance to cope with the tasks of daily living.

Special needs housing may be provided on the basis of, *inter alia*, gender-based violence.[97] Chenwi fittingly argues that women living with HIV/AIDS constitute a vulnerable category for whom to provide a comprehensive and coherent policy on special needs housing.[98] Hence, it is imperative for the state to consider gender-based violence, HIV and AIDS when implementing housing policies. I hereby submit that access to special needs housing gives women the agency to realise their capabilities in the context of HIV and AIDS. Similarly, the state should restrain from unscrupulous and forced evictions as I argue below.

6.2.17 Restraint from evictions

The state is also under an obligation to refrain from forced evictions and must ensure that the law is enforced against its agents or third parties who carry out forced evictions. This is in

[97] See CESCR General Comment 4, para 8 (e). See also, section 40(1) of the Habitat Agenda adopted by the Second United Nations Conference on Human Settlements (Habitat II) at Istanbul in 1996.

[98] On special needs housing, see Chenwi, L., 'Taking those with special housing needs from the doldrums of neglect: A call for a comprehensive and coherent policy on special needs housing' (2007)11 *Law, Democracy and Development* [hereafter Chenwi: 2007]1. See also Kothari, M., 'Women and adequate housing' (2006) A report of the UN Special Rapporteur on adequate housing, UN Doc. E/CN.4/2006/118 [hereafter Kothari: 2006].

light of the fact that certain aspects of eviction are now interpreted within this right.[99] Hence, state parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out without appropriate safeguards by private persons or bodies.[100] The state must ensure that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.[101] It is therefore, safe to say that this places an obligation on the state to ensure that women, as a vulnerable group, are protected from being exposed to a situation of homelessness. Homelessness reduces women's ability to live a healthy life and impacts on their right to health within the context of HIV and AIDS.[102]

6.2.18 Access to property and inheritance (in marriage and family relations)

Related to the right to housing, is women's right to property and inheritance. I presented the link between HIV, AIDS and women's right to property (including inheritance) in chapter four.[103] This extends to marriage and divorce laws. Below follows a comprehensive analysis of state obligations in this regard.

[99] CESCR General Comment 7, para 8.

[100] CESCR General Comment 7, para 8.

[101] CESCR General Comment 7, para 9.

[102] See analysis in chapter four, section 4.4.

[103] Chapter four, section 4.6.

As a general duty, the state is obliged to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in articles 6 through 15 of the ICESCR.[104] Moreover, equality is a mandatory and immediate obligation.[105] Hence, within the particular context of women's right to inheritance, the state is obliged to refrain from discriminatory actions that result in denial of women's right to enjoy property on an equal basis.[106]

More specifically, the state is enjoined to take steps aimed directly towards the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles of men and women.[107] Given that most of the injustices on inheritance occur within marriage and custom, the state, within the context of health, is obliged to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional practices, for example, the practice of male primogeniture.[108]

The state should take appropriate means to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, to ensure on a basis of equality of men and women, the same right for spouses in respect of ownership, acquisition,

[104] CESCR General Comment 16, para 17.

[105] CESCR General Comment 16, para 16. See also, CESCR General Comment 3.

[106] See CESCR General Comment 16, paras 1 and 18; See also, articles, 1,2,3 and 16(1)(h) of CEDAW.

[107] CESCR General Comment 16, para 19.

[108] See CESCR General Comment 14, para 21.

management, administration, enjoyment and disposition of property.[109] Within the context of health, this would have the ultimate impact of empowering women and reducing their vulnerability in economic terms.

6.2.19 Recognition of de facto partnerships

The state must also recognise women's share of property in *de facto* marriages.[110] This is especially so in light of the fact that many women in sub-Saharan Africa continue to live in 'unceremonised unions' (cohabitation),[111] and should be protected upon the end of the relationship, or death of their partner.

[109] Article 16(1)(h) of CEDAW. See also, CEDAW General Recommendation 21: Equality in marriage and family relations [hereafter CEDAW General Recommendation 21] paras 30, 31 and 50.

[110] See CEDAW General Recommendation 21, paras 30–31. The CEDAW Committee stated that there are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognise that right, but the practical ability of women to exercise it may be limited by legal precedent or custom…even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.

[111] See for example, Mokomane, Z., Cohabiting unions in sub-Saharan Africa: explaining Botswana's exceptionality (2006) 37 *Journal of Comparative Family Studies* 25–42.

6.2.20 Protection of girls and widows

The state must also ensure the legal and *de facto* protection of girls and widows who always receive a marginal share at inheritance due to practices such as male primogeniture.[112] The protection of women and girls requires the states to address issues of religious or private law or custom conflict with those principles.[113] The duty to protect women and girls is especially important in light of the fact that women's access to property is enmeshed in religion, private law and custom.[114] This obligation implies that with property, women are empowered and can have the ability, to for example, leave an abusive relationship. It also means that with this empowerment, a woman can afford access to medical treatment for HIV and AIDS-related illnesses.

---

[112] See paras 34 and 35 of General Recommendation 21 which is to the effect that reports of states parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women…women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

[113] See para 50.

[114] Chapter four, section 4.6.

6.2.21 Freedom from gender-based violence

I explored the link between women, HIV and AIDS and domestic violence in chapter four.[115] Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural right on the basis of equality.[116] In this regard, the CESCR has succinctly asserted that states parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.[117] The CESCR rightly observes that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision.[118] The CESCR further rightly states that such prejudices and practices may justify gender-based violence as a form of protection or control of women.[119] Within the context of women, HIV and AIDS, therefore, the effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment of the relevant and fundamental freedoms. Hence, I hereby submit that the state has immediate obligations as analysed below.

[115] Chpater four, section 4.5.

[116] CESCR General Comment 16, para 27; CEDAW General Recommendation 19, articles 1,7 & 11.

[117] CESCR General Comment 16, para 27.

[118] CEDAW General Recommendation 19, article 11.

[119] CEDAW General Recommendation 19, article 11.

6.2.22 Proscription of gender-based violence

As a starting point, the state should unequivocally legislate on violence against women. This duty is on the basis that violence against women in the context of HIV and AIDS is a form of discrimination requiring state action. The duty to legislate against violence should be fulfilled without delay as it is an immediate obligation.[120] The state should, therefore, legislate against family violence and abuse, rape, sexual assault and other gender-based violence and give adequate protection to all women, and respect their integrity and dignity.[121] Furthermore, Meyersfeld[122] has compellingly observed that the right to be free from systematic intimate violence is an international human right for which states can be held liable.

6.2.23 Provision of remedies to victims: due diligence standard

Under international law, it is an acknowledged principle that states are under an obligation to act with 'due diligence' to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by private or state actors.[123] 'Due

---

[120] See article 2 of CEDAW.

[121] See CEDAW General Recommendation 19, article 24(a) and (b).

[122] Meyersfeld, B., *Domestic violence and international law* (2010) 106.

[123] CEDAW General Recommendation 19, article 9.

diligence' has a long history in international law.[124] The Inter-American Court of Human Rights established the importance of the due diligence standard in the context of human rights in its key judgment in *Velásquez Rodríguez v Honduras*.[125] In this case, which arose from the unexplained disappearance of Manfredo Velásquez, the Court held that Honduras had failed to fulfil its duties under Article 1(1) of the American Convention on Human Rights and concluded that:[126]

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Hence, the state must provide victims of domestic violence, who are primarily women, with access to safe housing, remedies and redress for physical, mental and emotional damage.[127] In this regard, the state is obliged to use effective measures,[128] preventive measures[129] and

[124] See Bourke-Martignoni, J., 'The history and development of the due diligence standard in international law and its role in the protection of women against violence' in Benninger-Budel, C., (ed) *Due diligence and its application to protect women from violence* (2008) 48–49.

[125] Inter-American Court of Human Rights *Velásquez Rodríguez v Honduras* (Judgment dated 29 July 1988) Series C: Decisions and Judgments, No. 04.

[126] Para 172. See also, Byrnes, A., & Bath, E., 'Violence against women, the obligation of due diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent developments (2008) 8 *Human Rights Law Review* 517–533; Combrinck: 2010, 53.

[127] CESCR General Comment 16, para 27.

[128] CEDAW General Recommendation 19, article 24(t)(i).

[129] CEDAW General Recommendation 19, article 24(t)(ii).

protective measures such as refuges, counselling, rehabilitation and support services for women who are victims of violence or who are at risk of violence.[130]

Appropriate protective and support services should be provided for victims. This involves gender-sensitive training of judicial and law enforcement officers and other public officials.[131] Furthermore, the state is obliged to prevent violations or to investigate and punish acts of violence by providing compensation,[132] in light of the principle of due diligence. The principle of due diligence is now regarded as a tool for the elimination of violence against women and is argued to have attained the status of international customary law.[133] Thus, under the due diligence principle, the state has the duty to protect and provide services to women, such as legal assistance, shelter and financial aid to victims of gender-based violence.[134]

6.2.24 Provision of support services

The duty to protect requires of states to ensure that women and girls who were victims or at risk of violence have access to justice as well as to health care and support services that respond to their immediate needs, protect them against further harm and address the ongoing

[130] CEDAW General Recommendation 19, article 24(t) (iii).

[131] CEDAW General Recommendation 19, article 24 (b).

[132] CEDAW General Recommendation 19, article 24(i).

[133] Special Rapporteur on Violence against Women, 2006. *The due diligence standard as a tool for the elimination of violence against women*. UN Doc.E/CN/2006/61; See also the Declaration on the Elimination of Violence Against Women, 1993 (Article 4(c); the Beijing Platform for Action, 1995 (para 124(b)) and the Inter-American Conventions on the Prevention, Punishment and Eradication of Violence Against Women, 1994 (Article 7 (b).

[134] Special Rapporteur on Violence against Women, 2006, para 47.

consequences of violence for individual women.[135] This should, for example, include access to post exposure prophylaxis.[136] The duty is also upon the state to provide immediate material assistance in terms of shelter, clothing, child maintenance, employment and education, to women survivors of violence.[137]

The analysis in this chapter has presented specific obligations state obligations in relation to women, HIV and AIDS. However, it should be noted that a country is only bound by a treaty when it is a party to it, for example, South Africa is not a party to the ICESCR. Also, a country may also limit its legal obligations under a treaty. At the time a state accedes to or ratifies an international treaty, the state is allowed to 'exclude' itself from certain aspects of the treaty by entering a 'reservation'. The Vienna Convention on the Law of Treaties (VCLT)[138] defines a reservation as a unilateral statement by a state party to a treaty through which it 'excludes' or 'modifies' in respect of that state the 'legal effect of certain provisions' of the treaty.[139] This provision is, therefore, an avenue through which international human rights law acknowledges that states may have legitimate justifications for insulating parts of the culture practised in that country from the homogenising effect of supra-national normativity.[140] There are rules on reservations. If the treaty prohibits it, no state party may

[135] Special Rapporteur on Violence against Women, 2006, para 82.

[136] This includes the attendant services of testing and counselling .

[137] Special Rapporteur on Violence against Women, 2006, para 83.

[138] Vienna Convention on the Law of Treaties was adopted 22 May 1969. It entered into force on 27 January 1980.

[139] See article 2(1)(d).

[140] See Viljoen, F., *International human rights law in Africa* (2007) [hereafter Viljoen: 2007] 23.

enter a reservation; if the treaty allows for the possibility of entering reservations, state parties may do so.[141] However, this does not apply to peremptory norms.[142] Hence, when the treaty is silent, the position in the VCLT is used. This is it to the effect that a state party may only enter reservations that are not 'incompatible with the object and purpose of the treaty'.[143] For this reason, except for where it has entered reservations, South Africa is bound by the normative standards set in this chapter.

Moreover, the South African Constitution (Constitution) provides that that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.[144] The relationship between international law and South African constitutional law was affirmed by O'Regan, J in the case of *Kaunda v President of the Republic of South Africa:*[145]

> Our Constitution thus asserts as a foundational value the need to protect and promote human rights. This value informs all the obligations and powers conferred by the Constitution upon

[141] VCLT article 19(a).

[142] A peremptory norm (also called *jus cogens* or *ius cogens*) is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted. There is no clear agreement regarding precisely which norms are *jus cogens* nor how a norm reaches that status, but it is generally accepted that *jus cogens* includes the prohibition of genocide, maritime piracy, slaving in general (to include slavery as well as the slave trade), torture, and wars of aggression and territorial aggrandisement – See Bassiouni, MC., 'International Crimes: 'Jus cogens' and 'obligatio erga omnes' (1996) 59 *Law and Contemporary Problems* 63, 68. See also Mitchell, DS., 'The prohibition of rape in international humanitarian law as a norm of jus cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative and International Law* 219.

[143] VCLT article 19(c). For more on reservations, see Viljoen: 2007, 23–25.

[144] Section 39(1)(b).

[145] 2005 (4) SA 235 (CC) paras 221 and 222.

> the state. The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired...our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.

On the strength of the above, the normative standards examined in this chapter enjoin South Africa to honour its international and constitutional commitments to the realisation of women's rights in the context of HIV and AIDS. Moreso, as a state in transformation, regard must be paid to those historically, socially, economicially and political marginalised – women affected by HIV and AIDS (the majority of whom are Black).[146]

6. 3 CONCLUSION

This chapter mapped out the explicit obligations arising under the relevant treaty provisions, General Comments, General Recommendations, Declarations, court cases, reports, consensus documents and other authorities. It is clear from the analysis in this chapter that despite the fact that HIV and AIDS is only mentioned expressly in one regional treaty (the African Women Protocol), there has developed a body of rights over the years establishing normative standards on realising women's right to health within the context of HIV and AIDS. It is further obvious that non-discrimination is the fulcrum of most of the freedoms and entitlements discussed. It also is comprehensible that the obligations set out in this chapter serve to enhance women's ability to realise their capabilities in the HIV and AIDS milieu. It is further definite that rights apply indivisibly within this context to address the crux of the

[146] See chapter seven, section 7.2 for statistics.

matter – gender-based inequality. This chapter, consequently, provides the normative calculus for appraising South Africa's legal and policy position in the next chapter.

CHAPTER SEVEN

AN ANALYSIS OF SOUTH AFRICA'S LAWS AND POLICIES IN THE CONTEXT OF WOMEN, HIV AND AIDS

> The path to the ANC government's eventual denial of AIDS treatment is littered with lost opportunities and bungled policies.
>
> Lisa Forman, 2007[1]

> Sorry tale of missed opportunities, inadequate analysis, bureaucratic failure and political mismanagement.
>
> Nicoli Nattrass, 2004[2]

7.1 INTRODUCTION

Against the setting of the analysis in the preceding chapters, this chapter appraises South Africa's legal and policy positions on women, HIV and AIDS. Hence, in this chapter, I shall present an overview of the epidemic in South Africa[3] and state of the health system in the

[1] Forman, L., 'A transformative power? The role of the human right to medicines in accessing AIDS medicines: International human rights law, TRIPS and the South African experience' *Unpublished doctorate thesis. University of Toronto, 2007* [hereafter Forman: 2007] 228.

[2] This description is given by Nattrass in Nattrass, N., *The moral economy of AIDS in South Africa* (2004) [hereafter Nattrass: 2004] 41. Nattrass compares AIDS management with warfare field-hospital management or triage. For more on the story of AIDS in South Africa, see also, Thornton, R., *Unimagined community: Sex, networks and AIDS in Uganda and South Africa* (2008) [hereafter Thornton: 2008] 149–219; Abdool, K et al., (eds) *HIV/AIDS in South Africa* (2005); Fourie, P., & Meyer, M., *The politics of denialism: South Africa's failure to respond* (2010); Fourie, P., *The political management of HIV and AIDS in South Africa: One burden too many* (2006); Marais, H., *Buckling: The impact of AIDS in South Africa* (2005).

[3] Section 7.2.

country.[4] I also examine the general situation of women's health in the country.[5] In this chapter, I shall also trace the trends in legal and policy responses highlighting the three phases of inaction, denialism and action.[6] This chapter also presents South Africa's international legal commitments and constitutional scheme.[7] On the foundation of the feminist capabilities approach framework, this chapter then makes legislative and policy analyses on the themes of access to health services,[8] access to adequate housing,[9] rights relating to property and inheritance[10] and freedom from gender-based violence.[11] The chapter concludes that although South Africa has made commendable strides in the relevant law and policy, implementation remains the main challenge to the realisation of women's rights in the context of HIV and AIDS.

7.2 OVERVIEW OF THE EPIDEMIC IN SOUTH AFRICA

South Africa is experiencing a maturing generalised HIV epidemic in which heterosexual sex is the predominant mode of transmission, followed by infections from mothers to children and

[4] Section 7.3.

[5] Section 7.4.

[6] Sections 7.5 and 7.6.

[7] Section 7.7.

[8] Section 7.8.

[9] Section 7.9.

[10] Section 7.10.

[11] Section 7.11.

other modes of transmission.[12] The UNAIDS defines South Africa's epidemic as being hyper-endemic as a result of the country having more than 15 percent of the population aged 15–49 living with HIV.[13] According to a recent survey,[14] the HIV prevalence is heterogeneous in South Africa's provinces, with the highest prevalence in 2008 being found in KwaZulu-Natal (15.8 percent) and Mpumalanga (15.4 percent). This is followed by Free State (12.6 percent), North West (11.3 percent), Gauteng (10.3 percent), Eastern Cape (9.0 percent) and Limpopo (8.8 percent). The two provinces with the lowest prevalence are the Western Cape (3.8 percent) and Northern Cape (5.9 percent).[15]

HIV prevalence remains disproportionately high for females overall in comparison to males, and it peaks in the 25–29 age group, where one in three people (32.7 percent) were found to be HIV positive in 2008.[16] HIV prevalence among females is more than twice as high as that of males in the age groups 20–24, and 25–29. HIV prevalence peaks among males in the 30–34 year age group, where a quarter of males were found to be HIV positive in 2008.[17] This proportion has remained unchanged in all three national surveys.[18]

[12] HSRC, 'South African national HIV prevalence, incidence, behaviour and communication survey' HSRC, 2008[hereafter HSRC: 2008] xv.

[13] UNAIDS, *Report on global AIDS epidemic*. UNAIDS, 2008 [hereafter UNAIDS: 2008].

[14] HSRC: 2008, xvi.

[15] HSRC: 2008, xv.

[16] HSRC: 2008, xv.

[17] HSRC: 2008, xv.

[18] The previous two surveys were in 2002 and 2005 – See HSRC: 2008, xv.

It should be borne in mind when interpreting statistics on HIV prevalence that prevalence trends in South Africa are increasingly complex.[19] This difficulty in determining trends is because growing access to anti-retroviral treatment has the potential to affect statistics on incremental trends of HIV prevalence.[20] Thus, by reducing HIV-related mortality, it makes it difficult to draw conclusions about the epidemic over time using prevalence as the only measure.[21] In order to critically appraise South Africa's laws and policies affecting women's health in the context of HIV and AIDS, I generally analyse the country's health system from a historical perspective. Thereafter, I generally examine the state of women's health in South Africa.

7.3 SHAPE OF THE HEALTH SYSTEM IN SOUTH AFRICA

In 1990, it was reported that there was racial discrimination in the provision of funds for health services in South Africa.[22] It was reported that Black hospitals were overcrowded and ill equipped whereas White hospitals were underutilised.[23] It was also reported that there was

[19] HSRC: 2008, xvi.

[20] HSRC: 2008, xvi. See also Mubanjizi, JC., & Twinomugisha, BK., 'The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?' (2010) 10 *African Human Rights Law Journal* 105 [hereafter Mubanjizi & Twinomugisha: 2010] 107.

[21] HSRC: 2008, xvi.

[22] Nightingale, E et al., 'Apartheid medicine, health and human rights in South Africa' (1990) 264 *Journal of the American Medical Association* 2102 [hereafter Nightingale et al:1990] 320.

[23] Nightingale et al: 1990, 320.

inadequate or insufficient health care in the 'homelands' and rural areas.[24] Because of this, the majority of the Black population did not have access to health care services.[25] Apartheid was to be abolished in 1990.

However, until now, South Africa's health system consists of a large public sector and a smaller but fast-growing private sector. Health care varies from the most basic primary health care, offered free by the state, to highly specialised health services available in the private sector for those who can afford it.[26] The state contributes about 40 percent of all expenditure on health.[27] The public health sector is under pressure to deliver services to about 80 percent of the population.[28] Despite this, most resources are concentrated in the private health sector, which sees to the health needs of the remaining 20 percent of the population.[29] The public

[24] Nightingale et al: 1990, 320.

[25] Nightingale et al: 1990, 320; Buch, E., 'Discrimination in the area of health and health care' in Heyns, C et al., (eds) *Discrimination and the Law in South Africa* (1994) 1 152; Klugman, B., 'Mainstreaming gender equality in health policy' (1999) *Agenda Monologue* 48 50–51; Ngwena, C., 'Accessing abortion services under the Choice on Termination of Pregnancy Act: Realising substantive equality' (2000) 25 *Journal for Juridical Science* 19 35; Ngwena, C., 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25 *Journal for Juridical Science* 1 6; Pieterse, E., & van Donk, M., 'Incomplete ruptures: The political economy of realising socio-economic rights in South Africa' (2002) 6 *Law, Democracy and Development* 193 203; Sarkin, J., 'Health' (1997/8) 8 *SA Human Rights Yearbook* 97 131; van Rensburg,HCJ et al., *Health care in South Africa: Structure and dynamics* (1992) 30–31; Ntuli, A et al., 'HIV/AIDS and health sector responses in South Africa:Treatment access and equity: Balancing the act' Equinet Discussion Paper Number 7, September 2003. See also, Coovadia, H et al., 'The health and health system of South Africa: historical roots of current public health challenges' (2009) 374 *The Lancet* 817–834.

[26] Department of Health, 2008. Available at www.doh.gov.za [hereafter DoH: 2008].

[27] DoH: 2008.

[28] DoH: 2008.

[29] DoH: 2008.

sector is largely under-resourced and over-used, while the mushrooming private sector, run largely on commercial lines, caters to middle and high-income earners who tend to be members of medical schemes,[30] and to foreigners looking for top-quality surgical procedures at relatively affordable prices.[31] The private sector also attracts most of the country's health professionals[32] and is primarily funded through contributions to mutual insurers called medical schemes.[33] Although only 14 percent of the total population of 47 million benefits from private health insurance coverage, 60 percent of total health funds were spent in the private sector in 2006.[34] Most women attend the public health sector because it is what their socio-economic status allows them to. In this regard, McIntyre and Thiede have correctly argued that the socio-economic status of an individual in South Africa is the primary determinant of the system through which the individual will receive access to health care.[35] I hereby wish to argue that within this dichotomy, women's ability to enjoy their right to health is highly curtailed. Moreover, the AIDS epidemic compounds this problem.

---

[30] DoH: 2008.

[31] DoH: 2008.

[32] DoH: 2008.

[33] Shisana, O et al., 'Public perceptions on national health insurance: Moving towards universal health coverage in South Africa (2006) 96 *South African Medical Journal* 814–818.

[34] McIntyre, D., & Thiede, M., 'Health care financing and expenditure' in *Harrison,* S et al., (eds) *South African Health Review* 2007. Durban: Health Systems Trust [hereafter McIntyre & Thiede: 2007].

[35] McIntyre & Thiede: 2007.

7.4 A STORY OF WOMEN'S HEALTH IN SOUTH AFRICA

Drawing from the above, women's health in South Africa can generally be understood within two contexts: pre and post-apartheid. This is because women's health has particularly been intertwined with the historical and political events in the country.[36] From 1948 to 1994, racial discrimination against all black people affected people's health in many ways. These included: social conditions that caused ill health, the segregation of health services and unequal spending on health services.[37] During the years of apartheid and before, the migrant labour system deliberately drew African men to the cities as workers in industry and the mines.[38] Under the pass laws,[39] the very same Black men were not allowed to reside in 'White' urban residential areas without permission.[40] As a result, millions of people were forced to live in townships where there was less clean water, electricity, or access to health

[36] Hassim, A et al., (eds) *Health and democracy: A guide to human rights, health law and policy in post apartheid South Africa* (2007) [hereafter Hassim et al: 2007] 11–13.

[37] For more on health under apartheid, see Hassim et al: 2007, 11–13; Abbott G., 'Upgrading health facilities' in Barron, P., (ed) *South African Health Review 1997*. Health Systems Trust; Barron, P., A fifteen year review of the health sector in South Africa. 2008. Prepared for the Department of Health; Barron, P., & Strachan, K., 'The Year in Review' in Barron, P., (ed) *South African Health Review 1997*. Health Systems Trust.

[38] Hassim et al: 2007,11–13.

[39] Pass laws in South Africa were designed to segregate the population and limit severely the movements of the non-white populace. This legislation was one of the dominant features of the country's apartheid system. The Black population were required to carry these pass books with them when outside their compounds or designated areas. Failure to produce a pass often resulted in the person being arrested. Any white person, even a child, could ask a black African to produce his or her pass – See, generally, Johnstone, FA., *Class, race, and gold: A study of class relations and racial discrimination in South Africa* (1976).

[40] Hassim et al: 2007, 11–13.

care services, such as clinics and hospitals.[41] For over 40 years, an environment that encouraged disease was created.[42]

For a group that is already marginalised by socio-cultural factors, the situation of women during apartheid was, therefore, one of multiple jeopardies. Bozzoli succinctly described the different positions of South African women as 'a patchwork quilt of patriarchies' expressed in class, race, gender, geographic location and ideological position.[43] Within this history, women became enmeshed in the web of racial grouping and gender designation that served to consign them to an inferior position of minors in both the private and public spheres. This extended to interpersonal power relations as buttressed by patriarchy. Sadly, this negative legacy continues. This scenario has not been helped by the wave of violence against women that is sweeping across the nation. Violence in South Africa has reached 'epidemic' levels.[44] There is evidence of high rape incidents and the physical and psychological abuse of women and girls with one in four men in South Africa having admitted to raping, and many confessing to

[41] Hassim et al: 2007,11–13.

[42] Hassim et al: 2007,11–13.

[43] Bozzoli, B., 'Marxism, feminism and South African studies' (1983) 9 *Journal of South African Studies* 139 155.

[44] Research conducted in the Gauteng region of South Africa revealed that a woman was killed by her partner every four days. For more on violence in South Africa, see generally, Vetten, L., 'Research into preventing intimate femicide in the Gauteng Province' (2003) 45 *Women's Health Project Review* 14; Combrinck, H., 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' in Murray, C., & O'Sullivan, M., (eds) *Advancing women's rights* (2005) 171. See also Kistner, U., 'Gender-based violence and HIV/AIDS in South Africa: A literature review' Centre for AIDS Development, Research and Evaluation (CADRE), 2003. Govender, M., 'Domestic violence: Is South Africa meeting its obligations in terms of the Women's Convention?' (2003) 16 *SAJHR* 663 676; Leclerc-Madlala, S., 'Crime in an epidemic: The case of rape and AIDS' (1996) 9 *Acta Criminologica* 31–38.

attacking more than one victim.[45] This is a reputable study that exposes the country's endemic culture of sexual violence.

7.5 THE PERIOD OF REGULATION

In South Africa, constitutional values, policy and legal responses to HIV and AIDS can be dichotomised into two main political eras – the apartheid era which was marked by the absence of a constitution as supreme law of the land, and the post-apartheid era in which a constitution has become the supreme law.[46] The apartheid era responses to HIV and AIDS seemed to be informed by racism, homophobia, xenophobia and the authoritarian state, rather than genuine public health concerns.[47] Initially many in South Africa demanded that the law be employed to isolate and quarantine persons with HIV and for making AIDS compulsorily

[45] Medical Research Council's report: *Understanding men's health and use of violence: Interface of rape and HIV in South Africa.* 2009. This is a reputable study that exposes the country's endemic culture of sexual violence.

[46] See Ngwena, C., 'Responses to AIDS and constitutionalism in South Africa' (2003) 24 *obiter* 299 [hereafter Ngwena: 2003]; Ngwena, C., & Matela, S., '*Hoffmann v South African Airways* and HIV/AIDS in the Workplace: Subjecting corporate ideology to the majesty of the Constitution' (2003) 18 *SA Public Law* 306–330; Ngwena, C., 'Constitutional values and HIV/AIDS in the workplace' (2001) 1 *Developing World Bioethics* 42–56; Ngwena C., 'Access to health care services as a justiciable socio-economic Right under the South African Constitution:*Minister of Health and Others v Treatment Action Campaign and Others* (2003) 6 *Medical Law International* 13–23; Ngwena, C., 'Right of access to antiretroviral therapy to prevent Mother-to-Child Transmission of HIV: An application of Section 27 of the Constitution' (2003) 18 *SA Public Law* 83–102; Hassim: 2007, 33.

[47] Ngwena: 2003.

notifiable.[48] Under apartheid, the government introduced coercive measures for HIV and AIDS. For instance, HIV/AIDS was declared a communicable disease under the Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions (Regulations).[49] The previous Health Act contained various measures aimed at certain 'communicable diseases'.[50] The wide definition of 'communicable disease' in the Act clearly encompassed HIV infection. [51] In addition, the Regulations provided for specific coercive measures that were to be applied *mandatorily* to expressly listed communicable diseases. The regulations listed AIDS (which is not communicable), but not HIV (which is).[52] Also in 1987, the government issued Regulations rendering persons with AIDS and HIV 'prohibited persons' in terms of the Admission of Persons to the Republic Regulation.[53] These were, however, abandoned when the Aliens Control Act came into force.[54] The Immigration Act,[55] which replaced the Aliens Control Act, did not alter the position.[56]

[48] Isolation is traditionally applied to isolate ill persons in order to treat them, and to prevent them from spreading disease. Quarantine is traditionally used to restrict the freedom of movement of healthy persons who have been exposed to a disease, but who do not yet show signs of infection, in order to prevent the spread of disease. See also Pillay, K., 'Notification of Aids and health rights' (1999) 2 *ESR Review* 7; Cameron, E., & Swanson, E.,'Public health and human rights - The AIDS crisis in South Africa' (1992) 8 *SAJHR* 200 201; Ngwena, C., 'Legal responses to AIDS: South Africa' in Franskowski, S., (ed) *Legal responses to AIDS in comparative perspective* (1998) 117.

[49] GN R 2438 in GG 11014 of 1987-10-30 promulgated in terms of s 32, 33 and 34 of the Health Act 63 of 1977.

[50] Act 63 of 1977.

[51] Section 1.

[52] Annexure 1 of the 1987 Regulations. My emphasis.

[53] Act 59 of 1972. S 13(1)(h) of the Act and reg 17 of the Regulations published in terms of s 54(1) of the Act as amended by GN R 2439 in GG 11014 of 1987-10-30.

[54] Act 96 of 1991. The Act's regulations did not include AIDS and HIV infection in the list of diseases affliction with which render a person a prohibited person, when new Regulations superseded the old with coming into

Hope was raised with the formation of The National AIDS Convention of South Africa (NACOSA) in October 1992, following an agreement between the former government and the ANC. In August 1994, the African National Congress (ANC) government adopted a National AIDS Plan (NACOSA AIDS Plan) to prevent the spread of HIV and reduce its impact.[57] The Plan focused particular attention on law reform and human rights principles. Priority was given to ensuring respect for the rights of those living with HIV/AIDS to provision for monitoring and enforcing human rights in specific areas.[58] This approach endorsed the complementarity premise in understanding the relationship between human rights and public health.[59] For various reasons, however, the social and programmatic substance of the NACOSA AIDS Plan was never significantly implemented.[60] But its legal ideas were a

---

operation of the 1991 Act (GN R2438 in GG 13521 of 1991-09-13). See also Cameron, E., & Swanson, E., 'Restrictions on migrant workers, immigrants and travelers with HIV or AIDS: South Africa's step forward' (1992) *International Law Journal* 496–500.

[55] Act 13 of 2002.

[56] For a further discussion on the context of response in South Africa see, generally, Cameron, E., 'Legal and human rights responses to the HIV/AIDS epidemic in South Africa.' Available at http://law.sun.ac.za/judgecameron.pdf. (Accessed 18 September 2009) [hereafter Cameron: 2005].

[57] The National AIDS Convention of South Africa (NACOSA) A National AIDS Plan for South Africa 1994-1995 (July 1994) 3–4.

[58] The areas of employment, health care, insurance, children's and women's issues, prisons, the criminal law and international travel were identified for this purpose (National AIDS Plan for South Africa 1994-1995 45–51).

[59] Heywood, M., & Cornell, M., 'Human rights and AIDS in South Africa: From right margin to left margin' (1998) 2 *Health and Human Rights* 61.

[60] See generally, Schneider, H., & Stein, J., 'Implementing AIDS policy in post-apartheid South Africa' (2001) 52 *Social Science and Medicine* 723–731; Cameron, E., 'Human rights: Consequences for the HIV epidemic-Beyond policy consensus to effective activism' (1999) 4 *Canadian HIV/AIDS Policy & Law Newsletter* 105–109; Ngwena: 2003, 132–133.

significant exception. They found fertile soil in the new constitutional dispensation. The recommendations of the South African Law Reform Commission between 1997 and 2001 played a signal role in addressing the most pressing issues relating to HIV and the law.[61]

7.6 THE AGE OF INACTION AND DENIALISM

One of the most visible trends that characterised South Africa's response to HIV/AIDS was utter denialism as orchestrated by the then South African president, Thabo Mbeki. In fact, Forman rightly asserts that Mbeki's personal views became not simply national policy, but actively subscribed to within the ANC and various government structures.[62] For example, during an address at the University of Fort Hare, Mbeki said:[63]

> And thus does it happen that others who consider themselves to be our leaders take to the streets carrying their placards, to demand that because we are germ carriers, and human beings of a lower order that cannot subject its passions to reason, we must perforce adopt strange opinions, to save a depraved and diseased people from perishing from self-inflicted disease. These have no possibility to derive inspiration from what Pixley Seme said almost a century ago, that Africa is like some great century plant that shall bloom in ages hence. Convinced that we are but natural-born, promiscuous carriers of germs, unique in the world, they proclaim that our continent is doomed to an inevitable mortal end because of our unconquerable devotion to the sin of lust.

[61] Ngwena: 2003, 118, 135; see also Aspects of the Law relating to AIDS. Fifth Interim Report par 1.14.

[62] For more on Mbeki's denialist policies, see Forman: 2007, 222–264; Thornton: 2008, 171–194;Salcedo, MO., 'Discourse and disease: An analysis of Thabo Mbeki's position on AIDS, 2000–2004' *Unpublished Master's thesis*, *University of Witwatersrand, 2004*.

[63] Thabo Mbeki, Address at the Inaugural Z.K. Matthews Memorial Lecture, University of Fort Hare, 12 October 2001. Available http://www.anc.org.za/ancdocs/history/mbeki/2001/tm1012.html. (Accessed 12 December 2009).

This attitude was to influence the policies that the government of the time adopted.[64] In October 1999, Mbeki told the National Council of Provinces that AZT was poisonous.[65] In September 2000, he told the South African parliament that HIV and AIDS numbers were not nearly as serious as scientists claimed.[66] The president cited World Health Organisation statistics for Africa which purported to show that the single largest killer on the continent was heart disease and then malaria. In early 2000, he set up the Presidential International Panel of Scientists on HIV/AIDS in Africa.[67] In the same year, Mbeki wrote a strongly worded letter to the then United Nations Secretary General, Kofi Annan, the US president, Bill Clinton, and

[64] See, also, generally, Nattrass, N., *Mortal combat: AIDS denialism and the struggle for antiretrovirals in South Africa*' (2007). Nattrass presents a history of AIDS policy in South Africa. The author exposes the strategy and tactics of AIDS denialists and focuses on the struggle for antiretrovirals to prevent mother-to-child transmission of HIV and to extend the lives of people living with AIDS.

[65] Mbeki was supported in this view by Farber and other scientists like Duesberg and Rasnick. For more on this, see Thornton: 2008, 38–40.

[66] McGreal, C., 'Thabo Mbeki's catastrophe' (2002) *Prospect* 42–47 [hereafter: McGreal: 2002] See also Forrest, D., 'Behind the Smokescreen' *Mail and Guardian* (26 October 2001). Although in late 2002 the relationship between Mbeki and the dissidents is denied, there remains a paper trail of speeches and comments that point to a lengthy period during which it can be said that Mbeki was preoccupied with the main theses of the denialists. These include his 'Letter to World Leaders' (3 April 2000) http://www.virusmyth.net/aids/news/lettermbeki.htm; 'Opening Speech to the Presidential Advisory Panel on AIDS' (6 May 2000) http://www.virusmyth.net/aids/news/tmspeech.htm and various interviews, including a live television interview with South African journalist Debra Patta (E-TV 'On the Record' (24 April 2001)), where Mbeki said that he would not take an HIV test on the grounds that it would be a 'publicity stunt', adding 'when you do an HIV test what is the test testing? . . . what is it measuring? So I go and do a test I'm confirming a particular paradigm. It doesn't help in addressing this health need'. Available at http://www.virusmyth.net/aids/news/etvmbeki.htm. (Accessed 14 February 2011).

[67] Thornton: 2008, 38.

British Prime Minister, Tony Blair in which he insinuated that HIV did not cause AIDS.[68] In the letter, he said:[69]

> A simple imposition of Western experience on African reality would be absurd and illogical … [and] a criminal betrayal of our responsibility to our own people … I am convinced that our urgent task is to respond to the specific threat that faces us as Africans. We will not eschew this obligation in favour of the comfort of the recitations of a catechism that may very well be a correct response to the specific manifestations of AIDS in the West.

Mbeki also said:[70]

> Needless to say, these figures will provoke a concerted propaganda campaign among those who have convinced themselves that HIV-Aids is the biggest cause of death in our country.

In April 2000, he declared that poverty was the real cause of AIDS.[71] He ordered the then health minister, Dr Manto Tshabalala-Msimang, to consider a cut in the AIDS budget, on the basis of five year-old statistics which purportedly showed that the disease caused little more than 2 percent of deaths in South Africa.

Some scholars have attributed the above denialist stance to the political environment at the time. It is argued that in the late 1980s and early 1990s, when AIDS was 'silently' buttressing

---

[68] President Mbeki, "Letter to World Leaders on AIDS in Africa, (Open Letter)" (3 April 2000) as quoted in Forman: 2007, 235. See also, Thornton: 2008, 38–40.

[69] Forman: 2007, 235; Thornton: 2008, 38–40.

[70] McGreal: 2002.

[71] This was during the World AIDS Conference in April 2000. Durban, South Africa.

in South Africa, the country was still reeling from the unbanning of the ANC and the democratic celebrations of political freedom.[72] It is also argued that the ANC lacked credibility or legitimacy amongst Black South Africans, and any broader efforts to alter sexual behaviour would certainly have been met with considerable suspicion.[73] It has also been expressed that the capacity of the new government to deliver was constrained by the global economic climate which influenced the ANCs move to greater fiscal discipline and reduced social spending.[74] By 1996, they adopted the neoliberal *Growth, Employment and Redistribution Strategy* (GEAR), which favoured privatisation, deregulation, rationalisation of the public sector and strict economic stringency in social spending.[75] The political and economic inequalities were, therefore, viewed as a long-term project that would emerge from a stronger economy rather than increased social spending.[76] Nevertheless, while the government remained in denial, AIDS took its toll. The government abdicated its constitutional duties progressively to realise access to health care services specifically in

[72] Forman: 2007, 229. See also Thornton: 2008, 153.

[73] Van der Vliet, V., 'South Africa Divided against AIDS: A Crisis of Leadership,' in Kyle, DK., & David, LL., (eds.) *AIDS and South Africa: the social expression of a pandemic* (2004) 48 49. Van der Vliet argues that given that the epidemic was still in the 'silent' HIV phase, many saw AIDS as a government construction, derided as standing for "Afrikaner Intervention to Deprive us of Sex." There were several conspiracy theories about the origins of AIDS, said to have been developed by 'imperialist' governments and deliberately transmitted by people working for the police. That there was in fact truth behind the latter assertions emerged during the Truth and Reconciliation Commission hearings. Any efforts by the apartheid government's efforts to promote condom use were viewed with incredible suspicion as part of a 'genocidal' family planning program, while inadequate efforts to promote safer sex were seen as the apartheid government's effort to control population growth.

[74] Forman: 2007, 225–227.

[75] Marais, H., *South Africa: Limits to change - The political economy of transformation* (1998) 163–165.

[76] Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2001) 5 *Law, Democracy & Development* 179–194.

regard to women and children.[77] In South Africa, by 1998, it was estimated that up to 70 000 children were being born every year with HIV and there were already signs that rising infant mortality was being caused by mother-to-child transmission.[78] This political apathy is in contrast to what other countries like Uganda did.[79] This state of affairs meant that government's programmes for women and AIDS were indifferent, ultimately leading to a constitutional confrontation as will be seen later in this chapter.[80]

7.7 INTERNATIONAL COMMITMENTS AND CONSTITUTIONAL SCHEME

The Constitution regulates the signing, ratification and the transformation of treaties into domestic law[81] and any international agreement becomes law in the state when it is enacted into law by national legislation – hence the country is dualist.[82] The Constitution also provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international

[77] Heywood, M., 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278.

[78] Ministry of Health: SA Demographic and Health Survey (1998).

[79] See generally, Mubanjizi & Twinomugisha: 2010; Thornton: 2008.

[80] Section 7.8.2.

[81] Section 231.

[82] Section 231(4) of the Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

law.[83] South Africa signed, but has not ratified the ICESCR.[84] The reasons for non-ratification are not clear. Some have asserted that non-ratification is due to bureaucratic bungling, caused by the responsibility for the ratification of the ICESCR being transferred from one department to another.[85] The government of South Africa however, ratified CEDAW without reservations.[86]

One of the most laudable aspects of the Constitution is its designation of the socio-economic rights as justiciable.[87] This designation provided one of the reasons for the author's choice of the country as a case study.[88] Prior to this recognition, several views expressed the strengths

[83] Section 39(1)(b).

[84] The CESCR has expressed its concerns about the country's non ratification of the treaty saying ratification of this international human rights instrument would strengthen the efforts of the State Party to meet its obligations. See for example, United Nations (2000). Concluding Observations of the Committee on the Rights of the Child: South Africa. Committee on the Rights of the Child, Geneva.

[85] See Heyns, C., & Viljoen, F., 'The Impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483–535. Khoza suggests that another possible explanation for South Africa not ratifying or for delaying ratification of the ICESCR could be the fact that socio-economic rights are firmly protected in South Africa's Constitution – See Khoza, S., 'A Submission to the Parliamentary Ad Hoc Committee on Review of State Institutions Supporting Constitutional Democracy. The South African Human Rights Commission and its monitoring of socio-economic rights through compiling periodic reports.' 2007. Community Law Centre, University of the Western Cape, Cape Town.

[86] On 15 December 1995.It entered into force on 15 January 1996. South Africa's initial report was due on 14 January 1997, and was submitted on 5 February 1998. It was considered by the UN CEDAW Committee during its nineteenth session in 1998. After the initial report, no further reports had been submitted. South Africa's second periodic report was due on 14 January 2001, the third periodic report was due on 14 January 2005. In 2009, the country reported to CEDAW for the period 1998 to 2009.

[87] This was facilitated through the case of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 (4) SA 744 (CC) [hereafter *Re Certification* case].

[88] The other motivations are provided in chapter one, section 1.9.

and danger of the inclusion or exclusion of socio-economic rights. For example, Scott and Macklem argued at the time of the drafting of the 1996 Constitution, that a decision by the South African constitution-makers to include civil and political rights in the Bill of Rights, but to treat social rights as non-justiciable, would create the danger that 'the values underpinning social rights would be devalued as a result of selective constitutionalisation'.[89] They fittingly observed:[90]

> In the absence of entrenched social rights, it would be unwise to expect that values unconstitutionalised (and thus not reinforced by the continuing processes of constitutional interpretation) could hold their own in wider political discourse. ...A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognise the realities of life for certain members of society who cannot see themselves in the constitutional mirror. Instead, they will see the constitutional construction and legitimation of a legal self for who social rights are either unimportant or taken for granted. With the passage of time and absent important countervailing factors, this normative vision will help to confirm the very reality that it posits.

It was also contended that the inclusion of socio-economic rights as justiciable would be unrealistic because these rights are incapable of immediate realisation.[91] It was as well argued that the budgetary implications would be onerous on the state and encroach on the

[89] Scott, C., & Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in new South African Constitution' (1992) 141 *U Pa L Rev 1* 1–148 27 [hereafter Scott & Macklem: 1992].

[90] Scott & Macklem: 1992, 35–36 as quoted in Liebenberg, S., *Socio-Economic Rights adjudication under a transformative constitution* (2010) [hereafter Liebenberg: 2010] 36.

[91] See Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1–3; Bossuyt, M., 'International human rights systems: Strengths and weaknesses' in Mahoney, K., & Mahoney, P., (eds) *Human rights in the twentieth century* (1993); Cranston, M., 'Human rights real and supposed' in Raphael D., (ed) *Political theory and rights of man* (1967) Cranston, M., *What are human rights* (1973).

constitutional principle of separation of powers.[92] Another view was that they should take the form of 'directive principles of state policy'.[93] The effect of the latter position would have been that they would not be enforceable but require political commitment.[94] The justiciable view took the day when the Constitutional Court rejected the arguments against including socio-economic rights as justiciable in the process of certifying the 1996 Constitution.[95] The Constitutional Court succinctly observed:[96]

> It cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred by a bill of rights that it results in a breach of separation of powers.

The Constitutional Court added that civil and political rights often have similar budgetary implications as socio-economic rights and that the fact that socio-economic rights would give consequence to such implications does not give bar to their justiciability.[97] This, therefore, gave legal force to the rights as opposed to directive principles which suffer from

[92] See Fuller, L., 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 – 409; Pieterse, M., 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882 – 905

[93] Davis, D., 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *South African Journal on Human Rights* [hereafter Davis: 1992] 475 – 490; Dlamini, C., *Human rights in Africa: Which way South Africa* (1995).

[94] Davis: 1992, 475 – 490.

[95] *Re Certification* case.

[96] Para 77.

[97] See *Re Certification*, paras 77 & 78.

abstraction.[98] This abstraction would have reduced them to mere suggestions of good governance.[99] This position supports the argument I made in chapter one that citizens should be able to make legal claims from the state.[100]

On the role of socio-economic rights in the Constitution, Liebenberg aptly argues:[101]

> Socio-economic rights in South Africa's Constitution have the potential to contribute to the transformation of our legal culture and political culture by inviting recourse to a set of values and social and material realities which have hitherto been suppressed in our legal culture. The conditions of social and economic deprivation in which many people in South Africa live their lives are rendered important subjects of constitutional concern. However, their potential to contribute to the transformation of South African legal culture will be constrained if their interpretation is controlled by formalism.

I am in agreement with Liebenberg's argument that socio-economic rights provide a forum for transformation. I hereby wish to argue that, in the context of women, HIV and AIDS, the regime of socio-economic rights provide the potential to require the state to enhance women's capabilities. The analyses in chapters three, four and five have substantiated the imperative for the realisation of women's socio-economic rights in the context of HIV and AIDS. I further hereby submit that, applied with the feminist capabilities approach, the realisation of socio-economic rights is an important framework to explore in order to transform legal and policy

[98] See Ackerman, BA., *Social justice in the liberal state* (1980) [hereafter Ackerman:1980] 5. Ackerman conceives of rights as political tools with which to express justified and legitimate claims to social goods within societal dialogues and political struggles. See also, Dworkin, R., *Taking rights seriously* (1977) 269.

[99] Ackerman: 1980.

[100] See chapter one, section 1.4.

[101] Liebenberg: 2010, 45.

approaches to women, HIV and AIDS. This imperative, further provides the podium to change the initial denialist stance towards HIV and AIDS in South Africa.

Furthermore, I am in accord with Liebenberg's assertion that the potential for socio-economic rights will be constrained if their interpretation is controlled by formalism.[102] The feminist capabilities approach to women, HIV and AIDS calls for attention to substantive equality. The realisation of this approach, therefore, finds support in the guarantees and implementation of women's socio-economic rights. The Constitution, therefore, espouses the body of rights that form the basis of analysis in this chapter. The next section examines the right to equality the overriding right in the context of women, HIV and AIDS. Thereafter, I examine the right to access health, the right to access adequate housing, right to property and freedom and security of the person.

The Constitution provides for the right to equality.[103] It is a free standing right under section 9 of the Constitution and is applicable directly and indirectly.[104] Moreover, the right enjoys a

[102] Liebenberg: 2010, 45.

[103] Section 9 provides:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

special place in the South African constitutional context.[105] Accordingly, the state is enjoined under the Constitution to eradicate inequalities in access to health services, access to adequate housing, rights relating to property and inheritance in family matters and freedom from gender-based violence. These imperatives resonate with the principle of substantive equality and the capabilities approach, especially in light of the health inequities and inequalities prevailing in South Africa.

The Constitution makes justiciable the right to access to health care.[106] As a justiciable socio-economic right, therefore, it allows for more leeway in limiting private commercial or other

---

[104] See section 9 (1) and section 9(2)'s determination that the right to equality encompasses the 'full and equal enjoyment of all rights and freedoms'.

[105] The centrality of the right to equality has been recognised by the South African Constitutional Court in many of its judgements, for example *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153(CC) in which Mohamed, J noted that 'there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised', para (20); *President of the Republic of South Africa v Hugo* 1997(6) BCLR 708 (CC) in which Kriegler, J held that 'in our own particular history, and our vision for the future, a Constitution was written with equality as its centre' (para 74); *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) where Moseneke said 'the achievements of equality goes to the bedrock of our constitutional architecture' (para 22).

[106] Section 27 provides:

> (1) Everyone has the right to have access to -
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.

interests in pursuit of social justice than would otherwise have been the case.[107] The utility of the right of access to health was to form the basis of a confrontation with government in the *Treatment Action Campaign* case.[108] Furthermore, the Constitution makes justiciable the right of access to housing.[109] The right of access to housing was to form a groundbreaking decision in the case of *Government of Republic of South Africa and Others v Grootboom and Others (Grootboom*).[110] This case is discussed later in this chapter.[111]

The Constitution also provides for the right to property.[112] The constitutional provisions of equality, together with the guarantee of the rights of access to health care services, right of

[107] Pieterse, M., 'A benefit-focused analysis of Constitutional health rights'. *Unpublished doctoral dissertation, University of Witwatersrand, 2005* [hereafter Pieterse: 2005] 179. See also Gertler, P., & Van der Gaag, J., *The willingness to pay for medical care: Evidence from two developing countries* (1990) 15–16; 21–22;Christianson, MA., 'Health care' in Strydom, EML., (ed) *Essential social security law* (2001) 122 147–148; Heywood, M., 'Debunking "Conglomo-talk": A case study of the amicus curiae as an instrument for advocacy, investigation and mobilisation' (2001) 5 *Law, Democracy and Development* 133 138 [hereafter Heywood: 2001].

[108] 2002 5 SA 721 CC.

[109] Section 26 provides:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[110] 2000 (11) BCLR 1169 (CC).

[111] See section 7.9.1.

[112] Section 25 provides:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

access to housing and property, permits an interpretation encompassing entitlements that can be utilised to realise women's rights in the context of HIV and AIDS, especially from a substantive equality point of view. Additionally, the Constitution espouses other rights of

---

(2) Property may be expropriated only in terms of law of general application -
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.
(4) For the purposes of this section -
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9) Parliament must enact the legislation referred to in subsection (6).

pivotal importance in this context: the right to human dignity,[113] life,[114] freedom from all forms of violence,[115] bodily integrity,[116] privacy,[117] education[118] and access to information.[119]

On the basis of the feminist capabilities approach, and the legal obligations set out in chapters five and six, the next section of this work presents a critical analysis of South Africa's laws and policies affecting women in the context of HIV and AIDS. This examination focuses on the country's efforts towards the realisation of women's rights in the areas of access to health services,[120] access to adequate housing,[121] access to property,[122] and freedom from gender-based violence.[123]

[113] Sections 10.

[114] Section 11.

[115] Section 12(1) (c).

[116] Section 12(2).

[117] Section 14.

[118] Section 29.

[119] Section 32.

[120] Section 7.8.

[121] Section 7.9.

[122] Section 7.10.

[123] Section 7.11.

7.8 ACCESS TO HEALTH GOODS AND SERVICES

In chapter six, I argued that the state has the obligation to provide free or low cost drugs to women.[124] In 1994, South Africa introduced free medical care for pregnant women and children under the age of 6 and later in 1996, free primary health care services for all South Africans.[125] The National Health Act [126] expressly recognises the state's positive obligation to realise the right to health services within available resources.[127] Cameron correctly argues that although the National Health Act does not directly address HIV/AIDS, it has important provisions for the disease.[128] These include provisions relating to the obligation on the Minister of Health to provide basic health services,[129] codification of the law with regard to patient confidentiality,[130] obligation to disseminate information regarding availability and accessibility of health services and the obligation to prepare national health plans.[131] Among

[124] Chapter six, section 6.2.13.

[125] McIntyre, D., & Gilson, L., 'Putting equity in health back into the social policy agenda: experience from South Africa' (2002) 54 *Social Science and Medicine* 1637–1656.

[126] Act 61 of 2003. The Act came into operation on 2 May 2005.

[127] Section 2(c)(i).

[128] Cameron: 2005. See also, AIDS Law Project, Law & Treatment Access Unit, 'Joint Submission of the AIDS Law Project and the Treatment Action Campaign to the Portfolio Committee on Health: Public Hearings on the National Health Bill, B32-2003,' (31 July 2003)" [online] available at http://www.aidslaw.org.za (health rights) [2005-09-16].

[129] Section 12.

[130] Sections 7–9 and 14.

[131] Section 25.

many things, the National Health Act mandates the public health sector clinics and community health centres to provide free health care services to all pregnant and lactating women who do not have medical scheme coverage.[132] This is a critical provision for women as it makes available the basic service of maternal health, a situation crucial to women infected with HIV and AIDS. It also goes to fulfil the obligation to provide free and low cost drugs to women, and also addresses issues of accessibility and affordability of health services as enunciated in the previous chapter. These legal guarantees go to enable women affected by HIV and AIDS to live amidst the epidemic in a manner that can see them realise their capabilities as health human beings.

Also, the South African prevention of mother-to-child transmission programme has been implemented at pilot sites since 2001,[133] and nationally since 2002.[134] The policy seeks to provide continued guidance towards successful reduction of mother to child transmission, building on work done in the past decade. Some of the specific interventions of the programme include: primary prevention of HIV especially among women of child bearing age,[135] integrating prevention of mother-to-child transmission interventions into routine maternal and child health, as well as general HIV care, treatment and support services.[136] It also includes promoting the acceptability of voluntary counselling and testing services in the context of prevention of mother-to-child transmission in facilities offering routine antenatal

[132] Section 4(3)(a).

[133] See Policy and Guidelines for the Implementation of the PMTCT programme [hereafter PMTCT Guidelines].

[134] PMTCT Guidelines.

[135] PMTCT Guidelines.

[136] PMTCT Guidelines.

care.[137] The programme also promotes routine offer of voluntary counselling and testing,[138] providing appropriate regimens to prevent mother-to-child transmission of HIV according to the risk profile based on the HIV test,[139] CD4 cell count and clinical staging and providing other appropriate treatment, such as for opportunistic infections management, nutritional support and anti-retroviral therapy.[140]

Furthermore, only the small minority who could afford to pay for private health care had access to treatment before 2004.[141] In 2005 to 2006, about 60 percent of pregnant women who tested HIV-positive received Nevirapine.[142] This is in line with the obligation to provide acceptable and affordable health services. One could therefore, argue that at a policy level, prevention of mother-to-child transmission is well covered. There have, however, been recent concerns at the high level of AIDS related maternal and infant mortality.[143] It is clear from the guidelines that South Africa has made an effort to provide a service that is focused on

[137] PMTCT Guidelines.

[138] PMTCT Guidelines.

[139] PMTCT Guidelines.

[140]PMTCT Guidelines.

[141] See Mubanjizi & Twinomugisha: 2010, 108.

[142] PMTCT Guidelines. The package includes primary HIV prevention programmes for women of childbearing age, routine offer of voluntary HIV counselling and testing to pregnant women, safe infant feeding counselling and support, safe obstetric practices, single dose Nevirapine to the mother and infant, and provision of infant formular to women who choose this route and who will be able to do it safely, in an acceptable, feasible, affordable and sustainable manner.

[143] Department of Health, 2006; Pattinson, R., 'Maternal health' South African Health Review 2006. Durban, South Africa, Health Systems Trust.

promoting women's health within the context of HIV/AIDS. However, the implementation of the guidelines has not been without challenge. Some of the most challenges will be discussed later in this chapter.[144]

It is further arguable that this prevention of mother-to-child transmission programme and the provision of Nevirapine, if implemented appropriately, can increase women's capacities to have healthy children. This service, in effect, has the benefit of reducing the disease and care burden that is borne by women in this context. This also leaves room for women to pursue other tasks that contribute to their wellbeing, such as seeking employment. The effect of this would be to realise their capacities as productive human beings with positive effects on their health.

7.8.1 Elimination of discrimination in access to health services

Chapter six analysed the state obligation to eliminate discrimination in accessing health goods and services.[145] The Medical Schemes Act[146] was enacted to regulate and reform private health care insurers and providers.[147] The Medical Schemes Act provides that all medical

[144] Section 7.8.6.

[145] Chapter six, section 6.2.3.

[146] Act No 131 of 1998.

[147] The preamble to the Act states: 'To consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; to protect the interests of members of medical schemes; to provide for measures for the co-ordination of medical schemes; and to provide for incidental matters.

schemes are entitled to medical treatment of HIV infection and medication, including the provision of anti-retroviral therapy as a Prescribed Minimum Benefit.[148] I hereby wish to argue that this law, if well implemented, has the potential to safeguard the health of women. I further argue that this provision, in turn, has the prospect of enabling women to function in the context of HIV and AIDS without the fear of losing insurance. I also assert that this provision room for them to realise their other capabilities as healthy human beings who are not denied meaningful existence on account of their HIV status.

The Medical Schemes Act also prohibits registration of a medical scheme which discriminates on a list of grounds akin to those in section 9 of the Constitution, but mainly including 'the status of health'.[149] This provision is supplemented by the provision of the same Act to the effect that the terms and conditions applicable to a person's admission to a medical scheme may not relate in any manner to similar grounds.[150] In effect, these two provisions prohibit the exclusion of membership from a medical scheme based on health status or any grounds listed in the Constitution.[151] I hereby submit that the above provision has the prospect of protecting

---

[148] Reg 2 of the Amendment to the General Regulations made in terms of the Medical Schemes Act 131 of 1998 GN R 1410 in *GG* 27055 of 2004-12-03. The national guidelines referred to are, according to the amendment, set out in the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa; and the National Anti-retroviral Treatment Guidelines – both of which are available at the office of the Director-General: National Department of Health.

[149] See section 24(2)(e) is to the effect that no medical scheme shall be registered under this section unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health.

[150] Section 29(1)(n).

[151] For more on this, see Ngwena, C., 'HIV/AIDS and equal opportunities in the workplace: The implications of the Employment Equity Act' (2000) 33 *CILSA* 96 106–107.

women living with HIV and AIDS as they are more likely to be victims in circumstances of health coverage. Moreover, I wish to argue that it has the further potential of protecting women against discrimination and stigma – vices that pervade women living with HIV and AIDS.[152] Protected against discrimination, women are more likely to function normally amidst the epidemic and to realise their capacities as healthy human beings.

At the time of writing this thesis, debates are alive in regard to the adoption of a National Health Insurance in South Africa.[153] If adopted, the National Health Insurance has the potential to increase access to treatment.[154] I have argued elsewhere that the adoption of an National Health Insurance is a road towards eradicating inequities and inequalities to health services.[155] The focus on health insurance is one that has the advantage of ensuring that women affected by HIV and AIDS are not left to the ravenousness of insurance providers. Studies in South Africa reveal that women who have standard higher education, higher incomes and live in affluent provinces and permanent accommodations, have a higher

---

[152] See analysis in chapter four, section 4.3.1.

[153] For more, see the website: http://www.southafrica.info/news/business/153793.htm. (Accessed 16 March 2011).

[154] See, generally, Amollo, R., 'In pursuit of health equity: A critique of the proposed national health insurance (2009) 10 *ESR Review* 14 [hereafter Amollo: 2009].

[155] Amollo: 2009.

likelihood of being insured.[156] One of the above studies correctly concluded that poverty reduction programmes aimed at increasing women's incomes in poor provinces, improving living environment (e.g. potable water supplies, sanitation, electricity and housing) for women in urban informal settlements, enhancing women's access to education, reducing unemployment among women, and increasing effective coverage of family planning services, will empower South African women to reach a higher standard of living and in doing so increase their economic access to health insurance policies and the associated health services.[157]

7.8.2 Accountability and social activism: *Treatment Action Campaign* case

Chapter six examined the obligation placed upon the state to provide essential medicines including ARVs.[158] In South Africa, the constitutional and legislative obligation imposed on the government to provide health care services culminated into a constitutional confrontation in the celebrated case of *Treatment Action Campaign.* The case presented a constitutional challenge to restrictions on the provision of anti-retroviral drugs to HIV positive pregnant women, resulting in tens of thousands of unnecessary infections and deaths. The case alleged violation of the right to health care services in section 27(1) and section 28(1)(c) of the South

---

[156] Kirigia, JM et al., 'Determinants of health insurance ownership among South African women' (2005) 5 *BMC Health Services Research* 1–10 [hereafter Kirigia et al: 2005]; Hoffman M et al., 'Women's health status and use of health services in a rapidly growing peri-urban area of South Africa' (1997) 45 *Social Science & Medicine* 149–57; Cooper, D et al., 'Urbanisation and women's health in Khayelitsha. Part II. Health status and use of health services' (1991) 79 *South African Medical Journal* 428–432.

[157] Kirigia et al: 2005.

[158] Chapter six, section 6.2.11.

African Constitution. Hence, I will argue that the case affirms the role of accountability and social activism in securing access to medicine and generally, the right to access health services.

The state's policy towards the prevention of mother-to-child transmission was confusing and uncertain. The policy established 18 'research sites' – two in each province – where Nevirapine would be provided to HIV positive pregnant mothers at childbirth.[159] Further, the policy placed a ban on health care professionals in state health care facilitates other than the 18 pilot sites from administering Nevirapine to HIV positive pregnant mothers.[160] This essentially meant that mothers and their babies who could not afford private health care and did not have access to one of the pilot sites, could not access anti-retroviral treatment.[161] The Constitutional Court found government policy on the provision of mother-to-child transmission unreasonable and unconstitutional because it excluded a significant segment of society.[162] The programme had failed to address the needs of mothers.[163] Hence, impeding access to other essential health services like sexual and reproductive services, which are key to women's health in the context of HIV and AIDS, would amount to a violation.[164] This

[159] *Treatment Action Campaign,* para 10–11.

[160] *Treatment Action Campaign,* para 10–11.

[161] *Treatment Action Campaign,* para 17.

[162] *Treatment Action Campaign,* para 68.

[163] *Treatment Action Campaign* , para 67.

[164] CESCR General Comment 14, paras 34; 35.

includes the obligation not to withhold or misrepresent health-related information, and to act transparently.[165] The Constitutional Court found the policy to be unconstitutional.[166]

The Constitutional Court also found the policy to be unreasonable because the cost of administering Nevirapine was negligible, its safety and efficacy was proven beyond question, the procedure of administering it was simple and that funds to expand its provision outside designated sites were available.[167] The Constitutional Court ordered the state to make Nevirapine available, to provide counsellors; and to take reasonable measures to extend the testing and counselling facilities throughout the public health sector.[168] The Constitutional Court rejected the argument advanced by one of the interveners for a distinction between a minimum core content of the right to healthcare and the obligations imposed on the state in section 27(2) that are subject to progressive realisation and available resources.[169]

In this context, I wish to argue that the Constitutional Court augmented the importance of Nevirapine as an essential medicine. The decision establishes a conceptual and remedial framework for judicial review and enforcement of the obligation to ensure access to health

[165] CESCR General Comment 14, para 34.

[166] The court said the policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites (para 67).

[167] *Treatment Action Campaign*, paras, 80; 95.

[168] *Treatment Action Campaign*, para 135.

[169] *Treatment Action Campaign*, paras 26–39.

care and provides an inspiring model for integrating political and legal action.[170] I further wish to argue that for women, it can be said that the case brought to light some of the major health issues confronting them, that is, access to HIV and AIDS-related treatment. Therefore, the Constitutional Court's approach in this case was proactive to the degree that it compelled the state to provide treatment that enables women affected by HIV and AIDS to have healthy babies. The ability to have a healthy child in turn ensures that women function normally and are capable of realising their other needs in day to day life.

I however, wish to argue that the benefit for women in the *Treatment Action Campaign* case is rather 'inadvertent'. The case paid little attention to the specific context of women and AIDS, focussing on children and not the mothers.[171] The case hinged on children's rights, forgetting the mothers. The opportunity was missed to interpret the right to health as including sexual and reproductive health for women. The Constitutional Court also missed an opportunity to explicitly engage with the meaning of 'access to care services for women' and the obligations

[170] Ngwena described it as a bold decision in that it 'countermanded government policy and effectively prescribed what it deemed to be an equitable health policy'. See, Ngwena, C., 'Access to anti-retroviral treatment therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83. See also, Khoza, S., 'Reducing Mother to Child Transmission of HIV: The Nevirapine Case' (2002) 3 *ESR Review* 2; Chirwa, D., 'Minister of Health and Others v Treatment Action Campaign and Others: Its Implications for the Combat Against HIV and AIDS and the Protection of Economic, Social and Cultural Rights in Africa' (2003) *East African Journal of Peace and Human Rights* 174 ; Chirwa, D., 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 547; De Vos, P., 'So much to do, so little done? The right of access to anti-retroviral drugs post-*Grootboom* (2003) 7 *Law, Democracy and Development* 94.

[171] Baimu, E., 'The government's obligation to provide anti-retrovirals to HIV-positive Pregnant women in an African human rights context: The South African Nevirapine case' (2002) 2 *African Human Rights Law Journal* 160; Cook, RJ., 'Exploring fairness in health care reform' (2004) 29 *Journal of Juridical Science* 18–19; Durojaye, E., 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 203.

that the state incurs in relation to these and other aspects of the right.[172] However, this argument is cognisant of the tremendous contribution the case made to the health of children in the context of HIV and AIDS in South Africa.

All the same, the case remains instructive in influencing government action through the judicial system. Liebenberg accurately affirms that the *Treatment Action Campaign* judgment placed it beyond doubt that the courts are not confined to making general declaratory orders[173] relating to the state's non-compliance with the constitutional duties imposed by socio-economic rights.[174] However, there are concerns around declaratory orders requiring benefits to particular groups. These concerns relate to institutional capacity and legitimacy of the courts to make decisions with policy direct implications.[175] Still, I agree with Liebenberg that these concerns should not be overstated as obstacles to providing direct benefits to litigants. In the same vein, I wish to argue that litigation on rights such as health, has the potential of improving women's access to health services such access to ARVs. Therefore, the decision in

[172] Pieterse: 200, 98–99; Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 2 3; Bilchitz, D., 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1 6; 8; 10; Brand, D., 'The proceduralisation of South African socioeconomic rights jurisprudence, or "what are socio-economic rights for?"' in Botha, H., Van der Walt, A, & Van der Walt, J., (eds) *Rights and democracy in a transformative constitution* (2003) 45–46; Iles, K., 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *SAJHR* 448 454.

[173] Declaratory orders are traceable as a common law remedy predating the Constitution; they serve the role of clarifying legal and constitutional obligations. Such clarification helps to enforce the constitution and the values upon which the Constitution is based – See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) para 107.

[174] Liebenberg: 2010, 411.

[175] Liebenberg: 2010, 63–74.

Treatment Action Campaign represents an approach that albeit indirectly, enhances women's capabilities in the context of HIV and AIDS.

At this point, it is important to acknowledge the role of civil society in promoting access to health care in the context of women, HIV and AIDS. The Treatment Action Campaign (TAC) – a national NGO-cum-social movement, has been a key role player in HIV and AIDS advocacy in South Africa.[176] Government's recalcitrance to provide prevention of mother –to-child treatment and the dawning awareness of the influence of pharmaceutical companies on treatment access motivated AIDS activists in late 1998 to form the NGO. TAC focused on advocating for access to affordable AIDS treatment.[177] The ginger group is closely modelled on the apartheid-era United Democratic Front, which operated as a civil society network engaged in mass mobilisation through grassroots activism, advocacy and protests.[178] The organisation's support base is also sustained by its collaboration with local and international partners. For instance, locally, it has networks and alliances, including with the Congress of South African Trade Unions (COSATU), which represents two million workers, and is a partner of the ruling tripartite alliance with government and with a broad base of other NGOS, religious groups and medical and health care worker organisations.[179] It also has alliances with international NGOs, such as Médecins Sans Frontières. As a lobby and advocacy group, it has utilised legal, social and political agency in democratic South Africa to champion the

[176] See also Mubanjizi & Twinomugisha: 2010, 118–119.

[177] Forman: 2007, 244. See also the TAC website – www.tac.org.za.

[178] Forman: 2007, 244.

[179] Forman: 2007, 244. See also Petchesky, RP., *Global prescriptions: Gendering health and human rights* (2003) [hereafter Petchesky: 2003] 133.

rights of people affected by HIV and AIDS as demonstrated in the way it brought about the *Treatment Action Campaign* case above.[180]

It is, therefore, clear that courts and civil society play a major role in realising women's right to access to health services in the context of HIV and AIDS. As such, the discrimination of women within the context of HIV and AIDS requires proactive approaches in order to enable women function normally amidst the epidemic and realise their capacities as healthy and productive citizens. Moreover, civil society action in this context enables women to access legal redress which in turn achieves state action that empowers women to realise their capabilities.

7.8.3 Utilisation of the TRIPS flexibilities

I set out that the state has an obligation to utilise flexibilities afforded under the TRIPS Agreement in order to make drugs more available and accessible.[181] South Africa had in place the Medicines and Related Substances Control Act [hereafter Medicines Act).[182] In 1997, Parliament passed the Medicines and Related Substances Control Amendment Act (Amended

[180] Other key civil society organisations that have played a role include: the AIDS Foundation of South Africa, the AIDS Consortium, Wits University AIDS Law Project, the AIDS Legal Network of South Africa, the Centre for HIV/AIDS Networking, Lovelife and the Health Systems Trust.

[181] Chapter six, section 6.2.6.

[182] Act 101 of 1965.

Medicines Act).[183] Among many things, the Amended Medicines Act gives the government a legal framework to compel pharmacists to prescribe cheaper generic substitutes of medicines no longer under patent (generic substitution).[184] The Amended Medicines Act also allows for cheaper importation of brand-name medicines from countries where the product is sold for less (parallel importing).[185] Furthermore, it allows for the issuance of compulsory licenses, under certain conditions, to local companies to produce generics of patented medicines (compulsory licensing).[186] The law also allows for a transparent pricing mechanism to make pharmaceutical companies justify the prices they charge.[187] It therefore allows the government to manufacture generic medicines and make medicines more affordable and accessible. The Amended Medicines Act, therefore, is an important piece of legislation for the provision of cheap ARVs drugs in South Africa. There is no need to emphasise that access to ARVs is empowering to women and improves their capacity to live health lives amidst the epidemic.

The regime of the Amendment Act presents a framework capable of ensuring the provision of ARV medicines for women, especially in light of the flexibility provided by the TRIPS Agreement. The law, therefore, bears prospects for women to function normally and realise their capabilities in the midst of HIV and AIDS. However, the implementation of this framework has not been easy. Denialist and obstructionist attitudes at national and provincial

[183] This was by the insertion of sections 22C, 22D, 22E, 22F, 22G and 22H in the Medicines and Related Substances Control Act 101 of 1965 [hereafter Medicines Act).

[184] See section 22(F).

[185] See section 22(H).

[186] See section 22(C).

[187] See section 22(G).

leadership levels have slowed the roll-out of ARVs.[188] Research shows that by the end of 2008, fewer than 600 000 people were being treated.[189] Furthermore, ARVs continue to come at a high cost and there is limited access to generic medicines.[190] In this midst, women are at the centre of the burden because of their economic levels. As such, their ability to function normally and to realise their capabilities is limited by the inaccessibility of life saving drugs.

In February 1998, The Medicines Act was challenged by the Pharmaceuticals Manufacturers Association (PMA) in the case of *Pharmaceutical Manufacturers' Association v President of the Republic of South Africa* (*PMA* case).[191] Initially the PMAs suit contended that the Medicines Act authorising parallel imports or compulsory licensing to obtain affordable

[188] See 'HIV/AIDS in South Africa' Available at htt://aids.org.za/hiv.htm. (Accessed 12 October 2010) (hereafter HIV/AIDS in South Africa: 2010).

[189] See HIV/AIDS in South Africa: 2010.

[190] HIV/AIDS in South Africa. For more reading on this, see also: Amollo, R., 'Revisiting the TRIPS regime: Rwanda-Canadian ARV drug deal 'tests' the WTO General Council Decision' (2009) 17 *African Journal of International and Comparative Law* 240–269; Forman, L., 'Trade rules, intellectual property and the right to health' (2007) 21 *Ethics and International Affairs* 337; Mushayavanhu, D., 'The Realisation of access to HIV and AIDS-related medicines in Southern African countries: Possibilities and actual realisation of international law obligations' in Viljoen, F., & Precious, S., (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) 127; Forman, L., 'Trading health for profit: Bilateral and regional Free Trade Agreements affecting domestic property rules on pharmaceuticals' in Cohen., JC et al., (eds.) *The power of pills: Social, ethical, and legal issues in drug development, marketing, and ricing* (2006) [hereafter Cohen et al: 2006] ; Pogge, T., 'Harnessing the power of pharmaceutical innovation,' in Cohen et al:2006, 142–149; Pogge, T et al., *Incentives for global public health: Patent law and access to essential medicines* (2010); Pogge, T., *Access to medicines*, special issue of (2008) 1 *Public Health Ethics* 73; Durojaye, E., 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 187; Forman: 2007.

[191] TPD 4183/98 (March 2001).

generic drugs violated the sanctity of patent rights inscribed in the TRIPS Agreement.[192] The PMA instituted litigation, claiming that the relevant provisions violated the rights of its members to intellectual property under the Constitution,[193] to freedom of trade, occupation and profession and to freedom of expression (in that it compelled pharmacists to inform customers of cheaper generic alternatives to prescribed medicines).[194] Due to a global outcry from humanitarian NGOs such as MSF and Oxfam,[195] PMA dropped their claim.[196] The case, however, demonstrated the government and civil society's vigilance against private actors seeking to diminish access to essential medicines. Hence, this was a commendable step to improve access to affordable medicine by the South African government and all the stakeholders who were involved. I wish to argue that this action was particularly important in light of women's low economic status. Had the PMA prevailed, it is arguable that many women's capabilities would have been limited within the context of HIV and AIDS.

Retail pharmacy chains and the South African Pharmaceutical Society were to later challenge price control regulations that were promulgated pursuant to section 22G of the Medicines Act, in terms of which limits are set on the profit margins of retail pharmacists in relation to

---

[192] The action was aimed specifically at Section 15 (c) of the Medicines and Related Substances Control Amendment Act, which allows government to purchase drugs from other countries where prices are lower, therefore allowing for parallel trading of those drugs with the local equivalent as well as compulsory licensing.

[193] Section 25 thereof.

[194] See paras 5.1–5.6; 6.4.

[195] Kofi Annan, Nelson Mandela, UN agencies responsible for HIV/AIDS, WTO and a range of demonstrators, including women's groups and COSATU strongly voiced their concerns against the PMA suit.

[196] For more discussion on the *PMA* case, see generally, Heywood: 2001, 133; De Vos: 2003, 83; See also, Petchesky: 2003, 86.

prescribed medicines in *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* (*New Clicks South Africa v Minister of Health*).[197] In dismissing a variety of the challenges to the validity of the regulations, the Cape High Court affirmed the legitimacy of the purpose of the regulations, which it saw as obviously being aimed at complying with the state's obligations to increase access to medicines through assuring their affordability in terms of section 27(2). The regulations were subsequently invalidated by the SCA for not having adhered to the legality principle and for not having prescribed an 'appropriate' fee for pharmaceutical products.

In *New Clicks South Africa v Minister of Health*, the Supreme Court of Appeal (SCA) remarked:[198]

> The Act must be read in the light of section 27(1) of the Bill of Rights, which provides that everyone has the right to have access to health care services, including reproductive health care and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. One has to agree that the right of access to health care includes the

[197] 2005 (3) SA 238 (SCA). The applicants applied for leave to appeal. In issue is the validity of the 'Regulations relating to a Transparent Pricing System for Medicines and Scheduled Substances'. They were promulgated on 30 April 2004 by the Minister of Health in terms of section 22G of the Medicines Act. The regulations under attack provide for a pricing system that defines and controls the single exit price for manufacturers and importers and for a dispensing fee, which, for pharmacists amounts to either 16% of the exit price (if it is less than R100) or R16 (if more than R100) without a medical prescription. If there is a prescription the figures are 26% (if it is less than R100) and R26 (if more than R100, whether R100 or R1000). The major issues were whether these fees are 'appropriate' and whether the regulation of the single exit price is legal. There were two applications. In one the first applicant is the Pharmaceutical Society of South Africa ('PSSA'), joined by six other entities that own pharmacies. The other is by New Clicks SA (Pty) Ltd, the owner of 86 pharmacies. The respondents in both applications were first, the Minister of Health and second, Prof D McIntyre, cited in the court below under uniform rule 53 in her capacity as chairperson of the pricing committee. At the appeal stage the Treatment Action Campaign joined the proceedings as *amicus curiae*.

[198] See para 42.

> right of access to medicines although this right is not without limitations... It is also correct that the prohibitive pricing of medicines may be tantamount to a denial of the right of access to health care. All that is really common cause. What is not, is how parliament has sought to achieve the progressive realisation of this right through the provisions of the Act.

The SCA also said that in determining what is appropriate one must consider the conflicting interests of all those involved and affected. On the one hand there is the public, which is entitled to access to health care including affordable medicines.[199] As such, the case gave meaning to definition of what access to health services means along the lines of the CESCR General Comment on health.[200] Within the context of women's access to medicines, the case can be merited for clearly showing the balance between public health and profits making for pharmaceutical business. Women's ability to access medicines is central to their wellbeing. The role of life saving drugs in enabling women to function and achieve their capacities in the amidst HIV and AIDS needs no emphasis.

In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Other (Minister of Health and Another v New Clicks South Africa*) [201] the Constitutional Court aptly observed:[202]

> The purpose of the subsection is clearly to give effect to the right of access to health care services comprehended in section 27(1)(a) and (2) of the Constitution. This section guarantees the right of access to health care services and enjoins the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of

---

[199] See para 77.

[200] Para 12 (b) thereof which provides for accessibility as an essential element of health care.

[201] 2006 (8) BCLR 872 (CC).

[202] Para 514.

> [this right]." The right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable.

The Constitutional Court succinctly added:[203]

> The manifest purpose of section 22G(2)(b) is to enhance accessibility and affordability of medicines. It is in the light of this purpose that the factors relevant to the determination of an appropriate fee must be determined. An appropriate fee illuminates factors relevant to its determination. It is therefore necessary to consider first the meaning of an appropriate dispensing fee. The Medicines Act does not define appropriate dispensing fee. However the term appropriate dispensing fee must be construed in the light of the purpose of section 22G(2)(b), namely, to promote the availability of medicines at the lowest possible cost.

The Constitutional Court's approach in *Minister of Health and Another v New Clicks South Africa* provides a fair balance between profit-making for pharmacies and the affordability of medicines. The Constitutional Court's reference to section 27 of the Constitution affirmed the importance of the right of access to health within the context of access to affordable medicines. In this way, the Constitutional court endorsed an interpretation that would not leave the marginalised vulnerable. Hence, the decision provides a position that enables poor people, including women affected by HIV to access life saving drugs. Furthermore, I wish to state the above decision affirmed the position of the CESCR placing the obligation upon the state to ensure the private third parties do not interfere with the right to the highest attainable standard of health.[204]

---

[203] Para 517.

[204] CESCR General Comment 14, para 33.

7.8.4 HIV and AID-related plans and strategies

Chapter six analysed the obligation upon the state to have in place HIV and AIDS-related plans and strategies.[205] The HIV/AIDS and STI Strategic Plan for South Africa (NSP 2007)[206] represents the country's multisectoral response to the challenge with HIV infection and the wide-ranging impacts of AIDS.[207] The NSP 2007 recognises that gender inequalities, patriarchal and other negative attitudes towards women 'impact significantly on the choices that women can make in their lives' and increases the risk of exposure to HIV.[208] The drafters of the NSP were therefore alive to the broader socio-economic factors in this context. Further, the NSP recognises that the need to improve access to information and legal remedies for the poor and the marginalised to 'identify and remove…cultural barriers to effective HIV prevention, treatment and support'.[209]

Furthermore, The NSP lists, as one of its four key priority areas, prevention, treatment, care and support.[210] It provides that under prevention, the plan intended to reduce by 50 percent the

[205] Chapter six, section 6.2.7.

[206] The HIV/AIDS and STI Strategic Plan for South Africa 2007–2011.

[207] It follows the HIV/AIDS/STI Strategic Plan for South Africa 2000-2005 (2000), and is inspired by various other documents, such as the National Operational Plan for Comprehensive HIV and AIDS management, treatment, care and support (Operational Plan), the 1997 Annual HIV/AIDS/STD Review, the DoH's White Paper for the transformation of the health system and the 1994 National AIDS Plan for South Africa. The Strategic Plan is based on an integration of STD/HIV/AIDS and TB Care and Response.

[208] NSP: 2007, 31–33.

[209] NSP: 2007, 15, 32–33,49.

[210] The other key areas are human rights, legal rights, monitoring, research and surveillance.

rate of infections by 2011, adding that the intention is to ensure that the large majority of HIV-negative South Africans remain negative.[211] The NSP further provides that as part of the prevention strategies, there will be efforts to increase prevention of mother-to-child transmission coverage by increasing geographical access as well as uptake by pregnant women.[212] It further provides that the prevention of mother-to-child transmission programme will be utilised to minimise the risk of HIV transmission and maternal mortality through providing ART to eligible pregnant women.[213] Further, the NSP provides that it seeks to improve HIV screening and diagnosis through VCT among the 15–49 age category.[214] This is part of the plan to reduce HIV and AIDS morbidity and mortality as well as its socio-economic impact by providing appropriate packages of treatment, care and support to 80 percent of PLWAs.[215] It is, therefore, clear in this broad strategic framework that the policy caters for preventive measures which are central to women. This is in line with the obligation to have national plans and strategies as emphasised previously.[216]

The NSP, therefore, entails a framework capable of enabling women to function normally and realise their capabilities within the context of HIV and AIDS. This is especially so in light of the NSP provisions on increasing prevention of mother-to-child transmission, improvement of

---

[211] NSP: 2007.

[212] NSP: 2007.

[213] NSP: 2007.

[214] NSP: 2007.

[215] NSP: 2007.

[216] Chapter six, section 6.2.7.

screening and diagnosis. However, as elucidated in the discussion above, implementation of the NSP has been slowed by several factors such as high cost of ARV drugs. I, therefore, recommend that in order for women's capacity to live amidst the HIV and AIDS epidemic to be ensured, access to ARVs and other relevant services should be enhanced.

7.8.5 Access to testing and counselling services (including to adolescents)

Chapter six analysed the state obligation to provide testing and counselling services.[217] The chapter discussed state obligation to respect the health needs of adolescents.[218] In 2004, the ART programme was introduced in the public primary health care setting.[219] Among others, the programme provided for grading of adverse reactions of ARV treatment in adolescents.[220] It is important to note that voluntary counselling and testing and ART are provided free of charge in public health facilities. This addresses the obligation to provide free or low cost drugs. The Guidelines have, therefore, provided for treatment responding to biological attributes of women and taken into account issues of sexual violence and the position of adolescents. In 2006 it was estimated that 70 percent of the 687 patients who had enrolled in Eastern Cape Province were women.[221] However, this is the case throughout South Africa.[222]

[217] Chapter six, section 6.2.8.

[218] Chapter six, section 6.2.12.

[219] ART Guideline, 2004 [hereafter Guidelines].

[220] See section 4 of the Guidelines.

[221] Ruud, KW et al., 'Antiretroviral therapy in a South African public health care setting – facilitating and constraining factors' (2009) 2 *Southern Med Review* 30 [hereafter: Ruud et al: 2009]; See also, Coetzee, D et

The attention paid to adolescents is critical to the effort to reduce infection among women. This is because adolescents are placed in a situation of double jeopardy of age and gender within the context of HIV and AIDS. They therefore need special measures in order to function and realise their capabilities within this context. Moreover the focus on sexual violence, if implemented means that a key factor, namely, violence will be dealt with. The role of violence in disempowering women needs no emphasis. I hereby argue that absence of violence means women are enabled to realise their other rights and capabilities in the context of HIV and AIDS.

7.8.6 Challenges and constraints to access to health services

However, all the potentials for the realisation of women's capabilities embodied in the laws and policies above have been dogged with implementation challenges. This is especially so in light of disparities between public and private health care in the country.[223] A heavy work load combined with lack of human resources is a challenge to the health care setting. For example, health care providers have expressed the view that the ART programme is growing continuously and yet there is no accompanying extra staff since 2004.[224] This challenge is

---

al., 'Outcomes after two years of providing antiretroviral treatment in Khayelitsha, South Africa' (2004) 18 *AIDS* 887–889 [hereafter Coetzee et al: 2004].

[222] See Coetzee et al: 2004, 887–889; Western Cape Department of Health, 2006. *The Western Cape Anti-retroviral Programme: Monitoring Report*, Cape Town.

[223] See section 7.3 of this chapter.

[224] Ruud et al: 200, 31; Amnesty International 'I am at the lowest end of all: Rural women living with HIV face human rights abuses in South Africa' 2008 [hereafter Amnesty International: 2008] 85.

further compounded by delays in the accreditation of sufficient facilities to provide ART and related services in comparison to the need.[225]

Furthermore, there are few doctors and pharmacists available. A study in Eastern Cape shows that nurses and support staff are given responsibility regarding treatment and follow up of HIV patients due to lack of doctors and pharmacists.[226] Thus there is a shift from pharmacists to nurses which, in turn, overloads nurses.[227] The shortage of nurses also leads to long waiting in queues.[228] In light of such overloads, many women cannot wait for long due to family care obligations.[229]

Furthermore, anecdotal reports show that most women living with HIV and AIDS in South Africa are not receiving the required nutritional support.[230] This challenge has led to situations where women prefer to choose disability grants over ARVs because the grant is used to buy food and transport.[231] Other challenges include patients with tuberculosis co-infection or

[225] Ruud et al: 2009, 32.

[226] Ruud et al: 2009, 31–32.

[227] Ruud et al: 2009, 31–32.

[228] Ruud et al:2009, 31–32.

[229] Ruud et al:2009, 31–32.

[230] Hardy, C., & Richter, M., 'Disability grants or antiretroviral? A quandary for people with HIV/AIDS in South Africa (2006) 5 *African Journal of AIDS Research* 89 [hereafter Hardy & Richter: 2006]

[231] According to the Department of Social Development, disability grants are available to adult South African citizens and permanent residents who are incapacitated and unable to work due to illness or disability. A number of people living with HIV/AIDS (PWAs) have accessed disability grants once they have fulfilled the criteria set down by the Department of Social Development. Current government policies entitle PWAs, at least in theory, to

severe disease progress,[232] patients with fear of stigmatisation,[233] and patients with complicated family relations or unstable situations at home.[234]

Other factors contributing to women's inability to enjoy equal access to HIV treatment in South Africa include discrimination, poverty, denial of property rights, poor transportation system and government reluctance to avail money and other resources.[235] This is worse for rural women. For example, the South African Human Rights Commission in its review of aspects of health services in the provinces, particularly noted that poor road conditions, long distances, infrequent transport and its high costs (relative to income) hinder patient's access to these services at the hospital level.[236] The study concluded that 'poorest and most vulnerable members of society are frequently excluded from accessing higher levels of care…' for these reasons. The barriers to access were found to be worse for HIV and AIDS patients where only

---

access antiretroviral medications. Where PWAs have been able to access antiretroviral treatment (ART) through the government's antiretroviral programme, this has led to an improvement in their health and subsequent disqualification for a disability grant. In South Africa's highly unequal society, the disability grant often operates as the only source of income for poor families. This has created an untenable situation as many PWAs are forced to choose between receiving their disability grant and accessing life-saving medication. See Hardy & Richter: 2006, 91. For the criteria followed, see the Social Assistance Act of 1992 and the Social Assistance Act Regulations of 1998. See section 2(3) thereof. See also, Nattrass, N., 'Gender and access to antiretroviral treatment in South Africa' (2008) 14 *Feminist Economics* 19–36.

[232] Ruud et al: 2009, 32.

[233] Ruud et al: 2009, 32.

[234] Ruud et al: 2009, 32.

[235] See generally, Amnesty International: 2008.

[236] South African Human Rights Commission, 'Provincial findings in preparation for the South African Human Rights Commission public enquiry into the right to have access to health care services.' 2007. Synthesis Report, prepared by Antoinette Ntuli [hereafter SAHRC: 2007].

a small number of health care facilities have been accredited to provide ART in rural areas.[237] Studies of the South African province of the Eastern Cape highlighted the serious transport barrier for some HIV patients who lived up to 200 kilometres from the nearest accredited treatment centre.[238] These studies support my central view in this thesis, namely, that women's capabilities have to be enhanced in order for them to realise their capacities in the context of HIV and AIDS.

Discriminatory attitudes towards women, as perpetuated by patriarchal tendencies, further impede access to treatment. Research reveals that many families will prefer to pay for medication for men rather than women.[239] What is more, many women still require the authorisation of husbands and partners before seeking medical treatment, including HIV and AIDS treatment.[240] Women also face the fear of disclosure of status to family members. For example, a study in South Africa shows that most women feared to be abandoned or rejected.[241] They also feared violence, upsetting family members and facing accusation of infidelity.[242]

[237] SAHRC: 2007.

[238] SAHRC: 2007. For more on how transport constrains women's access to health care services, see, Venter, C et al., 'Engendering mobility: Towards improved gender analysis in the transport sector' in van Merle, K., (ed) *Sex, gender, becoming: Post apartheid reflections* (2006) 117.

[239] Centre for Health and Gender Equity, 'Gender, AIDS, and ARV therapies: Ensuring that women gain equitable access to drugs within US funded treatment initiatives. 2004.

[240] UNAIDS, UNFPA, UNIFEM Women and HIV/AIDS: Confronting the crisis (2004); SAHRC: 2007; Amnesty International: 2008, 58.

[241] Amnesty International: 2008, 47.

[242] Amnesty International: 2008, 64.

Also, women continue to face stigma from healthcare providers. This includes prejudicial attitudes towards adolescents seeking medical services.[243] This makes the health care ethos of dignity, non discrimination and privacy elusive.[244] These rights are crucial to the clinical management of women and HIV and AIDS. Health care centres are supposed to provide a congenial environment in which women are supported in decision-making regarding treatment thereby improving the quality of care. Generally therefore, women living with HIV and AIDS face problems in accessing appropriate services which meet their specific health needs, which are rarely understood or addressed by health service providers. This, in turn, limits women's capabilities to function as human beings in the midst of HIV and AIDS.

7.9 ACCESS TO ADEQUATE HOUSING

Chapter six examined the obligations arising upon the state to provide access to adequate housing.[245] In South Africa, housing remains one of the most visible legacies of apartheid.[246] Women's access to adequate housing in South Africa is informed by the historical, social and economic context within which people seek access to housing. The post-apartheid Government inherited a highly unequal land ownership structure, created by legislation in the

---

[243] Sloth-Nielsen, J., & Mezmur, B., 'HIV and AIDS and children's rights in law and policy in Africa: Confronting ydra head on' in Sloth-Nielsen, J., (ed) *Children's rights in Africa: A legal perspective* (2008) 283.

[244] See CESCR General Comment 14, para 3.

[245] Chapter six, section 7.9.

[246] Kothari, M., 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: Mission to South Africa' 2008 [hereafter Kothari: 2008] para 29.

early twentieth century and reinforced by apartheid, whereby 75 percent of the population was settled on 13 percent of the land.[247] Discriminatory laws and practices have limited women's access to housing and black women have been disproportionately affected.[248] Both colonial and apartheid laws and policies restricted black urbanisation, particularly African urbanisation.[249] In particular, influx control resulted in African men having easier access to urban areas as their labour was required on the mines and in industry. Women's labour in urban areas was meanwhile largely limited to domestic work.[250] Express laws and policies to control the mobility of women were enacted from the 1930s. These laws made women dependent on their male partners or fathers for their right to remain in urban areas. In 1964 African woman who were not employed or legally resident could only enter white urban areas with a visitor's permit.[251] The application for a visitor's permit required the permission of male relatives. This resulted in many women being denied housing rights.[252]

[247] Kothari: 2008, para 29.

[248] Pillay, K et al., 'Rights, roles and resources: an analysis of women's housing rights – implications of the Grootboom case –Women's Budget Initiative,' Cape Town, July 2002 [hereafter Pillay et al: 2002] 5.

[249] According to the 2005-2006 annual report of the Commission on Restitution of Land, 71,645 out of 79,696 claims were settled by 31 March 2006, leaving 8,051 outstanding claims. The report notes that 11 percent of the settled claims were rural and 89 percent urban. The total amount of land involved in settled restitution claims was 1,067,152 ha and ZAR 2.9 bn was paid in compensation. However, the observations made on budgets for 2006/07 estimated that the restitution programme may spend only ZAR 1.9 billion of the ZAR 2.7 billion allocated budget by the end of the financial year (Report of the Portfolio Committee on Agriculture and Land Affairs on Budget Vote No. 29, dated 28 March 2006, para. 7.1.8, available at http://www.pmg.org.za/docs/2006/comreports/060523pcagricreport2.htm. (Accessed 23 January 2011) [hereafter Commission on Restitution of Land: 2006].

[250] Commission on Restitution of Land: 2006.

[251] Pillay et al: 2002.

[252] For more details on the exclusion of Black women from access to urban areas during apartheid, see generally, Pillay et al: 2002.

One of the visible aspects of housing in South Africa is informal settlements. In 2004, the number of informal settlement dwellings had reached an estimated 1.4 million.[253] Most people living in settlements throughout the country have no access to water, electricity or sanitation.[254] Data shows that in urban informal settlements, there is a high prevalence and incidence rates.[255] This is, for example, illustrated by the fact that in 2008, the Western Cape which had a prevalence rate, at 15 percent, which was lower than the national average of 30 percent, but the informal settlements of Khayelitsha and Gugulethu/Nyanga had prevalence rates of 33 percent and 29 percent respectively.[256] A report of the UN Special Rapporteur on Adequate Housing, following his mission to South Africa, highlighted women's vulnerability in relation to HIV/AIDS and housing.[257] In 2009, residents of Sol Plaatjies, an informal settlement in the Inner City of Johannesburg, said access to health care services is the biggest problem facing people living with HIV and AIDS.[258] It has, therefore, been suggested that a

[253] Richards, R et al., 'Measuring quality of life in informal settlements in South Africa (2007) 81 *Social Indicators Research* 375–388 [hereafter Richards et al: 2007].

[254] Kothari: 2008, para 43; Richards et al: 2007.

[255] Isandla Institute and the South African Cities Network, 'Positive' Spaces: Sustainable Human Settlements in the Context of HIV/AIDS.' Report of the National Seminar and Learning Event. 2007. The Report is available at http://www.sacities.net/2007/pdfs/positive_spaces.pdf [hereafter:Islanda: 2007]; Marais, H., 'The uneven impact of AIDS in a polarised society' (2007) 21 *AIDS* S21-S29 as quoted in Bezuidenhout, JB., 'Poverty and HIV in South African urban informal settlements: exploring the obstacles residents face in accessing basic services and health care services' 2009 Research Elective Report, Radboud University Nijmegen, Netherlands. Available at http://programs.ifpri.org/renewal/pdf/JohannesburgBezuidenhout.pdf. (Accessed 21 November 2009) [hereafter Bezuidenhout: 2009].

[256] Islanda: 2007; See also, Department of Health, Strategic Plan 2007/08-2009/10, available at http://www.doh.gov.za/docs/policy/stratplan-f.html.(Accessed 21 November 2009).

[257] Kothari: 2008, paras 84, 88.

[258] Bezuidenhout: 2009, 24.

holistic response to HIV/AIDS that takes into consideration external factors like housing be mounted.[259]

I hereby wish to reiterate that women living with or affected by HIV and AIDS require special housing.[260] Furthermore, an obligation is placed upon the state to provide adequate housing, which includes legal security of tenure.[261] Legally and 'textually' speaking, South Africa has legal guarantees that can be used to realise women's housing rights in the context of HIV and AIDS. In addition to the constitutional provisions on access to adequate housing, post apartheid South Africa has a range of laws which affect women's housing rights including: the Housing Act,[262] the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE Act)[263] the Extension of Security of Tenure Act,[264] the Recognition of Customary Marriages Act,[265] the Rental Housing Act,[266] and the Housing Consumers Protection Measures Act.[267]

[259] Islanda:2007.

[260] See also discussion in chapter six, section 6.2.16.

[261] See chapter six section 6.2.17.

[262] Act 107 of 1997.

[263] Act 19 of 1998.

[264] Act 62 of 1997.

[265] Act 120 of 1998.

[266] Act 50 of 1999.

[267] Act 95 of 1998.

The Housing Act includes a number of principles that underpin the realisation of housing rights in South Africa. These include, *inter alia*, meaningful consultation, prioritising the needs of the poor and the protection of tenure options.[268] Hence, this law does exhibit sensitivity to vulnerable groups. For example, the principles to promote measures to prohibit unfair discrimination on the ground of gender and all other forms of unfair discrimination by all actors in the housing development process and to promote the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.[269] This law is, therefore, a representation of a legal step to protect vulnerable groups including women.[270] In this way, the law presents a regime that can be utilised to ensure that women are enabled to enjoy their right to housing.

The state further has the obligation to protect women against forced and unlawful evictions.[271] In this light, 'textually', South Africa has in place the PIE Act.[272] PIE Act sets out the procedures for evictions carried out by an owner or person in charge and an organ of state.[273] An owner or person in charge can institute proceedings to evict an unlawful occupier. Before the hearing, written and effective notice of the proceedings must be served by the party

[268] Section 2(1).

[269] Section 2(1).

[270] For more on the Housing Act, see also, Combrinck, H., & Chenwi, L., 'The role of informal community structures in ensuring women's rights to have access to adequate housing in Langa, Manenberg and Mfuleni.' (2007) [hereafter Combrinck & Chenwi: 2007] 7.

[271] See chapter six, section 6.2.17.

[272] No 19 of 1998.

[273] Section 4.

initiating the litigation on the unlawful occupier and the municipality having jurisdiction.[274] Furthermore, the PIE Act notes that special consideration should be given to the rights of households headed by women.[275] I, therefore, argue that with such an 'arsenal' of housing laws, women's housing situation should be improved. In this regard, the Constitutional court has produced instructive jurisprudence.[276] Several principles and tenets have emerged from these cases. These relate to the reasonableness standard, the role of judicial activism, evictions from private land, alternative accommodation and meaningful engagement. These are examined herebelow.

7.9.1 Reasonableness standard and judicial activisim: The *Grootboom* case

The *Grootboom* case fortifies state obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. It concerns questions about the enforceability of social and

[274] Section 4.

[275] See section 4(6). The proposed amendment to this section is to the effect that the owner or person in charge must give at least two months' notice before the hearing of proceedings; the notice has to be given to the unlawful occupier, the head of the provincial office of the national department of Land Affairs in whose jurisdiction the land is situated, the relevant provincial department of housing, and the relevant municipality. For more on this, see Chenwi, L., 'Evictions in South Africa: Relevant International and National Standards'. 2008. University of the Western Cape: Community Law Centre [hereafter Chenwi: 2008] 36–42.

[276] For jurisprudence on the right to adequate housing in South Africa, see the following cases: *Grootboom*; *City of Cape Town v Rudolf* 2004 (5) SA 39 (C); *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 (2) SA 140(CC) [hereafter *Jaftha*]; *President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd* 2005 (5) SA 3 (CC) [hereafter *Modderklip*]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008(3) SA 208 (CC) [hereafter *Occupiers of 51 Olivier Road*]; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister of Housing and Minister of Local Government and Housing, Western Cape (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape as amicus curiae)* 2009 (9) BCLR 847 (CC) [hereafter *Joe Slovo*].

economic rights. A group of 510 children and 390 adults lived in appalling circumstances in Wallacedene informal settlement.[277] They then illegally occupied nearby land earmarked for low-cost housing, but were forcibly evicted.[278] Their shacks were bulldozed and burnt and their possessions destroyed.[279] Their places in Wallacedene had been filled and in desperation they settled on its sports field and in an adjacent community hall.[280]

The Cape of Good Hope High Court found that the children and, through them, their parents were entitled to shelter under section 28(1)(c) and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality, immediately to provide them with tents, portable latrines and a regular supply of water by way of minimal shelter.[281] This decision formed the basis for the appeal to the Constitutional Court.[282]

Yacoob, J noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country.[283] It must provide access to housing, health-care, sufficient food and water, and

[277] *Grootboom*, para 3.

[278] *Grootboom*, para 3.

[279] *Grootboom*, para 10.

[280] *Grootboom*, para 11.

[281] *Grootboom*, para 11.

[282] *Grootboom*, para 11.

[283] *Grootboom*, para 93.

social security to those unable to support themselves and their dependants.[284] The Constitutional Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting.[285] Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[286] Human dignity, freedom and equality are denied to those without food, clothing or shelter. The right of access to adequate housing can thus not be seen in isolation.[287] The state must also foster conditions that enable citizens to gain access to land on an equitable basis.[288] But the Constitution recognises that this is an extremely difficult task in the prevailing conditions, and does not oblige the state to go beyond its available resources or to realise these rights immediately.[289] Nevertheless, the state must give effect to these rights and, in appropriate circumstances the courts can and must enforce these obligations.[290]

The Constitutional Court said the question is always whether the measures taken by the state to realise the rights afforded by section 26 are reasonable.[291] To be reasonable, measures

[284] *Grootboom*, para 93.

[285] *Grootboom*, para 83.

[286] *Grootboom*, para 23.

[287] *Grootboom*, para 24.

[288] *Grootboom*, para 40.

[289] *Grootboom*, para 45.

[290] *Grootboom*, para 45.

[291] *Grootboom*, para 41. See also analysis in chapter five, section 5.7.2.

cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[292] Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored.[293] If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness.[294] In creating the above standards of reasonableness, I wish to assert that the Constitutional Court adopted an activist position – this approach in turn enhances the potential of housing policies to improve women's living conditions.

The Constitutional Court emphasised that neither section 26 nor section 28(1)(c) gave any of the respondents the right to claim shelter immediately.[295] However, the programme in force in the area of the Cape Metropolitan Council at the time the application was launched fell short of the obligations imposed upon the state by section 26.[296] Although the overall housing programme, implemented by the state since 1994, had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions.[297] Their immediate need

---

[292] *Grootboom*, para 44.

[293] *Grootboom*, para 44.

[294] *Grootboom*, para 44.

[295] *Grootboom*, para 95.

[296] *Grootboom*, para 95.

[297] *Grootboom*, para 99.

could be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability.[298]

The Constitutional Court thus found a violation of the right to adequate housing in section 26. The Constitutional Court held that article 26 obliges the state to devise and implement a coherent and co-ordinated housing programme, and that in failing to provide for those in most desperate need the government had failed to take reasonable measures to progressively realise the right to housing.[299] The Constitutional Court issued a declaratory order which required the state to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for in the state programme applicable in the Cape Metropolitan area before the Accelerated Managed Land Settlement Programme had been introduced. I argue that the Constitutional Court's approach represents a substantive equality approach to women's housing needs. This is especially so in light of the development of the reasonableness standard in which the Constitutional Court explained that mere legislation is not enough.[300] Further on this note, the Constitutional Court said:[301]

[298] *Grootboom*, para 52.

[299] *Grootboom*, para 96.

[300] The Constitutional Court said:

> [42] The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The Constitutional Court, further, citing Chaskalson, J in *Soobramoney v Minister of Health, KwaZulu-Natal* (*Soobramoney*),[302] added:[303]

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Highlighting substantive equality approaches to the right to housing, De vos has persuasively asserted:[304]

> [43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

[301] *Grootboom*, para 23.

[302] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC), para 8.

[303] Para 25.

[304] De Vos, P., '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258 267 [hereafter De Vos: 2001]. See also Scott, C., & Alston, P., 'Adjudicating constitutional

> The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find there was a constitutional duty on the state to pay special attention to the needs of the group. This means the state plans and actions aimed at the realisation of social and economic rights, that fail to take cognisance of the position of the economically most vulnerable groups would be difficult to justify. For example, it is widely accepted that rural women in South Africa are in a particularly vulnerable position. State plans to realise the right, of access to health care services that fail to take note of this fact and fail to begin to address the needs of this particularly vulnerable group, might become constitutionally suspect.

De Vos further fittingly argues that the decision was within a context that acknowledges the vast social and economic inequalities between different groups that leave many people extremely vulnerable and even desperate,[305] and that it confirmed the importance of the concept of substantive equality in determining the scope and content of social and economic rights.[306] Thus, although the court in the *Grootboom* case did not specifically deal with the position of women, the principles set out in the judgment in respect of vulnerable and disadvantaged groups can be applied to women in the context of HIV and AIDS. Because women are more likely than men to be living in intolerable conditions, the case provides a useful framework for analysis of women's housing rights.[307] The judicially active position of the Constitutional Court is therefore, commendable. South Africa has also adopted several

priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 206–268.

[305] De Vos: 2001, 368.

[306] De Vos: 2001, 273.

[307] See generally, Pillay et al: 2002; Combrinck et al: 2007, 5.

housing policies and delivery programmes with variations like the National Housing Code,[308] and Breaking New Ground Policy (BNG),[309] among others.[310]

7.9.2 Evictions from private land and rule of law: The *Modderklip* case

In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (*Modderklip*),[311] the Constitutional Court dealt with the state's duty in the context of private land-owner's unsuccessful efforts to execute an eviction order granted in terms of section 4 of PIE Act against a community occupying his land.[312] The case arose from the occupation by a group of 40,000 unlawful occupiers of a portion of privately owned farmland. The landowner, Modderklip Boerdery (Pty) Ltd, applied in the High Court for an eviction under the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE).[313] The

[308] Adopted March 2000. It sets out principles that guide the overall approach to housing in South Africa. Under the third principle on 'fairness and equity', the code notes that given the history of regulation and statutory discrimination in South Africa, it is essential that new policies and legislative actions by the state be particularly sensitive to the removal of entrenched discriminatory mechanisms and conventions to ensure equality in respect of gender, *inter alia*.

[309] National Department of Housing, '*Breaking New Ground*': Comprehensive plan for Housing delivery. Department of Housing. 2004.

[310] For more on the government's housing policies and programmes, See, generally Combrinck, H., 'Living in security, peace and dignity: The right to have access to housing of women who are victims of gender-based violence' (2009) 18–30.

[311] 2005 (5) SA 3 (CC). Judgment in the original eviction application is reported as *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W).

[312] *Modderklip*, para 23.

[313] *Modderklip*, para 4.

High Court allowed the application and granted the eviction order, requiring the occupants to vacate the land within two months, failure of which the Sheriff was authorised to evict them.[314] The occupants did not vacate the land as ordered, the land owner was informed by the Sheriff that a deposit of R1.8 million, later increased to R2.2 million, had to be made to facilitate the eviction.[315] The landowner was not prepared to incur that expense; he took up the matter with the High Court by applying for an order against the authorities compelling them to carry out the court order, arguing that the authorities were obliged to protect his property.[316] The landowner further argued that the state had a duty not only to execute the court order but also to provide alternative land to the occupants to end the illegal occupation.[317]

The Constitutional Court confirmed the position that the state may not abdicate its responsibilities in a dispute between private parties where important constitutional rights are threatened and state intervention is required for their protection.[318] The Constitutional Court also affirmed that where an eviction will place persons in a situation of desperate housing need they should generally have access to some form of accommodation pending their integration in long-term development programmes.[319]

[314] *Modderklip*, para 5.

[315] *Modderklip*, para 7.

[316] *Modderklip*, para 7.

[317] *Modderklip*, para 20.

[318] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) ,para 27. See also Liebenberg: 2010, 285; van der Walt, AJ., 'The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144 159–161.

[319] *Modderklip*, para 27.

Commendably, the Constitutional Court used the principle of the rule of law, emphasising that the first obligation relates to the obligation to provide the necessary mechanisms for citizens to resolve the disputes that arise between them.[320] The effect of this obligation is the entitlement of every citizen to have access to courts or other independent forums provided by the state for the settlement of such disputes.[321] The Constitutional Court further added that the effective execution of orders was also intergral to the rule of law and the right to have access to courts or other independent forums. In such a case, the active participation of the state is required.[322] Furthermore, the Constitutional Court elucidated that it requires the state to 'take reasonable steps, where possible, to ensure that large scale social disruptions in the social fabric do not occur in the wake of of the execution of court orders, thus undermining the rule of law'.[323]

The *Modderklip* case therefore, represents a decision that places the right to housing within the broader lens of the rule of law. I agree with Liebenberg that all the three judgments in the *Modderklip* case confirm that the state may not abdicate responsibilities in a dispute between private parties where important Constitutional rights are threatened.[324] This affirmation is particularly important for women in the context of HIV and AIDS because homelessness

---

[320] *Modderklip*, para 39.

[321] *Modderklip*, paras 39–40.

[322] *Modderklip*, para 42.

[323] *Modderklip*, paras 43.

[324] Liebenberg: 2010, 285.

aggravates the AIDS epidemic.[325] Moreover, housing as a material needs is central to women's ability to function and achieve their capabilities in the context of HIV and AIDS.

7.9.3 Alternative accommodation and meaningful engagement: The *Joe Slovo* case

The Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (*Joe Slovo*)[326] case considers the implications of section 26 of the Constitution in situations where the state seeks to evict and relocate a large, settled community from their homes in order to facilitate a major housing development.[327] The case concerned an application for the eviction of approximately 20 000 residents of the Joe Slovo informal settlement in the Western Cape. The application was brought in the Western Cape High Court, Cape Town, by government agencies responsible for housing on the basis that the eviction was required for the purpose of developing affordable housing for poor people.[328] The High Court held that the government agencies had complied with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) and granted the eviction order.[329]

[325] See discussion in chapter four, section 4.4.

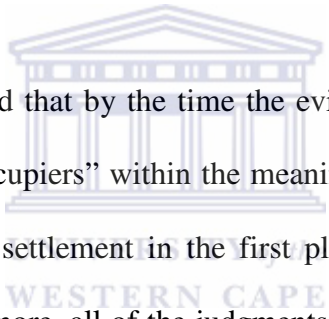
[326] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister of Housing and Minister of Local Government and Housing, Western Cape* 2009 (9) BCLR 847 (CC).

[327] *Joe Slovo*, para 18.

[328] *Joe Slovo*, paras 37–39.

[329] *Joe Slovo*, paras 37–41; 86; 90.

The applicants appealed this decision to the Constitutional Court. In the Constitutional Court, the applicants presented the following main arguments: First, they argued that they had consent to live in the Joe Slovo settlement, which consent had not been terminated.[330] Thus, they were not unlawful occupiers within the meaning of the PIE Act and could consequently not be evicted.[331] Second, they argued that the eviction was not 'just and equitable' within the meaning of the PIE Act.[332] Finally, they argued that they had a legitimate expectation that 70 percent of the houses in the new development should be allocated to former and current residents of Joe Slovo.[333] The government agencies assert that the residents occupied Joe Slovo unlawfully, that their eviction is just and equitable and that there was no legitimate expectation of the kind asserted.[334]



The Constitutional Court accepted that by the time the eviction proceedings were launched, the applicants were "unlawful occupiers" within the meaning of PIE, either because they did not have consent to occupy the settlement in the first place, or because that consent was subsequently revoked.[335] Furthermore, all of the judgments agree that, in seeking the eviction of the applicants, the respondents (particularly the national Minister for Housing and the Minister for Housing in the Western Cape) have complied with their obligations to act

[330] *Joe Slovo*, paras 43–53.

[331] *Joe Slovo*, paras 43–53.

[332] *Joe Slovo*, paras 3; 86.

[333] *Joe Slovo*, paras 5; 129; 268; 301.

[334] *Joe Slovo*, para 110.

[335] *Joe Slovo*, paras 154–156; 271–278; 341–358.

reasonably in seeking to promote the right of access to adequate housing contained in section 26 of the Constitution.[336]

The Constitutional Court agreed that the eviction order as crafted in the judgment of the Court is just and equitable.[337] Amongst other things, the applicants were ordered to vacate the Joe Slovo informal settlement in accordance with the timetable annexed to the judgment.[338] The judgment also required the parties to engage meaningfully on whether the timetable established should be changed and on any other relevant matter upon which they agreed to engage.[339] The judgment also required that no eviction may take place unless the people evicted are offered alternative accommodation, being temporary residential units consistent with specific requirements set out in the court's order.[340]

In *Joe Slovo*, Moseneke, DCJ aptly noted:[341]

> No matter how commendable the government's intentions are regarding the intended use of the land from which the community has been removed without the solid promise of alternative housing, evictions may turn out to be a method of brutal state control and a far cry from the progressive realisation of the socio-economic rights our Constitution guarantees. Courts must remain vigilant to ensure that when the government seeks to evict a community in pursuit of commendable housing plans, the plans must include the guarantee that those who are evicted and relocated have a reasonable

[336] *Joe Slovo*, para 6.

[337] *Joe Slovo*, paras 5; 116; 118; 175.

[338] *Joe Slovo*, para 7.

[339] *Joe Slovo*, para 7.

[340] *Joe Slovo*, para 7.

[341] *Modderklip*, para 172. See also para 170.

> opportunity of accessing adequate housing within a reasonable time in relation to the housing projects concerned.

The respondents were also directed to engage meaningfully with the applicants.[342] O'Regan, J emphasises the importance of the fair procedures in terms of the Promotion of Administrative Justice Act,[343] and 'meaningful engagement' in the reasonable implementation of government plans to realise socio-economic rights.[344] Hence, meaningful participation is not only an expression of the dignity of citizens, but is indispensible to ensuring both the design and implementation of programmes to realise socio-economic rights are effective and sustainable.[345] According to O'Regan J, a consideration that weighed heavily in the balance in finding that 'the failure to have a coherent and meaningful strategy of engagement' did not render the plan 'unreasonable to the extent that the respondents have failed to establish a right to evict the occupiers' was the fact that '[t]housands of other households have already co-operated with the respondents in the hope that their co-operation will hasten the building of the housing project and result in their receiving permanent housing'.[346] Sach, J also attacks the failure in communication.[347]

[342] *Joe Slovo*, para 7.

[343] Act No 3 of 2000.

[344] *Joe Slovo*, paras 296–301.

[345] Liebenberg, 2010, 308.

[346] *Joe Slovo*, paras 302–303 as cited in Liebenberg: 2010, 309.

[347] *Joe Slovo*, para 378.

The *Joe Slovo* judgment, therefore, affirms the critical role of the provision of alternative accommodation in the evaluation of justice and equity of evicting large scale settled communities.[348] The case also alerts us to the principles of meaningful engagement which was also interpreted in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.[349] Here, the Constitutional Court had to deal with the duties derived from the subsection of section 26 of the Constitution. The case concerned an eviction application brought by the City of Johannesburg on health and safety grounds in terms of the provisions of the National Building Regulations and Building Standards Act.[350] The Constitutional Court stated that every level of government is obliged to act consistently with the constitutional obligation to take reasonable measures to extend access to adequate housing.[351] The Constitutional Court stated that whether there has been meaningful engagement is one of the 'relevant circumstances' to be taken into account in terms of section 26 (3) of the Constitution. The Constitutional Court issued an interim order requiring the City of Johannesburg and the applicants 'to engage with each other meaningfully' in an effort to resolves the disputes between them.[352] In effect, the judgment establishes that the eviction of residents by local authorities in circumstances where they

[348] Liebenberg: 2010, 311.

[349] 2008(3) SA 208 (CC).

[350] Act 103 of 1977. Section 12 (4) (b) of this Act provides that if a local authority 'deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered...order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice'.

[351] *Occupiers of 51 Olivier Road*, para 10.

[352] *Occupiers of 51 Olivier Road*, para 5.

many become homeless cannot ordinarily take place without a reasonable and good faith effort to engage meaningfully with the affected residents.[353]

Arguably, many members of the communities in the above cases include women affected by HIV and AIDS. I wish to assert that for the latter category, this position impels the state to ensure that their health and wellbeing is not compromised in times of massive evictions. In the midst of unjust and inequitable dislocation of communities, the marginalised bear the impact. Moreover, in such situations, many aspects of their wellbeing are disrupted, for example, adherence to ARV treatment, access to water, preparation of food and access to health facilities. In quintessence, in a situation of eviction, women'a ability to access the basic essentials they require to function normally is compromised. In this context, women are unable to accomplish their capabilities as healthy and productive beings in the context of HIV and AIDS.

A myriad of problems continue to negatively affect social housing policies.[354] These include: the lack of cooperative governance in housing development and the insufficient information-sharing between levels of administration.[355] It also includes the lack of integrated housing development which ignores the need for social services within housing projects and poor quality construction.[356] It has also been observed that the realisation of the right to adequate housing in South Africa is compromised by the government's fragmented approach to the

[353] *Occupiers of 51 Olivier Road*, para 22. See Liebenberg: 2010, 293–303;418–419.

[354] Kothari: 2008, para 36.

[355] Kothari: 2008 para, 36.

[356] Kothari: 2008 para, 36.

implementation of housing law and policy.[357] There is also a poor pace of delivery as well as backlogs,[358] and no gender disaggregated data on housing delivery.[359] This means that it is not known how many women are benefiting from housing delivery, thereby falling short of the international obligation to have date that clearly indicates women's positioning in access. Two forces, however, continue to threaten women's right to housing in South Africa – lack of security of tenure and fear of eviction.

Nevertheless, read together with the right to health within women's context and AIDS, there is no doubt that legally and 'textually' speaking, South Africa has housing laws, policies and jurisprudence with the potential to enable women realise their capabilities in the context of HIV and AIDS. The provision of adequate housing, a material need, goes a step further to providing an environment in which women affected by HIV and AIDS feel secure. This security, once assured, provides a space within which women can live healthy lives and exercise choice over matters such as health. The ability to exercise choice is central to the capabilities approach.[360] Hence, the fulfilment of the obligation to provide women with adequate housing is a springboard for the realisation of women's capabilities in the context of HIV and AIDS.

[357] Kothari: 2008 para, 37.

[358] Sisulu, L., 'Housing Annual Report 2007/2008' Department of Housing: 2008.

[359] Combrinck et al: 2007, 7.

[360] Chapter three, section 3.4.

7.10 RIGHTS RELATING TO PROPERTY

Analysis in chapter four demonstrated the link between women's property and inheritance rights, HIV and AIDS.[361] Chapter six laid examined the obligations placed upon the state to eliminate discriminatory practices regarding women's access to property, such as the protection of women in *de facto* marriages,[362] protection of widows and girls,[363] and the elimination of the practice of male primogeniture.[364] Similar to most sub-Saharan countries, in South Africa, issues relating to women's property rights revolve around marriage and inheritance customs.[365] To address some of these concerns, South Africa enacted the Recognition of Customary Marriages Act (RCMA).[366] The RCMA provides for women's full legal status and capacity on the basis of equality with their spouse, with right of access to the courts to alter matrimonial property arrangements or in regards to divorce.[367] Further, the RCMA lays down procedures allowing the spouses jointly to apply to court for changes to be

[361] Chapter four, section 4.6.

[362] Chapter six, section 6.2.19.

[363] Chapter six, section 6.2.20.

[364] Chapter six, section 6.2.20.

[365] See, generally, Mireku, O.,' Judicial balancing of parallel values: Male rimogeniture, gender equality and chieftaincy succession in South Africa' Paper available at http://www.enelsyn.gr/papers/w14/Paper%20by%20Prof%20Obeng%20Mireku.pdf. (Accessed 2 April 2011).

[366] Act No. 120 of 1998. See also, generally, Himonga, C.,'The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82–107 [hereafter Himonga: 2005].

[367] Section 6 of the RCMA provides that a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

made in the matrimonial property arrangements, and requiring for all persons with a sufficient interest in the matter, in particular the male applicant's existing spouse(s) and future spouse, to be joined in the proceedings.[368] It, therefore, allows for community in property.[369]

The regime of the RCMA is capable of benefiting women in the context of HIV and AIDS in the sense that the community of property can protect women's rights to the property that she and her partner collect during the marriage. This can also help women to be economically independent and can give women the security of knowing that the marriage is recognised, that they have a right to the common property of the marriage and that they have a right to inherit from the marriage under the rules of intestate succession.[370] It also relates to maintenance, thereby reducing women's economic vulnerability, a key factor affecting women in the context of HIV and AIDS.

Consequently, the ability to own property, which may be material such as land, houses, and furniture, enables women to exercise choice over such property in several ways. This may include using them for commercial gains, for matrimonial livelihood and shelter, for credit and any other exercise of power beneficial to the woman. Hence, women living with HIV and AIDS are more likely to afford AIDS treatment and costs, live in dignified houses, and be protected from violence that arises within the context of, for example, inadequate housing. Access to property, therefore, gives women the potential to function and realise their capacities as worthy beings.

---

[368] See sections 7 and 8 of the RCMA.

[369] See sections 7 and 8 of the RCMA.

[370] Mbatha, L et al., 'Culture and religion' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) 158 161, 190–191.

A resilient cultural practice endangering women's access to property is the practice of male primogeniture. The issue relating to male primogeniture first came to the fore in South Africa in the case of *Mthembu v Letsela and Another* (*Mthembu*).[371] The Supreme Court of Appeal dismissed an application challenging the constitutionality of male primogeniture on the grounds of sex and gender. The decision was widely criticised for failing to clear the clout of male primogeniture.[372] Over the past five years, South African courts have been faced with several issues affecting women's access to property. These include: male primogeniture, de facto marriages, marital property and security of tenure as examined hereafter.

7.10.1 Male premogeniture: The *Bhe* case

Subsequently, the Constitutional Court's approach in the case of *Bhe and Others v Magistrate, Khayelitsha and Others* (*Bhe*)[373] was to address the issue more comprehensively. The case dealt with two main issues. The first was the question of the constitutional validity of a provision of the Black Administration Act.[374] The second concerned the constitutional validity of the principle of primogeniture in the context of the customary law of succession.[375]

---

[371] 2000 (3) SA 867 (SCA).

[372] Himonga, C., 'African customary law in South Africa - many faces of Bhe v Magistrate Khayelitsha' (2005) 2 *Recht in Afrika* 163–183 [hereafter Himonga: 2005] 168.

[373] 2005 (1) SA 580 (CC).

[374] Act 38 of 1927.

[375] *Bhe*, para 3.

The application in this case was made on behalf of two minor girls (first and second applicants) aged nine and two respectively. The girls' mother (third applicant) and the deceased lived together.[376] During the time, the deceased had obtained a state housing subsidy, which he used to acquire immovable property in Khayelitsha in the Western Cape, and he planned to build a house on it.[377] However, he died before he could do so. Until his death, the deceased occupied the property together with his partner and two children, living in a temporary structure.[378] After his death, the mother and children continued to live on the plot. The deceased's father (second respondent) who lived in the Eastern Cape claimed that he was the intestate heir of the deceased by virtue of African customary law and therefore was entitled to inherit the property of the deceased.[379] He indicated that he intended to sell the property in order to defray the funeral expenses incurred as a result of his death.[380] This would have had the effect of leaving the widow and the girls destitute and homeless.

The Constitutional Court held that section 23 of the Black Administration Act and its regulations were manifestly discriminatory and in breach of the rights of equality in section 9(3) and dignity in section 10 of the South African Constitution, and therefore must be struck down.[381] The Constitutional Court also considered the principle of primogeniture and held

[376] *Bhe*, para 14.

[377] *Bhe*, para 14.

[378] *Bhe*, para 14.

[379] *Bhe*, para 17.

[380] *Bhe*, para 17.

[381] *Bhe*, para 73.

that this principle amounted to unfair discrimination against women and illegitimate children and was therefore unconstitutional and invalid.[382] Hence, the Constitutional Court declared the two girls to be the sole heirs to the deceased's estate and entitled to inherit equally. The Constitutional Court's findings and reasoning in the *Bhe* case provides an important framework for women in the context of HIV and AIDS. The decision effectively affirms does away with the practice of male primogeniture through the recognition of the right to equality on the grounds of sex and gender.[383] Reasoning against male primogeniture, the Constitutional Court remarked:[384]

[382] *Bhe*, para 100.

[383] At para 71, the court notes:

> The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are of the most valuable of rights in any open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

[384] Para 91. The court also notes:

> [92] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.
>
> [93] To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves…the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.

> The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.

In light of HIV and AIDS, this argument could be used to ensure that girls and women do not become vulnerable upon the death of a male family head in light of the interaction between access to property, HIV and AIDS. However, it has been argued that the extent to which women will benefit from the *Bhe* decision may depend on whether they are governed by official or living customary laws.[385] The Constitutional Court in *Bhe* missed an opportunity to deal with customary law as it relates to the living aspects of the law.[386] This dichotomy is important in assessing how helpful this law is for women, given their already disadvtantaged position in the context of HIV and AIDS. To the extent that the Constitutional Court in *Bhe* found the practice of male primogeniture to be discriminatory, I wish to state that the position was affirmed that women's access to property is a matter of equality and dignity. Moreover the capabilities approach equally values these rights.[387] Ownership and exercise of autonomy over property enables women to realise their capabilities and to function as human beings in the context of HIV and AIDS.

[385] Customarily law is a system of law that operates at official and non-official levels. Official customary law denotes the customary law that is recorded in text books, court precedents and codified in legislation, while living (unofficial) customary law means the customary practices or norms observed by people living under customary law in their day to day lives. For more on this, see generally, Chanock, M., *law, custom and social order: The colonial experience in Malawi and Zambia* (1985); Himonga: 2005.

[386] Himonga: 2005.

[387] See analysis in chapter three, section 3.6 & 3.7.

7.10.2 De facto marriages: The *Volks NO* case

In relation to the protection of women in marriage, the case of *Volks NO v Robinson and Others* (*Volks NO*)[388] is also enlightening. In this case, Mrs Robinson was in a permanent life partnership with Mr Shandling from 1985 until his death in 2001.[389] They did not marry although there was no legal obstacle to marriage.[390] She submitted a maintenance claim against the estate in terms of the Maintenance of Surviving Spouses Act.[391] The executor of the estate, Mr Volks, refused her claim because she was not a "survivor" entitled to maintenance in terms of the Maintenance of Surviving Spouses Act.[392] As a result, she launched proceedings in the High Court and successfully challenged the definition of the term "survivor" in the Maintenance of Surviving Spouses Act.[393] The claim was upheld because her relationship with Mr Shandling was a "monogamous permanent partnership" substantially similar to a marriage.[394] The exclusion of permanent life partners was found to be in violation

[388] 2005 (5) BCLR 446 (CC).

[389] *Volks NO*, para 3.

[390] *Volks NO*, para 3.

[391] Act 27 of 1990. See *Volks NO*, para 9.

[392] *Volks NO*, para 9.

[393] She was assisted in this application by the Women's Legal Centre Trust (the Trust), which was admitted as the second applicant in the proceedings. See *Volks NO*, paras 11 & 12.

[394] *Volks NO*, para 21.

of the rights to equality and dignity and, therefore, unconstitutional.[395] The court read in words to cure the under-inclusiveness of the Maintenance of Surviving Spouses Act. [396]

Mr. Volks appealed the decision and relief granted by the High Court. Upholding the appeal, Skweyiya, J said that an interpretation of the Maintenance of Surviving Spouses Act that would include permanent life partnerships, would be 'unduly strained' and manifestly inconsistent with the context and structure of the text.[397] Skweyiya, J added that the Maintenance of Surviving Spouses Act is incapable of being interpreted so as to include permanent life partners.[398] Skweyiya, J further added that whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons.[399] Sweyiya, J disappointingly noted:[400]

> I conclude that it is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable.

[395] *Volks NO*, para 25.

[396] *Volks NO*, para 25.

[397] *Volks NO*, para 45.

[398] *Volks NO*, para 45.

[399] *Volks NO*, para 56.

[400] *Volks NO*, para 60.

On dignity, Skweyiya, J further, lamentingly said:[401]

> I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

I hereby submit that the Constitutional Court's decision in *Volks NO* is retrogressive. The decision shows the socio-economic patterns that disadvantage women.[402] The Constitutional Court missed an opportunity to utilise feminist principles, including substantive equality, to recognise cohabiting couples. The prevailing position that women in cohabiting relationships have no legal status is in utter disregard of their rights to equality and dignity. This means that women in cohabiting relationships cannot inherit property accruing from the relationship. Hence, their ability to exercise choices in order to realise their capabilities is limited. This position does not auger well for a country with a high level of cohabitation and child-headed households in South Africa. The 2007 General Household Survey shows that a growing number of children are orphaned by AIDS in South Africa.[403] In South Africa, HIV prevalence among young pregnant girls is much higher. The 2008 South Africa Country Report under the United National General Assembly Special Session indicates that 12.9

[401] *Volks NO*, para 62.

[402] See Jagwanth, S., 'Expanding equality' in Murray, C., & O'Sullivan, M., *Advancing women's rights: The first decade of democracy* (2005) 131 136.

[403] Information available at: http://www.childrencount.ci.org.za/content.asp?PageID=71. (Accessed 19 December 2010).

percent of young pregnant girls aged between 15 and 19 are living with HIV.[404] These are mostly not in the 'so called unrecognised unions'.

7.10.3 Matrimonial property: The *Gumede* case

Still on women's access to property, in 2008, the Constitutional Court was faced with a challenge of the RCMA in the case of *Gumede v President of the Republic of South Africa and Others* (*Gumede*).[405] The applicant challenged a provision of the RCMA which was to the effect that proprietary consequences of a customary marriage entered into before the commencement of the RCMA has to continue to be governed by customary law.[406] The RCMA commenced on 15 November 2000. Another provision challenged was to the effect that a customary marriage entered into after the commencement of the RCMA is a marriage in community of property.[407] Further, the applicant challenged the KwaZulu Act on the Code of Zulu Law (KwaZulu Act)[408] which provides that the family head is the owner of and has control over all family property in the family home,[409] and the Natal Code of Zulu Law (Natal Code)[410] which provided that that the family head is the owner of and has control over

---

[404] DoH,'The National HIV and Syphilis Prevalence Survey 2007' DoH, 2008, 19.

[405] 2009 (3) BCLR 243 (CC).

[406] Section 7(1) of the RCMA provides that the proprietary consequences of a customary marriage entered into before the commencement of the RCMA continue to be governed by customary law. See *Gumede*, para 3.

[407]. Section 7(2) of the RCMA. See *Gumede*, para 3.

[408] 16 of 1985.

[409] Section 20. See *Gumede*, para 3.

[410] Proclamation R151 of 1987. See *Gumede*, para 3.

all family property in the family home.[411] The case also challenged the provision of the Natal Code that 'inmates' of a kraal are in respect of all family matters under the control of and owe obedience to the family head.[412]

Following in the footsteps of the reasoning in the *Bhe* case, the Constitution Court declared the above provisions unconstitutional finding that they contravened the constitutional provisions on equality.[413] The Constitutional Court made it clear that its order did not limit its retrospective effect on parties to existing marriages.[414] In essence, the case replaced the African customary marriage with an official statutory marriage.[415] The *Gumede* case is significant in light of the injustices women suffer under customary marriages and can be utilised to assert women's access to property during and at dissolution of marriage.

7.10.4 Security of tenure: The *Tongoane* case

In May 2010, the Constitutional Court declared the Communal Land Rights Act (CLARA)[416] unconstitutional and invalid in its entirety. This was in the case of *Tongoane and Others v*

---

[411] Section 20. See *Gumede*, para 3.

[412] Section 22. See *Gumede*, para 3.

[413] *Gumede*, para 59.

[414] *Gumede*, para 58.

[415] See Bekker, J., & Gardiol, VN., '*Gumede v President of the Republic of South Africa*: harmonisation, or the creation of new marriage laws in South Africa?: Case note (2009) 24 *SA Public Law* 206–222.

[416] Act 11 of 2004.

National Minister for Agriculture and Land Affairs and Others (*Tongoane*). [417] The CLARA is now repealed and is discussed here retrospectively. The CLARA was intended to meet one of the longstanding constitutional obligations of Parliament to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of apartheid that were imposed under the colour of the law.[418] The case concerned three challenges: First, the procedure that must be followed in enacting this legislation; second, whether Parliament complied with its constitutional obligation to facilitate public involvement in the legislative process that culminated in the enactment of CLARA; and, third, whether the provisions of CLARA, instead of providing legally secure tenure, undermine it.[419] I focus on the third because it is the substantive challenge of relevance to women's right to property.

Four communities[420] whose land rights were affected by CLARA mounted a two-pronged constitutional challenge to the legislation.[421] Substantively, the applicants challenged the CLARA on the ground that its provisions undermine security of tenure.[422] This challenge was

---

[417] CCT100/09 [2010] ZACC 10 (11 May 2010).

[418] See *Tongoane*, para 1.

[419] See *Tongoane*, para 3.

[420] Kalkfontein, Makuleke, Makgobistad and Dixie.

[421] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, Case No 11678/2006, North Gauteng High Court, Pretoria, 30 October 2009, unreported. The communities also challenged the constitutional validity of certain provisions of the Traditional Leadership and Governance Framework Act 41 of 2003. This challenge was dismissed by the High Court. The communities initially sought leave to appeal against the dismissal of this challenge. They did not l persist in seeking this relief in the Constitutional Court.

[422] See *Tongoane*, para 4.

partially successful. The High Court declared certain provisions of CLARA invalid.[423] Although it found that Parliament should have followed the procedure for the passing of Bills affecting the provinces prescribed by section 76,[424] it declined to grant relief on that account because Parliament had committed an error in good faith and did not intend to suppress the views of the provinces.[425] It accordingly dismissed this part of the application.[426]

The *Tongoane* case also raised a substantive issue in relation to whether instead of providing legally secure tenure, the CLARA undermined it.[427] However, the Constitutional Court did not deal with the issue based on the procedural finding.[428] This susbstantive aspect of the *Tongoane* case would have contributed to women's position in respect to access to land. It would have also contributed to the capabilities approach of enabling access to material needs like land. Nevertheless, the decision is commendable in the sense that it gives women the opportunity to participate in the process of drafting legislation.

---

[423] *Tongoane*, para 5.

[424] Section 76 of the Constitution provides for the procedure to be followed in the consideration of ordinary bills affecting provinces.

[425] See *Tongoane*, para 5.

[426] *Tongoane*, para 5.

[427] *Tongoane*, paras 3 - 4.

[428] *Tongoane*, paras 40; 115–116.

An attendant debate within the context of the CLARA is the regime of the Traditional Leadership and Governance Framework (TLGFA)[429] – an affiliate act to the CLARA. The TLGFA derived some of its authority from the CLARA. Particularly, the TLGFA vests excessive powers with traditional leaders.[430] Hence, the invalidation of the CLARA marks a significant step in realising women's access to land in that, since some of the provisions of the TLGFA were to be read with the CLARA.[431] It remains to be seen whether the powers granted to traditional and tribal authorities under the TLGFA will in effect become toothless.

Women's access to property is fundamental to their equality and dignity within the context of the capabilities approach. As applied within the context of HIV and AIDS, laws and policies that dispossess women of property, or fail to enhance their ability to own property, further consign women to places of vulnerability. Approaches should strive to empower women to own and access property. In this way, their capabilities to cope with the challenges that attend HIV and AIDS is enhanced.

7.11 FREEDOM FROM GENDER-BASED VIOLENCE

The high levels of violence in South Africa warrants no further accentuation. South Africa's transition from apartheid to a democratic state has coincided with and, in many respects,

[429] Act 41 of 2003.

[430] In terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land.

[431] Section 28(4) was to be read with section 21 of CLARA.

provided the impetus for a concerted focus on advancing women's rights.[432] This transition to a democratic state has been accompanied by an intensive focus on the use of the law as an instrument to address the high levels of gender-based. For feminist activists, the law has been an important site of struggle against discriminatory laws, policies and practices around sexual assault in particular.[433] Without a doubt, South African courts have been judicially active in regard to gender-based violence. *Inter alia*, the courts have dealt with the meaning of elimination of violence against women, due diligence principle and judicial gender-sensitivity as examined hereafter.

(a) Elimination of violence: The Baloyi case

In the case of *S v Baloyi and Others* (*Baloyi*),[434] the Constitutional Court had to deal with a challenge of a provision of the Prevention of Family Violence Act.[435] The appellant averred that section 3(5)[436] of the Prevention of Family Violence Act placed a reverse onus of proving absence of guilt on a person charged with breaching a family violence interdict. In doing so, the provision allegedly conflicted with the presumption of innocence, a limitation

[432] Artz, L., & Smythe, D., 'Feminism vs. the state?: A decade of sexual offences law reform in South Africa (2007) 74 *Agenda* 6 [hereafter Artz et al: 2007].

[433] Artz et al: 2007.

[434] 2000 (2) SA 425 (CC).

[435] Act 133 of 1993. Except for two provisions, this Act was repealed by the Domestic Violence Act – Act 119 of 1998.

[436] This section prescribed the procedure to be followed at an inquiry into an alleged breach of an interdict: it provided that the procedure set out in s 170 of the Criminal Procedure Act 51 of 1977 would be applicable to such an inquiry.

that could not be constitutionally justified.[437] Referring to private sources of violence, Sachs, J reaffirmed the duty placed on the state:[438]

> The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person, and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any wayand not to be treated or punished in a cruel, inhuman or degrading way.

The Constitutional Court also correctly stated that domestic violence compels constitutional concern in a number of important respects. On the one hand:[439]

> Section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity,and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any wayand not to be treated or punished in a cruel, inhuman or degrading way.

[437] The Transvaal High Court declared invalid section 3(5) of the Prevention of Family Violence Act, and referred its declaration to this Court for confirmation. It based its order of invalidity on three findings: first, that the section places a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict, second, that in so doing it conflicts with the presumption of innocence, and third, that such limitation of the right to be presumed innocent cannot be constitutionally justified – See *Baloyi*, para 1.

[438] See *Baloyi*, para 11.

[439] Para 11.

On the other hand:[440]

> [T]o the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form...The non-sexist society promised in the foundational clauses of the Constitution, and the right to equality and non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy impunity.

I wish to commend the decision in the case of *Baloyi* case for reiterating the urgent obligation placed upon the state to eliminate violence against women. The Constitutional Court's emphasis of private sources of domestic violence is important in light of the fact that many women are vulnerable to HIV and AIDS due to violence from intimate partners. To the extent that the Constitutional Court recognised this imperative, the decision serves to show the pressing need for the elimination of violence if women's capacities have to be realised in the context of HIV and AIDS.

(b) Due diligence: The Carmichele case

In the case of *Carmichele v Minister of Safety and Security* (*Carmichele*),[441] the Constitutional Court had to deal with the constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The specific issue was whether the High Court and the Supreme Court of Appeal (SCA) ought to have broadened the concept of "wrongfulness" in the law of delict in the light of the state's

[440] Para 12.

[441] 2001 (10) BCLR 995 (CC).

constitutional duty to safeguard the rights of women.[442] The applicant sued the two Ministers concerned for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail.[443] In the High Court the applicant alleged that this had been an omission by the police and the prosecutor.[444] She also relied on the duties imposed on the police by the interim Constitution and on the state under the rights to life, equality, dignity, freedom and security of the person and privacy.[445] The High Court dismissed the claim at the close of the applicant's case, finding that she had not established that the police or the prosecutor had wrongfully failed to fulfil a legal duty owed specifically to her.[446] The applicant appealed SCA, which held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her.[447]

This position of the Constitutional Court in the *Carmichele* case affirmed the principle of due diligence principle in cases of violence against women. The Constitutional Court considered the potential liability of both police and prosecutors.[448] As to the police, it held that the state is

[442] Para 38.

[443] Paras 66–67.

[444] Para 67.

[445] Para 27.

[446] Para 3.

[447] Para 3.

[448] Paras 72–78.

obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women.[449] It is important that women be free from the threat of sexual violence. In the particular circumstances of the present case **t**he police recommendation for the assailant's release could, therefore, amount to wrongful conduct, giving rise to liability for the consequences.[450] Similarly, the Constitutional Court held that prosecutors, who are under a general duty to place before a court any information relevant to the refusal or grant of bail,[451] might reasonably be held liable for negligently failing to fulfil that duty.[452]

(c) Judicial gender-sensitivity: The Ferreira case

The case of *S v Ferreira* (*Ferreira*)[453] concerned a situation where an abused woman was on trial for killing the perpetrator of the abuse. Howie, JA notes that the appellant's actions must be judicially evaluated 'not from a male perspective' but by the court placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and assistance of expert evidence such as that given here.[454] Howie, JA pertinently noted:[455]

---

[449] Para 62.

[450] Para 74.

[451] Para 74.

[452] Para 62.

[453] 2004 (2) SACR 454 (SCA). See also the case of *S v Engelbrecht* 2005 (2) SACR 41 (WLD).

[454] Para 40.

> Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment. "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self determination of South African women." It also, therefore abuse, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.

I wish to state that SCA's approach in the case of *Ferreira* is instructive in regard to how the judiciary should deal with female offenders in cases of domestic violence. In an environment of systemic violence against women, the judiciary should be alert to gender sensitivities and adopt a more *women friendly* approach. Moreover, this approach is in line with the CEDAW Committee position – that gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the CEDAW.[456]

7.11.1 Proscription of sexual offences and remedies to victims

Chapter six analysed the state has the obligation to *unequivocally* legislate against violence against women.[457] For several years, in South Africa, rules governing the criminal justice management of sexual assault cases were pervaded by a historical mythology about rape victims and inherently sexist assumptions about woman and their sexuality.[458] These had all been scrupulously deconstructed through feminist legal submissions and scholarship and have

---

[455] Para 40.

[456] CEDAW General Recommendation 19: Violence against women (1992) article 24(b).

[457] Chapter six, section 6.2.22. My emphasis.

[458] Artz et al: 2007, 7.

led to several hard earned laws such the Domestic Violence Act,[459] the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Act), [460]and changes to the Criminal Procedure Act,[461] and the Children's Act.[462] I examine the Domestic Violence Act and the Sexual Offences Act here below.

(a) The Domestic Violence Act

The preamble to the Domestic Violence Act acknowledges the severity of the problem of violence against women and notes that the legislation had as its purpose providing victims the maximum protection under the law.[463] The Domestic Violence Act imposes specific obligations on the National Commissioner of Police and the National Director of Public Prosecutions to issue instructions and develop policy for the effective implementation of the new law.[464] Police members have specific legal obligations under the Domestic Violence Act in response to complaints of domestic violence.[465] Moreover, the Domestic Violence Act, to

[459] Act 116 of 1998.

[460] Act No. 32 of 2007. Certain aspects of the Act came into effect on the 16th of December 2007. For more discussion on the process leading to the lobbying and enactment of the Act, see, Artz et al:2007; Albertyn, C et al., 'Women's freedom and security of the person' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) 295 [hereafter Albertyn et al: 2007] 376, Smythe, D., & Artz, L., Sex offences bill a step forward but still flawed, Weekend Argus 11 August 2007 (analysis of the Sexual Offences Bill).

[461] Act 105 of 1977.

[462] Act 38 of 2005.

[463] See preamble to the Domestic Violence Act.

[464] Section 18(3) of the Domestic Violence Act.

[465] Section 18(4) of the Domestic Violence Act.

ensure that these were followed, includes mechanisms for disciplinary action should a member of the South African Police Services fail in their duties with respect to this law.[466] Failures in the execution of these duties constitute misconduct under the Domestic Violence Act and South African Police Services national instructions.[467] In this way, a mechanism is in place to hold the responsible authorities accountable, especially in light of the due diligence principle. Implementation of this law has, however, been faced with several challenges such as the fact that most officials of the South African Police Services do not understand their responsibilities.[468]

(b) The Sexual Offences Act

The Sexual Offences Act was enacted to institutionalise constitutional rights in legislation and is founded in the right to be free from all forms of violence.[469] The right to equality seems to have been uppermost in the minds of the drafters. This would relate to substantive equality.[470] The Sexual Offences Act provides, amongst others, for post-exposure prophylaxis for

[466] Sections 18 (3) and (4) of the Domestic Violence Act.

[467] See sections 18 (3) and (4) of the Domestic Violence Act; SAPS National Instruction 7/1999 Version 02.00 in terms of section 18(3) of the Domestic Violence Act (Available at: www.info.gov.za/gazette/notices/2006/28581.pdf); Parenzee, P et al.,'Monitoring the Implementation of the Domestic Violence Act, First Report.' 2001. Institute of Criminology, University of Cape Town. Available at: http://www.ghjru.uct.ac.za/osf-reports/dva-report.pdf. (Accessed 15 August 2009).

[468] South African Police Service *Annual Report* (2009) 5.

[469] This is on the basis of section 12(1)(c) of the Constitution. See preamble to the Sexual Offences Act.

[470] For a further discussion on the bill in terms of definition of rape, see, Artz et al: 2007.

victims.[471] During the lobbying for the Sexual Offences Act, post-exposure prophylaxis came to be equated with a legal right to medical care.[472] I, therefore, wish to argue that this is a radical step towards fulfilling the state obligation to provide access to health services or remedies to victims of sexual violence. Although the inclusion of post-exposure prophylaxis in the Sexual Offences Act is certainly a victory, the fact that its provision seems to be linked to reporting the rape to the police (either directly or through a designated health facility) is extremely problematic. Rape victims may choose not to report to the police for any of a number of reasons and this should not prevent them from accessing what may be life-saving medication.

As a result of this focus on post-exposure prophylaxis, the law fails to specifically set out the rights of victims in terms of medico-legal management of rape cases and, in its current formulation.[473] The Sexual Offencs Act does not even include a broad treatment clause. This is a critical omission as medico-legal evidence is often the only corroboration to the victim's testimony and as this is often the most poorly executed part of a rape investigation. It is necessary to place a positive obligation on health care providers to provide proper medical care and a thorough forensic examination.[474]

---

[471] See sections 27–29 of the Sexual Offences Act. It must be taken for four weeks and will only be effective if it is started within 72 hours (three days) of the exposure. Post-exposure prophylaxis, if taken correctly, appears to be at least 80 percent effective at preventing an infection from developing.

[472] See the South African Law Commission *Sexual Offences: Report* as cited in Albertyn et al: 2007, 376.

[473] See sections 27–29 of the Sexual Offences Act.

[474] See Artz et al: 2007.

In light of the state obligation to provide remedies to victims, and to exercise due diligence in handling cases of violence against women, the Sexual Offences Act provides for compulsory HIV testing of alleged sex offenders.[475] This provision is the centre of controversy, especially as it involves so many competing rights such as the right of an arrested person to be presumed innocent.[476] The purpose of this provision is to assist rape victims to 'make informed medical, lifestyle and other personal decisions'.[477] The criticism here is that it is unclear what these decisions are, first, the victim needs to start taking post-exposure prophylaxis within six hours, and secondly, no later than 72 hours, after being raped.[478]

It has also been rightly argued that there is no way that the perpetrator will be apprehended, brought before court, given his due process rights to be heard, tested and the result provided to the alleged offender and the victim in time for her to make a decision about whether to take post-exposure prophylaxis.[479] Furthermore, even if he tests negative, it may be because the alleged offender is in window period. This might provide the victim with a false sense of security and result in her stopping medication and being put at further risk.

[475] See sections 30-39 of the Sexual Offences Act.

[476] This is part of the fair trial right in section 35(3)(h) of the Constitution. See section 30(1)(a)(i) of the Sexual Offences Act.

[477] Section 34(a)(i) of the Sexual Offences Act.

[478] Section 28(2) of the Sexual Offences Act.

[479] Artz et al: 2007.

Research shows that very few patients who are initially provided post-exposure prophylaxis starter packs return to the clinic for their HIV test results or to receive further treatment.[480] The Western Cape Department of Health, for instance, stated that the number of patients who complete the 28-day full treatment is 'not high',[481] while the Medical Research Council put the figure at a low 15 percent,[482] with considerable attrition over the four week period of scheduled return visits. Most of the patients who did not finish the treatment had stopped taking it by the end of the first week.[483]

Given South Africa's low conviction rates, the possibility of an alleged offender being tested and subsequently acquitted is very real and may result in him suing the victim for damages. It has been suggested that the problem is best addressed by guaranteeing unqualified access to post-exposure prophylaxis.[484] Nevertheless, the Sexual Offences Act is a giant step for gender-responsive approaches to HIV and AIDS, especially in the context of the rampant sexual violence against women in the country. It remains to be seen whether the law will translate into real changes for women, particularly on sexual violence. Considerably, it espouses provisions capable of enhancing women's ability to live in peace, dignity and security.

[480] Amnesty International: 2008, 43.

[481] See interviews with the Department of Health, Western Cape, Cape Town, 11 May 2007 – conducted by Amnesty International. See Amnesty International: 2008, 43.

[482] Interview with Medical Research Council, Pretoria, 14 May 2007 – conducted by Amnesty International. See Amnesty International: 2008,43.

[483] Christofides, N et al., 'The state of sexual assault services: Findings from a situational analysis of services in South Africa' The South African Gender-based Violence and Health Initiative, October 2003.

[484] Artz et al: 2007.

7.11.2 Protection against harmful cultural practices – virginity testing

I analysed the state obligation to eliminate harmful cultural practices in chapter six.[485] I also examined the obligation to take into account the plight of adolescents.[486] I use the practice of virginity testing to illustrate the importance of this protection in the context of HIV and AIDS in South Africa. However, this choice does not disregard other harmful cultural practices like dry sex.[487]

A traditional healer in South Africa is quoted to have said:[488]

> People say to me, 'Why are you doing this?' And I say to them: 'What have you done to stop AIDS, to limit abortion?...We are going ahead with our virginity testing because we have nothing else.

In August 2002, a crowd of teenage girls, singing, chanting slogans and holding hand-written placards, said:[489]

[485] Chapter six, section 6.2.22.

[486] See chapter six, section 6.2.12.

[487] Dry sex involves the insertion of various drying or absorbent materials or agents into the vagina before (or during) sexual intercourse. A dry sex preparation may consist of vinegar, bleach, chlorine, toothpaste, soaps, powders or herbal potions. For more on this, see, Van der Poll, L., 'The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective' (2009) 13 *Law, Democracy & Development* 1–21[hereafter Van der Poll: 2009] 4.

[488] Nomagugu Ngobese, tester and traditional healer. See Daley, S., 'How South Africans Screen Girls for Abstinence' as quoted in George, ER., 'Like a virgin? Virginity testing as HIV/AIDS Prevention: Human rights universalism and cultural relativism revisted' (2008) *International & Comparative Law Colloquium Papers.* Paper 4.

[489] The girls were followed by a handful of middle-aged women, called the *abahloli*-women who conduct virginity inspections on young girls. They were marching to protest against the Commission on Gender Equality

As part of the effort to promote female sexual chastity as an AIDS prevention strategy, the practice of virginity testing was revived in parts of South Africa during the early 1990s.[490] The testing procedure is as follows: the girls line up, then lie in a row on their backs on grass mats spread out on the ground. They part their legs, while the *umhloli*[491] peers briefly at each girl's exposed genitals before making her judgement (occasionally, the *umhloli* will use her hands to part a girl's labia).[492] With each confirmed virgin, the crowd of assembled women cheer and ululate to congratulate the girls. Those who "pass" the test are awarded a printed certificate and a sticker or smearing of white clay on the forehead that visibly confirms their success in the test.[493] Those who 'fail' are usually pulled aside to be spoken to briefly by the *umhloli*, who will try to establish what happened: which boy has taken her virginity? Was the

(CGE) and the South African Human Rights Commission (SAHRC), who had condemned their activities. See Scorgie, F., 'Virginity testing and the olitics of sexual responsibility: Implications for AIDS intervention' (2002) 61 *African Studies* 55 [hereafter Scorgie: 2002].

[490] For more on virginity testing in South Africa, see, Scorgie: 2002; Richter, L., 'Sexual abuse of young children in Southern Africa.' 2004. Human Science Research Council Cape Town; Leclerc-Madlala, S., 'Protecting girlhood? Virginity revivals in the era of AIDS' (2003) 56 *Agenda* 16–25; Leclerc-Madlala, S., 'On the virgin cleansing myth: Gendered bodies, AIDS and ethnomedicine' (2002) 1 *African Journal of AIDS Research* 87–95 [hereafter Leclerc-Madlala: 2002].

[491] The traditional Zulu virginity tester.

[492] Scorgie: 2002, 58. See also Van der Poll: 2009, 5.

[493] Scorgie: 2002, 58.

girl willing? Was she abused? Advice on how to behave in the future-to abstain from sex, in other words-is also dispensed at this time.[494]

The practice has been criticised as, *inter alia*, violating of the right to privacy and control over one's body. Its effectiveness in this respect has also been questioned.[495] Leclerc-Madlala rightly argues that, 'examining girls to determine their virginity status is another thread to reinforce a web of meaning that places women and women's sexuality at the centre of the current AIDS epidemic'.[496] This is because being declared a virgin may also convey an additional risk of rape.[497] The possibility that people who want to rape virgins to cleanse themselves from HIV may attack these girls or women were raised as a concern around virginity testing in the hearings of the South African Gender Commission for Equality.[498]

On the practices of virginity testing and dry sex, Van der Poll convincingly asserts:[499]

> It need not be argued that dry sex and virginity testing implicate both women's agency and their sexuality. A due appreciation of the material conditions of (African) women's lives, particularly as these are revealed in relation to their sexuality, sharply calls into question the extent to which women can be construed as free, independent agents, exercising unrestricted choices as a free expression of

---

[494] Scorgie: 2002, 58.

[495] Hamilton, G., 'Virgin testing: one answer to the AIDS epidemic?'(1998) 15 *Indicator South Africa* 62–66; Maharaj, A.,'Virginity testing: a matter of abuse or prevention?' (1999) 41 *Agenda* 96; Leclerc-Madlala, S., 'Infect one, infect all: Zulu youth response to the AIDS Epidemic in South Africa' (1997) 17 *Medical Anthropology* 363–380.

[496] As cited in Jewkes, R., 'Child sexual abuse and HIV infection' in Richter, L et al., (eds) *Sexual abuse of young children in southern Africa* (2004) [hereafter Jewkes: 2004] 137.

[497] Van der Poll: 2009, 6.

[498] Jewkes: 2004, 138.

[499] Van der Poll: 2009, 6.

> their sexual desires. Consequently the beliefs that drive and sustain cultural sex practices warrant closer inspection... Cultural beliefs attribute value to traditional practices, and attach sanctions to non-compliance. Women's sexuality is directly implicated by practices and sanctions emanating from societal sex norms.

Van der Poll's arguments reasonate with the core proposal in this thesis – the necessity to consider the feminist capabilities approach in addressing with women, HIV and AIDS. Fittingly, the author affirms:

> It could well be argued that the abuses of women result from, and are compounded by, their social, economic and political inequalities. Lack of access to education, land, financial resources, and health care, coupled with women's inequality within the family, render it virtually impossible for them to live free from (sexual) abuse and violence. Viewed through this particular (feminist) lens, the two practices are not all that different. Social coercion is, after all, fundamentally driven by patriarchal needs and desires, expressed through the medium of (female) sexuality. Arguments supporting women's agency and the idea that women, as a group, can freely express their sexual desire within such a decidedly patriarchal social, economic and political context thus become highly suspect.

South Africa now proscribes virginity testing and other related practices in the Children's Act.[500] Van der Poll describes this attempt as 'rather modest.'[501] The author, however, adds

---

[500] Section 12 provides: (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

> (2) A Child-
> *(a)* below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
> *(b)* above that minimum age may not be given out in marriage or engagement without his or her consent.
> (3) Genital mutilation or the circumcision of female children is prohibited.
> (
> (4) Virginity testing of children under the age of 16 is prohibited
> 5) Virginity testing of children older than 16 may only be performed
> *(a)* if the child has given consent to the testing in the prescribed manner;

that the ban points to the possible human rights implications of this practice.[502] In agreement with Van der Poll, I wish to assert that there is need for an express penal provision. A provision that clearly sets out criminal liability in relation to the prohibition of virginity testing. The state should have in place a system to identify groups and individuals practising virginity testing; and alert them to the implications of doing it. Mechanisms under the Domestic Violence Act are accompanied by sanctions.[503] Similarly, the law envisioned should have provisions for sanctions.

At the core of feminist aspirations and the capabilities approach is the eradication of gender-based violence as a form of discrimination. This extends to all forms of violence. It need not be emphasised that violence denies women the agency to exercise choice and autonomy. In essence, it takes away a women's ability to function as a normal being and to achieve their full capacities. The scenario is worse for women within the context of HIV and AIDS. South Africa's laws have taken giant leaps in the road towards the realisation of this ideal. However, operationalisation of these legal ideals is far from success. An approach that views women's security and dignity as fundamental to their ability to live normal lives, especially in the context of HIV and AIDS, is needed. The feminist capabilities approach is of essence.

(b) after proper counselling of the child; and

(c) in the manner prescribed.

(6) The results of a virginity test may not be disclosed without the consent of the 15

(7) The body of a child who has undergone virginity testing may not be marked.

[501] Van der Poll: 2009, 13.

[502] Van der Poll: 2009, 13.

[503] Refer to section 7.11.1.

7.12 CONCLUSION

This chapter has critically appraised some of South Africa's laws and polices relating to women and HIV/AIDS in the key areas of access to health services, access to adequate housing, rights relating to inheritance and freedom from gender-based violence. The country's response has gone through phases of apartheid which created a culture of ill health for women, post apartheid which gave more recognition to women's right to health, a period of political denialism which slowed the pace of intervention and more recently, a proactive response. What can generally be concluded is that the legal and policy machinery to address women's rights in the context of HIV and AIDS exists. What however, remains challenging is implementation. It is also clear that some laws could be made more accommodative of the realities of women living with HIV and AIDS – this way, their potential to enhance women's capabilities will be improved. These are the laws and polices relating to access to health, access to adequate housing, access to property and freedom from gender-based violence. In the next chapter, I make summary of this study, formulate recommendations and conclude the investigation in this thesis.

CHAPTER EIGHT

Law is not everything, but [it] is not nothing either.

Catharine MacKinnon[1]

RECOMMENDATIONS AND CONCLUSION

8.1 INTRODUCTION

It is well acknowledged that HIV and AIDS pandemic is now generalised in the South African population.[2] It is also recognised that the pandemic has affected women more than men in South Africa.[3] Chapters two and four of this thesis demonstrated that women's inequality, lack of access to health services, access to adequate housing, access to property and freedom from gender-based violence have ensured this gendered nature of HIV and AIDS.[4] Hence, the realisation of these rights been shown to have the potential to improve women's conditions in the context of HIV and AIDS.[5]

---

[1] MacKinnon, C., *Feminism unmodified: Discourses on life and law* (1987) 116.

[2] See analysis in chapter seven, section 7.2.

[3] See analysis in chapter seven, section 7.2.

[4] See analysis in chapters two and four.

[5] See analysis in chapters three, four, five and six.

Chapter three of this thesis examined the importance of the feminist capabilities approach as a possible, although not the only framework that could be used to address women's concerns in the context of HIV and AIDS. As conceived by Sen, the capabilities approach relates to poverty, inequality and human development.[6] As later developed by Nussbaum, the capabilities approach relates to women's development.[7] Thus, the approach provides a broad normative framework for the evaluation of individual well-being and social arrangements, the design of policies and proposals about social change in society.[8] Quintessentially, therefore, the capabilities approach assigns a critical task to state policy: namely, the improvement of quality of life for all people, as defined by their capabilities.[9] On this basis, I argued that the state should undertake to realise the rights of women affected by HIV and AIDS in the areas of health, housing, property and freedom from violence.[10]

Analysis in chapter three shows that the capabilities approach is not without criticism.[11] Nonetheless, it is a framework that provides a critical avenue in addressing women's rights

---

[6] See, generally, Sen, A., *Development as freedom* (1999).

[7] See, generally, Nussbaum, MC., *Women and human development: The capabilities approach* (2000) [hereafter Nussbaum: 2000].

[8] See, generally, Nussbaum: 2000.

[9] See, generally, Dixon, R., & Nussbaum, MC., 'Abortion, dignity and a capabilities approach' Public law and legal theory working paper No. 345, March 2011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799190 (Accessed 19 April 2011).

[10] See chapter three, section 3.4.

[11] See analysis in chapter three, section 3.4.4.

in the context of HIV and AIDS. Principally, the argument is that a minimally just society is one that secures to all citizens a threshold of a list of key entailments, on the grounds that such entitlements are requisite of a life worth of human dignity.[12]

In addition to the feminist capabilities approach, this thesis, albeit to a small extent, employed the dominance theory of the radical feminist thought.[13] This feminist theory is associated with the second wave feminism.[14] A key slogan of this feminist thought, 'the personal is political', summarises the radical insistence that the roots of women's oppression is to be found in the 'private' domination and control which patriarchal culture exercises over women's bodies.[15] Out of this affirmation, Mackinnon asserts that male dominance is perhaps the most pervasive and tenacious system of power in history.[16] Notwithstanding the criticisms levelled against it, the radical feminist theory is credited for, *inter alia*, the milestones they made made relating to domestic violence.[17] The role of violence in the context of gender, HIV and AIDS warrants no further accentuation. Hence, this thesis argued that radical feminist stance approach is unavoidable in the analysis in this thesis.[18]

[12] Dixon & Nussbaum: 2011, 4.

[13] See chapter three, section 3.2.2.

[14] See chapter three, section 3.2.2.

[15] Beasley, C., *What is feminism? An introduction to feminist theory* (1999).

[16] MacKinnon, C., *Feminism, Marxism, method and the state: Toward feminist jurisprudence* (1983) 635.

[17] See chapter three, section 3.2.2.

[18] See chapter three, section 3.2.2.

Internationally, norms relating to women's rights, HIV and AIDS, have developed on the basis of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (the African Charter), and the Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol).[19] These norms would provide the normative calculus for evaluating South Africa's laws and policies affecting women in the context of HIV and AIDS in chapter seven of this work.

Based on the above theoretical and normative calculus, a deduction can be made that in South Africa, women affected by HIV and AIDS continue to languish in conditions of poor access to health services, inadequate access to housing, limited access to property and live amidst gender-based violence. Notwithstanding the above situation, South Africa has legal protections and jurisprudential developments that are critical to the realisation of women's rights in the context of HIV and AIDS. Specific conclusions in this regard are made in this chapter.[20] What remains to be improved is implementation of these laws and policies in a manner that should enhance women's capabilities and functionings to enable them live with dignity in the HIV and AIDS melieu. In this regard, explicit recommendations are made in this chapter.[21]

Having highlighted the above aspects of this thesis, the next section of this thesis is a summary of the study.

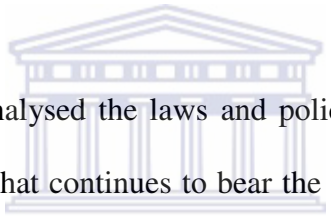
[19] See chapter five, sections 5.2–5.6.

[20] See sections 8.3.1–8.3.9.

[21] See section 8.4.

8.2. A SUMMARY OF THE ANALYSIS

This thesis sought to examine the extent of South Africa's realisation of women's rights within the context of women, HIV and AIDS. Analyses were to be based on four themes, namely: the right of access to health services, right to adequate housing, right to property in family relations and the right to freedom from gender-based violence. These analyses were to be based on the normative standards established at the regional and international level, and against the theoretical framework of the feminist capabilities approach as complemented by the dominance theory of the radical feminist thought. Here below, I make a summary of the analyses in this thesis.



In this thesis, I have critically analysed the laws and policies of South Africa.[22] The thesis focused on women as the group that continues to bear the yoke of the epidemic and a group that suffers socio-economic inequities leading to both *de facto* and *de jure* inequality.[23] In this light, analyses relied on the legal bases of women's right to equality,[24] together with socio-economic rights to the highest attainable health,[25] right to adequate housing,[26] women's property and inheritance rights[27] and protection from gender-based violence.[28] This work was

[22] See analysis in chapter eight.

[23] See analyses in chapters one, two and four.

[24] See chapter five, section 5.2 .and chapter six, section 6.2.

[25] See chapter five, section 5.3 and chapter six, sections 6.2.2–6.2.14.

[26] See chapter five, section 5.4 and chapter six, sections 6.2.15–6.2.17.

[27] See chapter five, section 5.5 and chapter six, sections 6.218–6.2.20.

influenced by the feminist capabilities approach as supplemented by the dominance theory of radical feminist thought.

In examining the above issues, chapter two of the thesis relied on the concept of gender as a tool of analysis.[29] The chapter thus substantiated why gender forms the focus of this study. The discussion demonstrated this by, *inter alia*, providing evidence on how women are more vulnerable to the HIV and AIDS epidemic.[30] In this chapter, I demonstrated the connection between women, HIV and AIDS by highlighting the key concepts of gender, sex and sexuality.[31] The chapter, therefore, focussed on the factors that contribute to gender inequality within the context of HIV and AIDS, including both biological and physiological, and socio-economic and cultural factors.[32] Illustrations and examples were drawn widely but focussing on sub-Saharan Africa.

Chapter three presented the theoretical and philosophical framework of the thesis. Building on chapter two which presented the gendered nature of the HIV and AIDS epidemic, this chapter adopted the feminist capabilities approach,[33] and to a small extent, the dominance theory of radical feminist thought.[34] The chapter generally examined feminist legal theory and

[28] See chapter five, section 5.6 and chapter six, sections 6.2.21–6.2.24.

[29] See chapter two, section 2.3.

[30] See chapter two, section 2.5.

[31] See chapter two, sections 2.2; 2.3; 2.4.

[32] See chapter two, sections 2.5.1–2.5.6.

[33] See chapter three, section 3.4.

[34] See chapter three, section 3.2.2.

specifically examined the liberal[35] and radical feminist theories.[36] These theories provided the frameworks of analyses for women in the context of HIV and AIDS in relation to access to health, access to housing, access to property and freedom from gender-based violence. Aware of the variations and diversity of feminism, the chapter aligned itself with the core principle of feminist legal theory which concerns itself with the belief that women are not treated the same as men by the legal systems, policies, social structures and the actors within them.

Chapter three further advanced the feminist capabilities approach as a framework that presents one of the best opportunities for implementation of law in such a manner that seeks to eradicate deep-rooted gender inequalities with the goal of realising women's capabilities. The argument being that within the context of a 'sexed and gendered HIV and AIDS', approaches should strive to strengthen women's abilities to live amidst the epidemic. The chapter concluded that the feminist capabilities approach, supported by the dominance theory of the radical feminism, principles of substantive equality, socio-economic rights and dignity,[37] provide a framework that presents opportunities for implementation of law in such a manner that seeks to eradicate deep-rooted gender inequalities with the goal of realising women's capabilities.

Chapter four examines the link between HIV and AIDS and women's rights to access to health services (and and its underlying determinants),[38] adequate housing,[39] access to property

[35] See chapter three, section 3.2.1.

[36] See chapter three, section 3.2.2.

[37] See chapter three, section 3.7.

[38] See chapter four, section 4.3.

[39] See chapter four, section 4.4.

(including succession, inheritance and marriage)[40] and freedom from gender-based violence.[41] The chapter drew the link between women and socio-economic rights. Illustrations were drawn widely from sub-Saharan Africa to argue these themes.

Chapter five examined the normative basis of the thesis. The chapter grounded analyses on the right to substantive equality and the realisation of women's socio-economic rights.[42] The chapter, therefore, laid out general obligations to realise women's right to socio-economic rights. State obligations were mainly presented on the basis of the framework of the ICESCR, the CEDAW, the CRC and the African Women Protocol.

Chapter six analysed the specific obligations to realise women's right to socio-economic rights. State obligations were mostly presented on the basis of the framework of the ICESCR, CEDAW, CRC, the African Charter and the African Women Protocol.[43] The explicit obligations were drawn from regional and international court decisions, Special Rapporteur reports, General Comments, Concluding Observations and General Recommendations of the respective treaty bodies. Scholarly works on women's rights to access to health services, adequate housing, access to property and freedom from gender-based violence were also relied upon.[44]

---

[40] See chapter four, section 4.6.

[41] See chapter four, section 4.5.

[42] See chapter five, sections 5.2–5.6.

[43] See chapter six, sections 6.2.1–6.2.24.

[44] See chapter six, sections 6.2.1–6.2.24.

Chapter seven examined the legal and policy position on women and AIDS in South Africa. The chapter presented an overview of the epidemic in the country,[45] and provided an impression of the current health system pointing out the history of ill health for women against the apartheid background.[46] The chapter also highlighted key trends like the shift from regulation to inaction[47] and then to denialism.[48] On the basis of the feminist capabilities approach, the chapter examined South Africa's legal and policy position on women, HIV and AIDS – relating to access health services,[49] access to adequate housing,[50] access to property,[51] and freedom from gender-based violence.[52] I commended South Africa's legislative, policy and jurisprudential contribution in some of the thematic areas above.[53] The chapter concluded that implementation remains the main challenge to the laws and policies in place.[54]

Drawing from the analyses in chapters one to seven, the next section of this chapter presents some deductions from the South African experience. Some of these inferences highlight the

[45] See chapter seven, section 7.2.

[46] See chapter seven, sections 7.3; 7.4.

[47] See chapter seven, section 7.5.

[48] See chapter seven, section 7.6.

[49] See chapter seven, section 7.8.

[50] See chapter seven, section 7.9.

[51] See chapter seven, section 7.10.

[52] See chapter seven, section 7.11.

[53] See chapter seven, section 7.12.

[54] See chapter seven, section 7.12.

successes and failures in relation to laws and policies affecting women in the context of HIV and AIDS.

8.3 THE SOUTH AFRICAN EXPERIENCE: SUCCESSES AND FAILURES

8.3.1 Socio-economic rights guarantees (justiciability)

This study has given expression to the utility of the justiciability of socio-economic rights in the realisation of women's rights in the context of HIV and AIDS. The recognition of socio-economic rights has the strength of 'high level' protection.[55] This thesis has demonstrated that guarantees of socio-economic rights have the potential to enable women realise their capabilities and to function within the context of a feminised disease such as HIV and AIDS. Moreover, socio-economic rights guarantees have a greater bearing for women in poor countries like most in sub-Saharan Africa. This plays the critical role of enabling women to function with dignity in the face of HIV and AIDS.

8.3.2 Reasonableness standard

The reasonableness standard developed in contrast to the minimum core standard as conceptualised by the CESCR.[56] The Constitutional Court has developed the reasonableness standard in assessing state measures as seen in the cases of *Government of*

[55] See chapter seven, section 7.7.

[56] See chapter five, section 5.7.1.

the Republic of South Africa v Grootboom (*Grootboom*)[57] and *Minister of Health and Others v Treatment Action Campaign and Others* (*Treatment Action Campaign*).[58] The state is therefore, required to adopt and reasonably implement a comprehensive and coherent programme. A critical element is the requirement that the programme which is designed to advance the progressive realisation of the rights cannot omit short-term measures of relief for those in desperate need.[59] Hence, the Constitutional Court has sought to ensure the value of human dignity within this framework.[60]

Liebenberg argues, and I agree, that a key strength of the reasonableness review is its sensitivity to the contexts of different values and interests that are at stake in these cases.[61] The author asserts that the reasonableness review is capable of accommodating a broad range of challenges to the design and implementation of the state's socio-economic programmes. This strength of the reasonableness standard is also its weakness in the sense that it can easily deteriorate into a weak standard.[62] Nonetheless, I, argue that within the reasonableness standard, women's entitlements within the context of HIV and AIDS can be fairly evaluated. The reasonableness standard review, therefore, represents not only an approach capable of transforming constitutional values, but also one that augments

[57] 2000 (1) SA 46 (CC). See analysis in chapter seven, section 7.9.1.

[58] 2002 5 SA 721 CC. See analysis in chapter seven, section 7.8.2.

[59] *Grootboom*, paras 44,64,68,99; *Treatment Action Campaign*, para 78.

[60] See Liebenberg, S., *Socio-Economic Rights adjudication under a transformative constitution* (2010) [hereafter Liebenberg: 2010] 223.

[61] Liebenberg: 2010, 223.

[62] Liebenberg: 2010, 223.

accountability. The place of accountability in laws and policies relating to women, HIV and AIDS needs no further emphasis. Moreover, such accountability allows for women's capabilities to be enhanced in order to enable them live with dignity amidst HIV and AIDS. Debatably therefore, the reasonableness standard allows for the realisation of the range women's rights analysed in chapters five and six of this thesis.

8.3.3 Meaningful engagement

An emerging principle in South African jurisprudence is 'meaning engagement' as elucidated in the cases of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* (*Occupiers of 51 Olivier Road*) [63] and *The Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (*Joe Slovo*)[64]. The Constitutional Court's firmness on the duty of the state to meaningfully engage allows affected communities to participate actively in defining detailed measures required to implement their rights.[65] This participation is critical because it inevitable that within these communities are women affected by the context of HIV and AIDS. Therefore, community engagement allows for women to participate in matters that can affect their capacities to live amidst the epidemic. Moreover, the involvement of communities gives women affected by HIV and AIDS an opportunity to be active citizens in decisions that

[63] 2008(3) SA 208 (CC).

[64] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister of Housing and Minister of Local Government and Housing, Western Cape* 2009 (9) BCLR 847 (CC).

[65] Liebenberg: 2010, 486.

affect their wellbeing. Broadly speaking therefore, meaningful engagement also permits the realisation of the array of women's rights as analysed in chapters five and six of this thesis.

8.3.4 Role of civil society and social activism

An important aspect of South Africa's approach to HIV and AIDS relates to the role of civil society and social activism.[66] The country's account demonstrates that civil society organisations can challenge state action on behalf of indigent and disadvantaged women affected by HIV and AIDS. A strong and robust civil society is important in poor countries where potential litigants may not be aware of their rights, or even afford litigation costs. In this way, a tool exists in litigation and civil society that can enable women to realise their capabilities in the context of HIV and AIDS. Mubanjizi and Twinomugisha further recommend that there is need to use civil society organisations in a collaborative rather than in an antagonistic manner.[67] An illustrative case is that of how Treatment Action Campaign garnered support and successfully challenged state policy in relation to the provision of anti-retroviral treatment.[68] This could also be compared to the role that The AIDS Support Organisation (TASO) played in Uganda.[69]

[66] See chapter seven, section 7.8.2.

[67] Mubanjizi, JC., & Twinomugisha, BK., 'The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?' (2010) 10 *African Human Rights Law Journal* 105 [hereafter Mubanjizi & Twinomugisha: 2010] 134.

[68] See chapter seven, section 7.8.2.

[69] TASO was founded in 1987 at a time when stigma was rife. It was the first organised community response to the AIDS epidemic in Uganda and the first indigenous AIDS organisation in Africa. Initially started by 16 people, including 12 people living with AIDS, within a year, 850 people had registered to use the services.

8.3.5 Judicial 'boldness' and transformative approaches

This study has demonstrated that judicial activism is a core component of the realisation of women's rights and human capabilities in the context of HIV and AIDS. This is especially the case in transformation process. Together with strong civil society, litigation can function as a mechanism to hold states accountable for the realisation of women's rights in the context of HIV and AIDS. However, litigation may not fetch the intended benefits if courts are reactive and timid. Experiences from South Africa show that judicial approaches have to be bold and proactive. National courts can play a crucial role in addressing issues of social justice such as women's rights in the context of HIV and AIDS. Judges can be creative in their interpretation of relevant constitutional provisions to compel the state to meet its obligations under international and regional human rights law. This includes those relating to women in the context of HIV and AIDS.[70] Furthermore, litigation serves to hold states accountable to their laws and policies. In this way, groups like women affected by HIV and AIDS are empowered

---

Today TASO advocates against discrimination and stigma, and provides counselling, information, medical and nursing care and material assistance to people with AIDS and their families. TASO has provided support to over 68,000 people who have HIV/AIDS and their families, as well as 1,000 AIDS orphans. For women, TASO presented a forum where they could take charge of their health. This is especially so because of TASO's focus on People Living With AIDS as 'senior partners' in the fight against AIDS. TASO also engaged in intense counselling, home based care, visits and massive campaign against stigma and discrimination. This way, many women accessed services like counselling and later access to ARVs. TASOs Achievements are available at http://www.tasouganda.org/lessons.php. (Accessed 12 December 2009). See also, Hampton, J., 'Living positively with AIDS: the AIDS Support Organization (TASO), Uganda.' Available at http://www.cababstractsplus.org/abstracts/Abstract.aspx?AcNo=19926714066. (Accessed 12 December 2010).

[70] On cases concerning human rights of people living with HIV/AIDS, see eg UNAIDS, *Courting rights: Case studies in litigating the human rights of people living with HIV* (2006).

to enforce laws more directly.[71] This in turn enhances their capabilities. The South African courts approaches in the cases of, *inter alia*, *Minister of Health and Others v Treatment Action Campaign and Others*,[72] *Government of Republic of South Africa and Others v Grootboom and Others*,[73] *Bhe and Others v Magistrate, Khayelitsha and Others*,[74] are illustrious of what judicial activism can achieve for marginalised groups such as women.[75] These cases provide a body of jurisprudence that has the potential to inspire legal and policy changes for women in the context of HIV and AIDS. For women's capacities to be realised in the context of HIV and AIDS, the role of a bold judiciary is pivotal.

8.3.6 Equality and dignity – core values

The South African experience has borne evidence that the rights to dignity and equality are fundamental to the realisation of women's rights in the context of HIV and AIDS. Moreover these rights are also essential to the feminist capabilities approach and radical feminist thought. Mostly springing from its apartheid history, the South African courts' regard for

[71] See Gloppen, S., 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights* 23 24.

[72] 2002 5 SA 721 CC. See chapter seven, section 7.8.2.

[73] 2000 (11) BCLR 1169 (CC). See chapter seven, section 7.9.1.

[74] 2005 (1) SA 580 (CC). See chapter seven, section 7.10.1.

[75] For more on South Africa's socio-economic rights jurisprudence and approaches, see generally, Mbazira, C., *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice'* (2009).

equality[76] and dignity[77] have displayed the centrality of the rights in question. The challenge presented by HIV and AIDS to women therefore, requires attention to gender inequality with the goal of enhancing women's ability to achieve their capacities through the rights examined in this thesis. Abstract as the right to dignity may be, it nonetheless provides an inextricable value in the understanding of women's rights in the context of HIV and AIDS.[78]

8.3.7 Accountability

The South African account has also demonstrated that accountability is the *raison d'être* of the human rights-based approach to women, HIV and AIDS. This study has shown that if women's rights to equality, access to health, adequate housing, property and freedom from violence have to be realised, the state must be able to answer. The need to account takes the imperatives placed on the state goes beyond a *mere moral claim*. Rather it asserts the

[76] On equality jurisprudence in South Africa, refer to the following cases: *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC)[hereafter *Prinsloo*]; *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC)[hereafter *Hugo*]; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC); *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) [hereafter *National Coalition for Gay and Lesbian Equality*] –See chapter three, section 3.6.

[77] On dignity jurisprudence in South Africa, refer to the following cases: *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC); *S v Makwanyane* 1995 (3) SA 391; *August v Electoral Commission* 1999 (3) SA 1 (CC); *National Coalition for Gay and Lesbian Equality ,* paras 15-18. *Hugo*; *Prinsloo; S v Mamabolo* 2001 (3) SA 409 (CC) para 41; *Dawood v Minister of Home Affairs* 2000(3) SA 939 at para 35; See also, Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1–31 – See chapter three seven, section 3.7.

[78] See chapter three , section 3.7.

obligation to account as a *legal claim.* As such, if women's capabilities and functionings within a feminised epidemic have to see fruition, the state should be able to defend its actions in this regard. This relates to, *inter alia*, the state's health plans, housing plans and all related measures on property and women's freedom from violence.

8.3.8 Women-responsive approaches to gender-based violence

On gender-based violence, South Africa's legal protections are not perfect but commendable. The country has taken strides in legislating against gender-based violence. For example, the country has in place, protections in the Domestic Violence Act,[79] the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Act)[80] the Criminal and the Children's Act.[81] Furthermore, the country has produced instructive jurisprudence on domestic violence– in the cases of *S v Baloyi* (*Baloyi*)[82] *Carmichele v Minister of Safety and Security* (*Carmichele*)[83] and *S v Ferreira* (*Ferreira*)[84] *inter alia*. The eradication of violence – an endemic form of discrimination, is the cornerstone of feminist approaches and the capabilities approach. Moreover, addressing HIV and AIDS requires the same. Inherently, the

[79] Act No 116 of 1998. See chapter seven, section 7.11.1.

[80] Act No. 32 of 2007. See chapter seven, section 7.11.1.

[81] Act 38 of 2005. See chapter seven, section 7.11.2.

[82] 2000 (2) SA 425 (CC) para 12. See chapter seven, section 7.11.a.

[83] 2001 (10) BCLR 995 (CC). See chapter seven, section 7.11.b.

[84] 2004 (2) SACR 454 (SCA). See chapter seven, section 7.11.c.

elimination of violence has the ripple effect of giving women choice and autonomy. This choice is what women need to be able to achieve their human capabilities in the face of HIV and AIDS.

8.3.9 Political will and commitment

It need not be argued that political leadership is central to the success of any law or policy.[85] It is clear from the examination of South Africa that political will and commitment bears responsibility for a country's state of the HIV and AIDS epidemic. Here, South Africa has no better lesson than that from Uganda where high-level political intervention, commitment and resoluteness saw a dramatic turn of the trajectory of HIV and AIDS in the country. Uganda's policies are credited with helping to bring adult HIV prevalence down from around 15 percent in the early 1990s to around 5 percent in 2001.[86] In marked contrast with South Africa,

[85] WHO, 'The world health report 2008: primary health care (now more than ever)' WHO: 2008. Available at http://www.who.int/whr/2008/whr08_en.pdf. (Accessed 12 December 2009); See also, WHO, 'Women and health: today's evidence tomorrow's agenda' WHO: 2009. Available at http://whqlibdoc.who.int/publications/2009/9789241563857_eng.pdf. (Accessed 14 December 2009) [hereafter: WHO: 2009] 73.

[86] In 1982, the first AIDS case in Uganda was diagnosed. Between 1982 and 1986 there was little understanding of what AIDS was. During this period the epidemic was largely addressed at local levels with communities caring for those infected and affected. There are varying statistics on the decline level. UNAIDS reported in 2004 that it was brought down from 18% prevalence rate in the early 1980s to stagnation around 6%. The sharp decline however is not contested. By the end of 2005, it was estimated that there were about 1 million people living with HIV/AIDS in the country, which puts the national prevalence of infection at 6.7 percent among adults (ages 15-49). About 520,000 women in the age group 15-49 were living with HIV/AIDS and UNAIDS estimated that more than 1 million children lost one or both parents to AIDS.[86] Overall, infections in urban areas was at 10.7 percent compared to 6.4 percent in rural areas while infection amongst urban women was almost twice as high (13 percent) compared to women in rural areas (7 percent).

Uganda ran a well-timed and successful public education campaign.[87] This was accompanied by determined political leadership and openness. Hence, political leadership was an essential ingredient in Uganda's success story.[88] It is hoped that the new political leadership in South Africa will usher in the necessary political will that will see the situation of women in the context of HIV and AIDS improve. So far, hope is apparent.[89] However, it is moot to discuss whether real transformation has occurred in this regard.

8.4 CONCEPTUAL, LEGAL AND PRACTICAL RECOMMENDATIONS

The analysis in this thesis has demonstrated the multifaceted nature of issues affecting women in the context of HIV and AIDS.[90] Other factors contributing to women's vulnerability in this scenario is poverty and weak institutions. Against this background, the recommendations I

[87] The 'ABCs' of HIV prevention: Report of a USAID technical meeting on behaviour change approaches to primary prevention of HIV/AIDS, September 17, 2002; UNAIDS: 2004.

[88] For more on Uganda's success story, see, Thornton, R., *Unimagined community: Sex, networks and AIDS in Uganda and South Africa* (2008)85–148;UNAIDS, 'Accelerating action against AIDS in Africa.' Geneva: 2003. See also Okware, S et al., 'Fighting HIV/AIDS: Is success possible?' (2001) 79 *Bulletin of the World Health Organization* 1113–1120; Parkhurst, J., 'The Ugandan success story?: Evidence and claims of HIV-1 prevention' (2002) 360 *Lancet* 78–80; The Uganda AIDS Commission, 'The Story of AIDS in Uganda', July 2004. Available at http://www.aidsuganda.org/npdf/aidsstory.pdf. (Accessed 12 December 2009).

[89] On 1 December 2009, President Jacob Zuma, then, not long into his term of service, said of HIV and AIDS: 'It touches on matters that are intensely personal and private.' He added that it can only be overcome by individuals taking responsibility for their own lives and the lives of those around them. The period was also marking 16 days of violence against women and children. on 8 April 2010, the president took his fourth test, which showed he was HIV negative.

[90] See, generally, chapters two and four.

make are a combination of conceptual, legal and practical measures. In isolation, none of them can address the issues I raise in this thesis. Hence, I recommend a multipronged approach as elucidated below.

8.4.1 Conceptual recommendations

This thesis has emphasised the fact that deep entrenched stereotypes against women remain a serious problem in the societies under review. For example, women are viewed as lesser citizens, not worthy to own property, as the submissive sexual partner, the 'supposed to be modest' person and one whose bodily integrity can be abused without state intervention. Other patterns include stigma and discrimination in access to health services and housing. Social attitudes, which are often based on cultural practices and assumptions, are of course difficult to change. However, states have a duty to begin to address these impediments to the full realisation of the rights of women.

On this note, I appeal to South Africa to address such attitudes and patterns because they are provide the environment in which HIV and AIDS thrives among women. This imperative should be accompanied by committed political affirmations and will. The state should be seen to take appropriate steps towards this ideal by, for example, running programmes meant to show the importance of treating women with respect, equality and dignity. Moreover South Africa has affirmative action policies which could be used as a platform to further strengthen women's ability to access health services, housing services, credit facilities and other relevant services.

8.4.2 Legal recommendations

There is a pressing need for the state to ratify the ICESCR and its optional protocol (OP-ICESCR). South Africa actively participated in the discussions pertaining to the OP-ICESCR. The country firmly supported the justiciability of all economic, social and cultural rights, and the view that all the rights in the ICESCR should be subjected to the complaints procedure which allows both individuals and groups to submit complaints.[91] My argument is that with South Africa's ratification, matters pertaining to women's rights within the context of HIV and AIDS, can be addressed at an international level should the state fail to fulfil its obligations in this regard. Moreover, South Africa's refusal to ratify the ICESCR pours scorn on her constitutional commitment to protect socio-economic rights.[92]

South Africa must also address women's access to property, especially for those women in *de facto* relationships with partners. Women in cohabitation must be given express legal protection in light of the constitutional guarantees on dignity and equality. My argument is that the current regime of the RCMA and the other marriage laws only protect women who are 'spouses' as defined by the various acts, and yet many women live with men for long periods of time, bear children for them, and still have no legal protection. On women's access to property, the following decisions are commendable: *Bhe and Others v Magistrate, Khayelitsha and Others* (*Bhe* case),[93] *Gumede v President of the Republic of South Africa and*

[91] For more on this, see Chenwi, L., 'Claiming economic, social and cultural rights at the international level' (2009) 13.

[92] See Mubanjizi & Twinomugisha: 2010, 134.

[93] 2005 (1) SA 580 (CC). See chapter seven, section 7.10.1.

Others,[94] and *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*.[95]

8.4.3 Practical recommendations

The gap between the public and private health system in the country should be narrowed as over 80 percent of the population currently depend on the public sector, the majority of whom are women living with HIV and AIDS. This can be through improving, *inter alia*, remuneration of health care providers like nurses and doctors. This will also help deal with the migration of health care providers. Other measures could relate to defining more efficient ways of structuring, financing and planning the health system, including health ministry reorganisation, basic packages of essential services should be tailored to the country's particular priorities and needs and targeting the burden of disease, improving the human resource component by, for example, monitoring performance.

Also, a universal insurance programme is a key area for reform. In this regard, I commend the proposal for a National Health Insurance. A National Health Insurance offers a mechanism for providing equitable access to quality health services thereby promoting principles of a unitary system, redistribution and sharing of resources.[96] It provides for both contributors and non-

---

[94] 2009 (3) BCLR 243 (CC). See chapter seven, section 7.10.3.

[95] CCT100/09 [2010] ZACC 10 (11 May 2010). See chapter seven, section 7.10.4.

[96] For more on this, see generally, Amollo, R., 'In pursuit of health equity: A critique of the proposed national health insurance (2009) 10 *ESR Review* 14–17.

contributors in a universal system. If well implemented and well designed, it has the potential to improve access to health coverage. In a National Health Insurance, there are also prospects of the solidarity principle triumphing over market forces.[97] Currently, South Africa's health insurance system through medical schemes reveals a commoditisation of health. The government owes its citizens the protection against subjecting health and sickness to strings of demand and supply. Pursuing a National Health Insurance in which all citizens access health services is one such way. This would also conform to the long serving *Batho Pele*[98] principles. Moreover, a right to health approach to policy should endeavour to conform to principles relating to equity, universality and comprehensiveness.[99] This includes social solidarity and efficiency. Similarly, they should conform to the core elements of availability, accessibility, acceptability and quality.[100] The National Health Insurance is, however, not a single cure to the country's health problems. Several health sector reforms before it can work, for example, the training of medical personnel. Otherwise, the National Health Insurance may become a silver bullet.

On access to adequate housing, South Africa has a wealth of laws, policies, and jurisprudence. However, South Africa must confront the mammoth housing backlogs, ensure women's security of tenure, desist from unreasonable eviction of populations most of whom are women

---

[97] See Rudiger, A., 'From market competition to solidarity: Assessing the prospects of US health care reform plans from a human rights perspective' (2008) 10 *Health and Human Rights: An International Journal*. Available at www.hhrjournal.org. (Accessed 13 March).

[98] B*atho pele* means people first.

[99] De Negri , FA., 'A human rights approach to quality of life and health: Applications to public health programming' (2008) 10 *Health and Human Rights: An International Journal* Available at www.hhrjournal.org. (Accessed 13 March 2011).

[100] General Comment 14: The right to the highest attainable standard of health (2000) para 12(a).

and children, and as much as possible, have in place a gender disaggregated data system on housing to track how many women really access housing through its various policies.

On gender-based violence, the South African Police Services should be further trained on how to investigate and handle cases of domestic violence. This is on the basis of the 'due diligence' principle that the state should do all in its power to eliminate violence against women by providing avenues for redress. A similar obligation is placed on prosecutors and other stakeholders in the criminal justice and law enforcement systems. The state should also continue the campaign against the epidemic levels of violence in the country. Moreover, legal interpretations such as those in the cases of *Baloyi*, *Carmichele* and *Ferreira* provide exceptional guidance in this regard.

8.5 RESEARCH QUESTION REVISITED

This thesis sought to examine the extent of South Africa's realisation of women's rights within the context of women, HIV and AIDS. Analyses were to be based four themes, namely: the right of access to health services, right to adequate housing, right to property in family relations and the right to freedom from gender-based violence. These analyses were to be based on the normative standards established at the regional and international level, and against the theoretical framework of the feminist capabilities approach. I hereby wish to categorically assert that this thesis has discharged the above proposal. It has examined the extent of South Africa's realisation of women's rights within the context of women, HIV and AIDS. Analyses were based on the four themes, namely: the right of access to health services, right to adequate housing, right to property in family relations and the right to freedom from gender-based violence. Moreover, the thesis utilised the normative standards established at the

regional and international level as a normative calculus. More pertinently, for critical analysis, the thesis employed the theoretical framework of the feminist capabilities approach as it set out to do.

In specific rejoinder, this thesis finds that generally in South Africa, the majority of women affected by HIV and AIDS continue to decay in conditions of poor access to health services, inadequate access to housing, limited access to property and live amidst gender-based violence. Within this context, the rural-based women are the most marginalised. Nevertheless, over the past 15 years, there has been a steady accrual of legal protections and jurisprudential developments that are critical to the realisation of women's rights in the context of HIV and AIDS. What remains to be improved is implementation of these laws and policies in a manner that should buttress women's capabilities and functionings to enable them live with dignity in the HIV and AIDS melieu. Such an approach must pay attention to the specific circumstances of women affected by HIV and AIDS. Such is the core proposition in this thesis.

8.6 CONCLUSION

This thesis has examined the extent of South Africa's realisation of women's rights within the context of women, HIV and AIDS. This analysis reveals that South Africa has exemplified the transformative power of the law and social mobilisation. Both approaches provide valuable lessons. In this regard, a combination of legal strategies, social mobilisation, political ownership and civil society may not provide a magic potion but goes a long way in using human rights as a means to enable women realise their capabilities in the context of HIV and AIDS. In order for women in the midst of HIV and AIDS to be real social citizens, with the ability to claim equality and realise their capabilities, strategies should include:

democratisation of the state through constitutional entrenchment of a rights-based democracy allowing for political and legislative processes to civil society. This includes understanding of the state and its institutions like parliaments, courts and government departments and the ability to identify opportunities for reform on women's rights. It also entails the building of resources and expertise, partnerships and alliances, legal reform, political and technical expertise, doing the right research, understanding the process and utilising international standards.[101] The enquiry in this thesis leads me to the logical conclusion that although laws are vital, they cannot *per se* realise much for women affected by HIV and AIDS.

[101] See Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2002) 5 *Law, Democracy and Development* 179–194.

BIBLIOGRAPHY

1. BOOKS

Abdool, K., Salim, S., & Abdool, Q., (eds) *HIV/AIDS in South Africa* (2005) Cambridge University Press

Ackerly, B., *Political theory* (2004) Sage Publications

Ackerman, BA., *Social justice in the liberal State* (1980) Yale University Press

Aggleton, P., Davies, P., & Hart, G., (eds) *AIDS: Safety, sexuality and risk* (1995) Taylor and Francis

Aggleton, P., Hart, G., & Davies, P., (eds) *Families and communities responding to AIDS* (1999) UCL Press

Agnes, M., *Webster's New World College dictionary* (2007) John Wiley & Sons

Agostin, M., (ed) *Women, gender, and human rights: A global Perspective* (2001) Rutgers University Press

Alcamo, E ., *AIDS* (2003) Jones & Bartlett Boston

Alice, E., *Daring to be bad: Radical feminism in America, 1967-1975* (1989) University of Minnesota Press

Allman, J., Geiger, S., & Musisi, N.,(eds) *Women in African colonial histories* (2002) Indiana University Press

Alston, P., & Tomasevski, K., (eds) *The right to food* (1984) Martinus Nijhoff Publishers

Annandale, E.,& Hunt, K., (eds) *Gender inequalities in health* (2000) Open University Press

Appelbaum., E., Bailey, T., Berg, P., & Kalleberg, AL., *Shared work/valued care: New norms for organizing market work and unpaid care work* (2002) Economic Policy Institute

Argyrous, G., & Stilwell, F., *Economics as a social science: Readings in political economy* (2003) Pluto Press

Aristotle, *Nicomachean ethics,* V, 2-5

Askin, KD., & Koenig, DM (eds) *Women and international law* (1999) Transnational Publishers, Inc

Banda, F., *Women, law and human rights: An African perspective* (2005) Hart Publishing

Barnett, T., and A Whiteside, A., *AIDS in the twenty-first century: Disease and globalization* (2002) Palgrave Macmillan

Barron, P., (ed) *South African Health Review* (1997) Health Systems Trust

Bartlett, KT., & Rhode, DL., (eds) *Gender and law: Theory, doctrine, commentary* (2009) Aspen Publishers

Bartlett, KT & Rosanne, K., (eds) *Feminist legal theory: Readings in law and gender* (1991) Westview Press

Bartlett, KT., & Kennedy, R., (eds) *Feminist legal theory* (1991) Westview Press

Baylies, C.,& Bujra, J., *AIDS, Sexuality and gender in Africa: The struggle continues* (2000) Routledge

Beasley, C., *What is feminism? An introduction to feminist theory* (1999) Sage Publications

Bem, SL., *An Unconventional family* (1998) Yale University Press

Benninger-Budel, C., (ed) *Due diligence and its application to protect women from violence* (2008) Martinus Nijhoff Publishers

Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) Oxford University Press

Black, HC., *Black's law dictionary* (1990) West Publishing

Blair-Loy, M., *Competing devotions: Career and family among women executives* (2003) Harvard University Press

Boerefijn, I., Coomans, F., Rikki Holtmaat, R., & Wolleswinkel, R., *Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) Intersentia

Bonthuys, E.,& Albertyn, C., (eds) *Gender, law and justice* (2007) Juta & Co

Bossuyt, M., 'International human rights systems: Strengths and weaknesses', in Mahoney, K., and Mahoney, P., (eds) *Human Rights in the twentieth century* (1993) Martinus Nijhoff

Boston Women's Health Book Collective. *Our Bodies, Ourselves : A new edition for a new era* (2005) Touchstone

Botha, H., Van der Walt, A, & Van der Walt, J., *(eds) Rights and democracy in a transformative Constitution* (2003) SUN Press

Brand, B.,& Russell, S., (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House

Breitman, P., Knutson, K., & Reed, P., *How to persuade your lover to use a condom...and why you should* (1987) Prima Publishing and Communications

Brynes, A., Connor, J., & Bik, L., (eds.) *Advancing the human rights of women: Using international human rights standards in domestic litigation* (1997) Commonwealth. Secretariat

Caplan, P., (ed) *Risk revisited* (2000) Pluto Press

Chanock, M., *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985) Cambridge University Press

Chapman, AR., & Russell, S., (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) Intersentia

Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spidz, D., & Woolman, S., (eds) *Constitutional law of South Africa* (1998) Juta & Co

Cheadle, MH., Davids DM., & Haysom, NRL., (eds) *South African Constitutional law: The Bill of Rights* (2002) Butterworths

Cockburn, C., *In the way of women: Men's resistance to Sex equality in organizations* (1991) ILR Press

Cohen, JC., Illingworth, P., & Schuklenk, U.,(eds.) *The power of pills: Social, ethical, and legal issues in drug development, marketing, and pricing* (2006) Pluto Press

Collins Dictionary and Thesaurus (2006) Collins

Collinson, DL., Knights, D., & Collinson, M., *Managing to discriminate* (1990) Routledge

Coltrane, S., *Family man: Fatherhood, housework, and gender equity* (1996) Oxford University Press

Cook, RJ., (ed) *Human rights of women: National and international perspectives* (1994)

Cook, RJ., Dickens, BM., & Fathalla, MF., *Reproductive health and human rights: Integrating medicine, ethics and the law* (2003) Oxford University Press

Cornell, D., *At the heart of freedom: Feminism, sex, and equality* (1998) Princeton University Press

Cott, N., *Feminism and psychoanalytic theory* (1989) Yale University Press

Cranston, M., *What are human rights* (1973) Bodley Head

Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) Clarendon Press

Critchley, S., *The ethics of deconstruction* (1992) Blackwell Publishers

Crittenden, A., *The price of motherhood: Why the most important job in the world is still the least valued* (2001) Metropolitan Books

Daniels, AK., *Invisible careers: Women civic leaders from the volunteer world* (1988) University of Chicago Press

Davis, AJ., & Tschunin, V., *Essentials of teaching and learning in nursing ethics* (2006) Elsevier Health Science Oxford

Davis, DM., *Democracy and deliberation* (1999) Juta & Co

De Beauvoir, Simone., *The Second Sex* (1989) tr. by H. M. Parshley Vintage Books

Deutsch, FM., *Halving it all: How equally shared parenting works* (1999) Harvard University Press

Dienhart, A., *Reshaping fatherhood: The social construction of shared parenting* (1998) Sage Publications

Dlamini, C., *Human rights in Africa: Which way South Africa* (1995) Butterworths

Douglas, B., Mara, G., & Richardson, H., (eds), *Liberalism and the good* (1990) Routledge

Downing, JD., & Husband, C., *Representing race: Racisms, ethnicities and media* (2005) Sage Publications

Dworkin, A., *Intercourse* 1987 Basic Books

Dworkin, A., *Pornography: men possessing women* (1989) Plume

Dworkin, A., *Woman hating* (1974) E. P. Dutton

Dworkin, R., *Taking rights seriously* (1977) Harvard University Press

Dworkin, R., *A matter of principle (*1985) Harvard University Press

Eagleton., M., (ed) *A concise companion to feminist theory* (2003) Blackwell Publishing Ltd

Ehrensaft, D., *Parenting together: Men and women sharing the care of their Children* (1987) University of Illinois Press

Eisenstein, Z., *The radical future of liberal feminism* (1981) Longman

Engels, F., *The origins of the family, private property and the state* (1884) Hottingen-Zurich

Engh, IE., *Developing capacity to realise socio-economic rights. The example of the right to food in the context of HIV/AIDS in South Africa and Uganda* (2008) Intersentia

Epstein, CF., & Arne, LK., (eds) *Rethinking time and work* (2004) Russell Sage Foundation

Epstein, CF., *Women in law* (1981) Basic Books

Epstein, CF., *Women's place: Options and limits in professional careers* (1971) University of California Press

Faludi, S., *Backlash: the undeclared war against women* (1992) Vintage

Farmer, P., Connors, M., & Simmons, P., (eds) *Women, poverty and AIDS: Sex, drugs and structural violence* (1996) Common Courage Press

Firestone, S., *The dialectic of sex* (1979) the Women's Press

Fourie, P., *The political management of HIV and AIDS in South Africa: One burden too many* (2006) Palgrave Macmillan

Fourie, P & Meyer, M., *The politics of denialism: South Africa's failure to respond* (2010) Ashgate Publishing

Franskowski, S., (ed) *Legal Responses to AIDS in comparative perspective* (1998) Kluwer Law

Fraser, N., & Honneth, A., *Redistribution or recognition? A Political-philosophical exchange* (2003) Verso

Fredman, S., *Discrimination Law* (2002) Oxford University Press

Freedman, EB., *No Turning Back : The history of feminism and the future of women* (2003) Ballantine Books

Fuenzalida-Puelma, HL.,& Connor, SS., (eds) *The right to health in the Americas: A comparative constitutional study* (1989) Pan American Health Organization

Gargarella, R., Domingo P., & Roux, T., (eds) *Courts and social transformation in new democracies* (2006)

Garrett, S., *Gender* (1987) Tavistock Publications

Gertler, P., & Van der Gaag, J., *The willingness to pay for medical care: Evidence from two developing countries* (1990) Baltimore MD:Johns Hopkins University Press

Gillespie, S., (ed), *AIDS, poverty, and hunger: Challenges and responses* (2006) International Food Policy Research Institute

Gilligan, C., *In a different voice: Psychological theory and women's development* (1982) Harvard University Press

Gillis, ST., Howie, GI.,& Munford, R., *Third wave feminism: A critical exploration* (2007) Palgrave Macmillan

Goodson, A.,*Therapy, nudity and joy (*1991) Elysium Growth Press

Gouws, A., (ed) *(Un) Thinking citizenship: Feminist debates in contemporary South Africa* (2005) UCT Press (Pty) Ltd

Gutmann, M., *The meaning of macho: Being a man in Mexico City* (1996) University of California Press

Hannah, L., *Feminist ethics in psychotherapy* (1990) Springer Publishing Company

Harrison, S., Bhana, R., & Ntuli, A., (eds) *South African Health Review* (2007) Health Systems Trust

Hassim, A., Heywood, M., & Berger, J., (eds) *Health and Democracy: a Guide to Human Rights, Health Law and Policy in Post apartheid South Africa* (2007) SiberInk

Heinze, E., *The Logic of Equality: A Formal Analysis of Non-Discrimination* (2003) Ashgate Publishing

Henry, A., *Not my mother's sister: generational conflict and third-wave feminism* (2004) Indiana University Press

Heyns, C., van Der Westhuiszen, J., & Mayimele-Hashatse, T., (eds) *Discrimination and the law in South Africa* (1994) Centre for Human Rights, Pretoria

Holmstrom, LL., & Burgers, WA., *The victim of rape: Institutional reactions* (1983) Transaction Publishers

Holstein, JA., & Miller, G., (eds.) *Perspectives on social problems*: *A research annual* (1991) Jai Press

Humme, M., *Modern feminisms: Political, literary, cultural* (1992) Columbia University Press

Humme, M., *The dictionary of feminist theory* (1990) Ohio State University Press

Hunt, P., *Reclaiming Social Rights: International and Comparative Perspectives* (1996) Dartmouth

Jackson, H., *AIDS, Africa: A continent in crisis* (2002) SAfAIDS

Jaggar, A., *Radical feminism and human nature* (1988) Rowman & Littlefield Publishers

Jaggar, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) McGraw-Hill

Johnstone, FA., *Class, race, and gold: A study of class relations and racial discrimination in South Africa* (1976) Routledge

Kalipeni, E., Craddock, S., Oppong,JR., & Gosh,J., (eds) *HIV&AIDS in Africa:Beyond epidemiology* (2004) Blackwell Publishing

Kant, I., *The moral law: Kant's groundwork of the metaphysics of morals* (1963) trans Patron, HJ

Kenyon, C., Heywood, M., & Conway, S., 'Mainstreaming HIV/AIDS: Progress and challenges in South Africa's HIV/AIDS campaign'(2001) Health Systems Trust

Kometsi, K., *(Un)Real AIDS Review* (2004) Centre for the Study of AIDS, University of Pretoria

Kisoon, C., Caesar, M., & Jithoo, T., 'Whose right?' (2002) Centre for the Study of AIDS, University of Pretoria

Krausz, M., (ed) *Relativism, interpretation and confrontation* (1989) University of Notre Dame Press

Krolokke, C., & Sorensen, AS., *Three waves of feminism: From suffragettes to girls' in contemporary gender communication theories and analyses: From silence to erformance* (2005) Sage Publications

Kyle, DK.,& David, LL., (eds) *AIDS and South Africa: The social expression of a Pandemic* (2004) Palgrave Macmillan

Langford, M., *Claiming the Millennium Development Goals: A human rights approach* (2008) United Nations

Lerner, G., *The creation of patriarchy (1986)* Oxford University Press

Levinson, D., *Family violence in cross-cultural perspective* (1989) Sage Publications

Levy, A., *Female chauvinist pigs: Women and the rise of raunch culture* (2005) Free Press

Liebenberg, S., (ed) *The Constitution of South Africa from a gender perspective* (1995) Community Law Centre, University of the Western Cape

Liebenberg, S., *Socio-economic rights adjudication under a transformative constitution* (2010) Juta & Co

Locke, J., *Second treatise on government* (1960) Cambridge University Press

Loenen, T., & Rodrigues, P., *Non-discrimination law: Comparative perspectives* (1999) Kluwer Law International

Lodge, T., *Black politics in South Africa since 1945* (1983) Ravan

MacKinnon, C., *Feminism unmodified: Discourses on life and law* (1987) Harvard University Press

MacKinnon, C., *Feminism, marxism, method and the state: Toward feminist jurisprudence* (1983) University of Chicago Press

MacKinnon, C., *Toward a feminist theory of the state* (1991) Harvard University Press

Madrick, J., (ed.) *Unconventional wisdom: Alternative perspectives on the new economy* (2000) Century Foundation Press

Mahoney, K., & Mahoney, P., (eds) *Human Rights in the twentieth century* (1993) Martinus Nijhoff

Malson, MR., O'Barr, JF., & Wyer, M., *Feminist theory in practice and in process* (1989) Chicago University Press

Manderson, L., (ed) *Rethinking well-being* (2005) API Network

Mann, J., Gruskin, S., Grodin, M., & Annas, GJ., (eds) *Health and human rights: A reader* (1999) Routledge

Marais, H., *Buckling: The impact of AIDS in South Africa* (2005) Centre for the Study of AIDS, University of Pretoria

Marais, H., *South Africa: Limits to change - The political economy of transformation* (1998) Zed Books Ltd Press

Marshall, TH., *Citizenship and social class* (1950) Cambridge University Press

Mbazira, C., *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice'* (2009) Pretoria University Law Press

McMurrin, SM., (ed) *The Tanner lectures on human value* (1980) University of Utah Press

Meena, R., (ed) *Gender in Southern Africa: Conceptual and theoretical issues* (1992) Sapes Books

Meenan, H., (ed), *Equality law in an enlarged European Union: Understanding the Article 13 Directives* (2007) Cambridge University Press

Melanie, P., *The ascent of woman: A history of the suffragette movement and the ideas behind it* (2004) Abacus

Meyersfeld, B., *Domestic violence and international law* (2010) Hart Publishing

Millett, K, *Sexual politics* (1970) Doubleday

Mindel, A., *Condoms* (2000) BMJ books

Monaghan, K., Du Plessis, M., & Malhi, T., *Race, religion and ethnicity discrimination: Using international human rights law* (2003) Justice

Moore, H., *Feminism and anthropology* (1988) Polity Press

Moser, C.,& Peake, L., (eds) *Women, human settlements, and housing* (1987) Tavistock

Murray, C., & O'Sullivan, M., *Advancing women's rights: The first decade of democracy* (2005) Juta & Co

Myers, KA, Cynthia, DA., & Risman, BJ., *Feminist foundations: Toward transforming sociology* (1998) Sage Publications

Nancy, C., *Feminism and psychoanalytic theory* (1989) Yale University Press

Nattrass, N., *Mortal combat: AIDS denialism and the struggle for antiretrovirals in South Africa* (2007) University of KwaZulu-Natal Press

Nattrass, N., *The moral economy of AIDS in South Africa* (2004) Cambridge University Press

Ncube, W., (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate Publishing

Nnaemeka, O., & Ezeilo, J., (eds) *Engendering human rights, Cultural and socio economic realities in Africa* (2005) Palgrave Macmillan

Norsigian, J., *Our bodies, ourselves: A new edition for a new era* (2005) Touchstone

Nussbaum, MC., & Jonathan, G., (eds) *Women, culture and development* (1995) Clarendon Press

Nussbaum, MC., & Sen, A., (eds) *The Quality of Life* (1993) Clarendon Press

Nussbaum, MC., *Sex and social justice* (1999) Oxford University Press

Nussbaum, MC., *Women and human development: The capabilities approach* (2000) Cambridge University Press

Olivier,NJJ., Bekker, JC., Olivier (Jnr), NJJ., & Olivier, WH., *Indigenous law* (1995) Butterworths

Petchesky, RP., *Global Prescriptions: Gendering Health and Human Rights* (2003) Zed Books Ltd Press

Rae, D., *Equalities* (1981) Harvard University Press

Raphael D., (ed) *Political theory and rights of man* (1967) Palgrave Macmillan

Rawls, J., *A theory of justice* (1971) Harvard University Press

Reichenbach, L., & Roseman, MJ., (eds) *Reproductive health and human rights: the way forward* (2009) Havard University Press

Richard, P., & Aggleton, P., *Culture, society and sexuality: A reade*r (1999) UCL Press

Richter, L., 'Sexual abuse of young children in Southern Africa' (2004) HSRC Publishers

Richter, L., Dawes, A., & Higson-Smith, C., (eds) *Sexual abuse of young children in southern Africa* (2004) HSRC Publishers

Roeder, C., & Moellendorf, D., (eds) *Jurisprudence* (2004) Juta & Co

Rohleder, P., Swartz, L., Kalichman, SC., & Simbayi, LC., (eds). *HIV/AIDS in South Africa 25 years on: psychosocial perspectives* (2010) Springer Publications Ltd

Sakiko, FP & Shiva Kumar, AK., *Readings in human development* (2003) Oxford University Press

Sanday, PR., *Female power and male dominance: On the origins of Sexual Inequality* (1981) Cambridge University Press

Sen, A., *Commodities and capabilities* (1985) Elsevier Science Publishers

Sen, A., *Development as freedom* (1999) Oxford University Press

Sen, A., *Inequality re-examined* (1992) Clarendon Press

Sen, A., *Resources, values and development* (1984) Basil Blackwell

Sen, A., *The standard of living;The Tanner lectures* (1987) Cambridge University Press

Shue, H., 'The interdependence of duties' in Alston, P., & Tomasevski, K., (eds) *The Right to Food* (1984) Martinus Nijhoff Publishers

Shue, H., *Basic rights: Subsistence, affluence and U.S Foreign Policy* (1980) Princeton University Press

Sloth-Nielsen, J., (ed) *Children's rights in Africa: A legal perspective* (2008) Ashgate Publishing

Smart, C., *Feminism and the power of the* law (1989) Routledge

Smith, P.,(ed) *Feminist jurisprudence* (1993) Oxford University Press

Taylor , C., *Multiculturalism and "the politics of recognition"'* (1992) Princeton

Thornton, R., *Unimagined community: Sex, networks and AIDS in Uganda and South Africa* (2008) University of California Press

Toebes, B., 'The right to health as a human right in international law' (1998) Intersentia

Van Blerk., AE., *Jurisprudence: An introduction* (1996) Butterworths

Van der Walt, AJ., (ed) *Theories of social and economic justice* (2005) SUN Press

Van Merle, K., (ed) *Sex, gender, becoming: Post apartheid reflections* (2006) Pretoria University Law Press

Vaughan, M., *Curing their ills: Colonial power and African illness* (1991) Stanford University Press

Viljoen, F., (ed), *Righting stigma: Exploring a rights-based approach to addressing stigma* (2005) AIDS and Human Rights Research Unit, University of Pretoria

Viljoen, F.,& Precious, S., (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) Pretoria University Law Press

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

Viljoen, F., *International human rights law in Africa* (2007) Oxford University Press

Walby,S., *Theorising patriarchy* (1990) Blackwell

Walker, C., *Women and resistance in South Africa* (1991) New Africa Books

Wallace, T., & March, C., (eds) *Changing perceptions* (1991) Oxfam

Weisberg, DK., (ed) *Applications of feminist legal theory to women's lives: Sex, violence, work, and reproduction* (1995) Temple University Press

Weisberg, DK., (ed) *Feminist legal theory: Foundations* (1990) Temple University Press

Westendorp, I., *Women and housing: Gender makes a difference* (2007) Intersentia

Whelehan, I., *Modern feminist thought: From the second wave to post-feminism* (1995) New York University Press

Williams, J., *Unbending gender: Why family and work conflict and what to do about it* (2000) Oxford University Press

Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds) *Constitutional Law of South Africa* (2002) Juta & Co

Zeitzen, MK., *Polygamy: A cross-cultural analysis* (2008) Berg Publishers Oxford

2. CHAPTERS IN BOOKS

Abbott G., 'Upgrading health facilities' in Barron, P., (ed) *South African Health Review* (1997) Health Systems Trust

Akeroyd, A., 'Coercion, Constraints and 'Cultural Entrapments': A Further Look at Gendered and Occupational Factors Pertinent to the Transmission of HIV in Africa' in Kalipeni, E., Craddock, S., Oppong, JR., & Gosh,J., (eds) *HIV&AIDS in Africa-Beyond Epidemiology* (2004) Blackwell Publishing

Albertyn, C., 'Equality' in Cheadle, MH., Davids DM., & Haysom, NRL., (eds) *South African Constitutional law: The Bill of Rights* (2002) Butterworths

Albertyn, C.,'Feminism and the law' in Roeder, C., & Moellendorf, D., (eds) *Jurisprudence* (2004) Juta & Co

Albertyn, C., & Bonthuys, E., 'Introduction' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) Juta & Co

Albertyn, C., Artz, L., Combrinck, H., Mills, S., & Wolhuter, L., 'Women's freedom and security of the person' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) Juta & Co

Armstrong, A., 'Consent and compensation: The sexual abuse of girls in Zimbabwe' in Ncube, W., (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate Publishing

Arno, PS., & Figueroa,JB., 'The social and economic determinants of health' in Madrick, J., (ed.) *Unconventional wisdom: Alternative perspectives on the new economy* (2000) Century Foundation Press

Bailey, C., & O'Sullivan, M., (eds) 'Reproductive Rights' in Woolman , S., Roux , T., Klaaren, J., Stein, A., & Chaskalson, M., (eds) *Constitutional Law of South Africa* (2002) Juta & Co

Banks, O., *Becoming a feminist: The origins of "first wave feminism'* (1987) University of Georgia Press

Bartlett, K., 'Foundations of women's legal subordination' in Bartlett, K., (ed) *Gender and law: Theory, doctrine, commentary* (1993) Little, Brown & Co

Baylies, C., & Bujra, J., 'Discourses of power and empowerment in the fight against HIV/AIDS in Africa' in Aggleton, P., Davies, P., & Hart, G., (eds) *AIDS: Safety, sexuality and risk* (1995) Taylor and Francis

Bourke-Martignoni, J., 'The history and development of the due diligence standard in international law and its role in the protection of women against violence' in Benninger-Budel, C.,(ed) *Due diligence and its application to protect women from Violence* (2008) Martinus Nijhoff Publishers

Brand, D., 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in Van der Walt, AJ., (ed) *Theories of social and economic justice* (2005) SUN Press

Brand, D., 'The proceduralisation of South African socioeconomic rights jurisprudence, or "what are socio-economic rights for?' in Botha, H., Van der Walt, AJ., & Van der Walt, J., *(eds) Rights and democracy in a transformative constitution* (2003) SUN Press

Brynes, A., Connor, J., & Bik, L., (eds.) *Advancing the human rights of women: Using international human rights standards in domestic litigation* (1997) Commonwealth Secretariat

Buch, E., 'Discrimination in the area of health and health care' in Heyns, C., van Der Westhuiszen, J., & Mayimele-Hashatse, T., (eds) *Discrimination and the law in South Africa* (1994) Centre for Human Rights, University of Pretoria

Budlender, G., 'The right to alternative accommodation in forced evictions' in Squires, J., Langford, M., & Thiele, B., (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) University of New South Wales Press

Bujra, J., & Baylies, C., 'Risk and trust: Unsafe sex, gender, and AIDS in Tanzania' in Caplan, P., (ed) *Risk Revisited* (2000) Pluto Press

Bujra, J., & Baylies, C., 'Solidarity and stress: Gender and local moblisation in Tanzania and Zambia' in Aggleton, P., Hart, G., and Davies, P., (eds) *Families and Communities Responding to AIDS* (1999) UCL Press

Chapman, AR., 'Core obligations related to the right to health and their relevance for South Africa' in Brand, D., & Russell, S., (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House

Christianson, MA., 'Health care' in Strydom, EML., (ed) *Essential social security law* (2001) Juta & Co

Combrinck, H., 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' in Murray, C., & O'Sullivan, M., (eds) *Advancing women's rights* (2005) Juta & Co

Cook, RJ., 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in Cook, RJ., (ed) *Human rights of women: National and international perspectives* (1994) University of Pennsylvania Press

Cranston, M., 'Human rights real and supposed' in Raphael D, (ed) *Political theory and rights of man* (1967) Macmillan

Evans, J., *Feminist theory today: An introduction to second wave feminism* (1995) Sage Publications

Ewelukwa, UU., 'The girl child, African states, and international human rights law: Toward a new framework for action' in Nnaemeka, O., & Ezeilo, J., (eds) *Engendering human rights, cultural and socio economic realities in Africa* (2005) Palgrave Macmillan

Ewelukwa, UU.,'Caught between tradition, the courts and survival: Widows in contemporary African societies', in Nnaemeka, O., & Ezeilo, J., (eds) *Engendering human rights, cultural and socio economic realities in Africa* (2005) Palgrave Macmillan

Farha, L., 'Women and housing' in Askin, KD., & Koenig, DM (eds) *Women and international Law* (1999) Transnational Publishers, Inc

Flax, J., 'Post-modernisation and gender relations' in Malson, MR., Barr, JF.,& Wyer, M., *Feminist theory in practice and in process* (1989) Chicago University Press

Forman, L., 'Trading Health for Profit: Bilateral and Regional Free Trade Agreements Affecting Domestic Property Rules on Pharmaceuticals' in Cohen., JC., Illingworth, P., & Schuklenk, U., (eds.) *The power of pills: Social, ethical, and legal issues in drug development, marketing, and pricing* (2006) Pluto Press

George, R., *Postmodern social theory* (1997) McGraw-Hill

Gloppen, S., 'Courts and social transformation: An analytical framework' in Gargarella, R., Domingo P., & Roux, T., (eds) *Courts and social transformation in new democracies* (2006) Ashgate Publishing

Gubrium, AC., 'Contextualising the construction of women and men in South African AIDS prevention' in Holstein, JA., & Miller, G., (eds.), *Perspectives on social problems*: *A research annual* (1991) Jai Press

Hartmann, H., 'The unhappy marriage of marxism and feminism' in Jaggar, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) McGraw Hill

Hyden, G, Court, J., & Mease, K., *Making sense of governance: Empirical evidence from sixteen developing countries* (2004) Lynne Rienner Publishers

Jaggar, A., & Rothernberg, P., 'Theories of women's subordination' in Jaggar, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) McGraw Hill

Jagwanth, S., 'Expanding equality' in Murray, C., & O'Sullivan, M., *Advancing women's rights: The first decade of democracy* (2005) Juta & Co

Jewkes, R., 'Child sexual abuse and HIV infection' in Richter, L., Dawes, A., & Higson-Smith, C.,(eds)*Sexual abuse of young children in southern Africa* (2004) HSRC Publishers

Joni, J., 'Promoting the right health care services for people living with HIV/AIDS in rural and peri – urban communities in Viljoen, F., (ed), *Righting Stigma: Exploring a rights-based*

approach to addressing stigma (2005) AIDS and Human Rights Research Unit, University of Pretoria

Judith, SJ., & Thorne, B., 'The missing feminist revolution in sociology' in Myers, KA, Cynthia, DA., & Risman, BJ., *Feminist foundations: Toward transforming sociology* (1998) Sage Publications

Leclerc-Madlala, S., & Jewkes, R 'Child sexual abuse and HIV infection' in Richter, L., Dawes, A., & Higson-Smith, C., (eds) *Sexual abuse of young children in southern Africa* (2004) HRSC Press

Leclerc-Madlala, S., Simbayi, L.C. & Cloete, A. 'The sociocultural aspects of HIV/AIDS in South Africa' in Rohleder, P., Swartz, L., Kalichman, SC., & Simbayi, LC., (eds). *HIV/AIDS in South Africa 25 years on: psychosocial perspectives* (2010) Springer

Leslie, H., & Jennifer D., (eds) *Third wave agenda: Being feminist, doing feminism* (1997) University of Minnesota

Levinson, JH., & Levinson, SP., 'Women's health and human rights' in Agostin, M., (ed) *Women, gender, and human rights: A global perspective* (2001) Rutgers University Press

Liebenberg, S., 'Socio-economic rights' in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spidz, D., & Woolman, S., (eds) *Constitutional Law of South Africa* (1998) Juta & Co

MacEwen, M., 'Comparative Non-Discrimination Law: An Overview' in Loenen, T., & Rodrigues, P., *Non-Discrimination Law: Comparative perspectives* (1999) Kluwer Law International

MacKinnon, C., 'Difference and dominance: On sex discrimination' in Bartlett, KT., & Kennedy, R., (eds) *Feminist legal theory* (1991) Westview Press

MacKinnon, C., 'Difference and dominance: On sex discrimination' in Fullinwinder, RK., & Mills, C., (eds) *The moral foundation of civil rights* (1986) Rowman and Littlefield

Mbatha, L., Moosa, N., & Bonthuys, E.,'Culture and religion' in Bonthuys, E., & Albertyn, C., (eds) *Gender, law and justice* (2007) Juta & Co

McCrudden, C., & Kountouros, H., 'Human rights and European equality law' in Meenan,H., (ed), *EqualitylLaw in an enlarged European Union: Understanding the Article 13 Directives* (2007) Cambridge University Press

McFadden, P., 'Sex, sexuality and the problems of AIDS in Africa.' in Meena,R., (ed) *Gender in Southern Africa: Conceptual and theoretical issues* (1992) Sapes Books

McIntyre, D., & Thiede, M., 'Health care financing and expenditure' in *Harrison,* S., Bhana, R., & Ntuli, A., (eds) *South African Health Review* (2007) Health Systems Trust

Meena, R., 'Gender Research/Studies in Southern Africa: An Overview' in Meena, R., (ed) *Gender in Southern Africa, Conceptual and Theoretical Issues* (1992) Sapes Books

Meerkotter, A., 'The impact of the HIV/AIDS epidemic on women's citizenship in South Africa' in Gouws, A., (ed) *(Un) thinking citizenship: Feminist debates in contemporary South Africa* (2005) UCT Press (Pty) Ltd

Mgalla, Z., Wambura, L., & de Bruyn, M., 'Gender and HIV/AIDS/ STDs' in Ng'weshemi, J., Boerma, T., Bennett, J., & Schapink,D., (eds.) *HIV prevention and AIDS care in Africa: A district level approach* (1997) KIT Press

Moser, C., 'Women, human settlements, and housing: a conceptual framework for analysis and policy-making' in Moser, C., & Peake, L., (eds) *Women, human settlements, and housing* (1987) Tavistock

Musisi, N., 'The politics of perception or perception as politics? Colonial and missionary representations of Baganda Women, 1900–1945', in Allman, J., Geiger, S., & Musisi, N.,(eds) *Women in African colonial histories* (2002) Indiana University Press

Ngwena, C., & Cook, RJ., 'Rights concerning health' in Brand, D., & Heyns, C., (eds) (2005) *Socio Economic Rights in South Africa* Pretoria University Law Press

Nhlapo, T., 'African customary law in the interim Constitution' in Liebenberg, S., (ed) *The Constitution of South Africa from a gender perspective* (1995) Community Law Centre, University of the Western Cape

Nussbaum, MC., 'Aristotelian social democracy' in Douglas, B., Mara, G., & Richardson, H (eds), *Liberalism and the good* (1990) Routledge

Nussbaum, MC., 'Human capabilities, female human beings' in Nussbaum, MC., & Glover, J., (eds), *Women, culture and development* (1995) Clarendon Press

Nussbaum, MC., 'Well-Being, contracts and capabilities' in Manderson, L., (ed) *Rethinking well-being* (2005) API Network

Nussbaum, MC., & Sen, A., 'Internal Criticism and Indian Rationalist Traditions' in Krausz, M., (ed) *Relativism, interpretation and confrontation* (1989) University of Notre Dame Press

Pogge, T., 'Harnessing the power of pharmaceutical innovation,' in Cohen, JC., Illingworth, P., Schuklenk, U.,(eds.) *The power of pills: Social, ethical, and legal issues in drug development, marketing, and pricing* (2006) Pluto Press

Reed, E .,'Women: Caste, class, or oppressed sex' in Jagger, A., & Rothenberg, P., (eds) *Feminist frameworks: Alternative theoretical accounts of the relations between women and men* (1993) McGraw-Hill

Roemer, R., 'The right to health care' in Fuenzalida-Puelma, HL., & Connor, SS., (eds) *The right to health in the Americas: A comparative constitutional study* (1989) Pan American Health Organization

Roseman, MJ., 'Bearing human Rights: Maternal health and the promises of ICPD' in Reichenbach, L., & Roseman, MJ., (eds) *Reproductive health and human rights: The way forward* (2009) Havard University Press

Rubin., G., 'The traffic in women: Notes on the 'political economy' of sex' in Reiter., R., (ed) *Toward an anthropology of women* (1975) Monthly Review Press

Russell, S., 'Minimum state obligations: International dimensions' in Brand D., & Russell, S., (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House

Rwezaura, B., 'Protecting the rights of the girl child in Commonwealth jurisdictions' in Brynes, A., J Connor, J., & Bik, L., (eds.) *Advancing the human rights of Women: Using international human rights standards in domestic litigation* (1997) Commonwealth Secretariat

Shue, H., 'The interdependence of duties' in Alston, P., & Tomasevski, K., (eds) *The Right to Food* (1984) Martinus Nijhoff Publishers

Simmons, J., Farmer, P., & Schoef, BG., 'A Global Perspective' in Farmer, P., Connors, M., & Simmons, P., (eds) *Women, poverty and AIDS: Sex, drugs and structural violence* (1996) Common Courage Press

Sloth-Nielsen & Mezmur, B., 'HIV/Aids and Children's Rights in Law and Policy in Africa: Confronting hydra head on' in Sloth-Nielsen, J., (ed) *Children's Rights in Africa: A legal perspective* (2008) Ashgate Publishing

Smith, P., 'Feminist jurisprudence and the nature of law' in Smith, P., (ed) *Feminist jurisprudence* (1993) Oxford University Press

van der Vliet, V., 'South Africa divided against AIDS: A crisis of leadership' in Kyle, DK., & David, LL., (eds.) *AIDS and South Africa: The social expression of a pandemic* (2004) Palgrave Macmillan

Van Hoof, GJH., 'The legal nature of economic, social and cultural rights: A rebuttal of some traditional views' in Alston, P., & Tomasevski, K., (eds) *The Right to food* (1984) Martinus Nijhoff Publishers

van Marle, K., & Bonthuys, E., 'Feminist theories and concepts' in Bonthuys, E., & Albertyn, C., (eds), *Gender, law and justice* (2007) Juta & Co

Venter, C., Mashiri, M., & Buiten., D., 'Engendering mobility: Towards improved gender analysis in the transport sector' in van Merle, K., (ed) *Sex, gender, becoming: Post apartheid reflections* (2006) Pretoria University Law Press

3. ARTICLES IN JOURNALS, PERIODICALS AND ANNALS

Ackermann, L., 'Equality and the South African Constitution: The role of dignity' (2000) 60 *Heidelberg Journal of Int L* 537

Albertyn, C., 'Contesting democracy: HIV/AIDS and the achievement of gender equality in South Africa' (2003) 29 *Feminist Studies* 595

Albertyn, C., 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' (2001) 5 *Law, Democracy and Development* 179

Albertyn, C., & Goldblatt, B., 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998)14 *SAJHR* 248

Albertyn, C., & Kentridge, J., 'Introducing the right to equality in the Interim Constitution' (1994) 10 *SAJHR* 149

Almeder, R., 'Liberal feminism and academic feminism' (1994) 8 *Public Affairs Quarterly* 299

Alston, P., 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 6 *Human Rights Quarterly* 755

Amollo, R., 'In pursuit of health equity: A critique of the proposed national health insurance (2009) 10 *ESR Review* 14

Amollo, R., 'The Protocol on Women's Rights in Africa: What does it say about gender-based violence and HIV/AIDS' (2007) 2 *Iminyango Quarterly* 2

Amollo, R., 'Revisiting the TRIPS Regime: Rwanda-Canadian ARV drug deal ‘tests’ the WTO General Council Decision' (2009) 17 *African Journal of International and Comparative Law* 240

Artz, L., 7 Smythe, D., ‘Feminism vs. the state?: A decade of sexual offences law reform in South Africa (2007) 74 *Agenda* 6

Backman, G., Hunt, P., Khosla, R., Jaramillo-Strouss, C., Fikre, BM., Rumble, C., Pevalin, D.,Paez, DA., Pineda, MA., Frisancho, A.,Tarco, D., Motlagh, M., Farcasanu, D.,& Vladescu, C.,‘Health Systems and the Right to Health: An Assessment of 194 Countries’ (2008) 372 *Lancet Journal* 2047

Baimu, E., 'The government's obligation to provide anti-retrovirals to HIV-positive Pregnant women in an African human rights context: The South African Nevirapine case' (2002) 2 *African Human Rights Law Journal* 160

Baleka, A., ‘Concern voiced over 'dry sex' practices in South Africa’ (1998) 352 *The Lancet* 1292

Banda, F., 'Blazing a trail: The African Women's Protocol comes into force' (2006) 50 *Journal of African Law* 72

Bassett, MT., & Mhloyi, M., `Women and AIDS in Zimbabwe: The Making of an Epidemic' (1991) 21 *International Journal of Health Services* 151

Bassiouni, MC., ‘International Crimes: ‘Jus cogens’ and ‘obligatio erga omnes' (1996) 59 *Law and Contemporary Problems* 63

Bayefsky, AF., ‘The principle of equality or non-discrimination in international law’ (1990) 11 *Human Rights Law Journal* 1

Beechey,V.,‘On patriarchy’ (1979) 3 *Feminist Review* 66

Bekker, J., & Gardiol, VN., '*Gumede v President of the Republic of South Africa* : harmonisation, or the creation of new marriage laws in South Africa?: case note (2009) 24 *SA Public Law* 206

Bender, L., 'A lawyer's primer on feminist theory and tort' (1998) 30 *Journal of Legal Education* 3

Bilchitz, D., 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484

Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 2

Bilchitz, D., 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* 2

Bilchitz, D., 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1

Bohan, JS., 'Essentialism, constructionism, and feminist psychology' (1993) 17 *Psychology of Women Quarterly* 5

Bollyky, TJ., 'R if C > B + P: A paradigm for judicial remedies of socio-economic rights violations' (2002) 18 *SAJHR* 161

Botha, H., 'Democracy and rights: Constitutional interpretation in postrealist world' (2000) 63 *THRHR* 563

Bozzoli, B., 'Marxism, feminism and South African studies' (1983) 9 *Journal of South African Studies* 139

Braitstein, P., Brinkhof MW., Dabis F., Schechter M, Boulle A, Miotti P, Wood R, Laurent C, Sprinz E, Seyler C, Bangsberg DR, Balestre E, Sterne JA, May M, Egger M; Antiretroviral Therapy in Lower Income Countries (ART-LINC) Collaboration; ART Cohort Collaboration

(ART-CC) groups)., 'Mortality of HIV-1-infected patients in the first year of antiretroviral therapy: Comparison between low income and high-income countries' (2006) 367 *Lancet* 817

Brown, IS., 'Development of a scale to measure attitude toward the condom as a method of birth control' (1984) 20 *Journal of Sex Research* 255

Budig, MJ., 'Male advantage and the gender composition of jobs: Who rides the glass escalator?' (2002) 49 *Social Problems* 258

Buseh, AG., Glass, LK., McElmurry, BJ., 'Cultural and gender issues related to HIV/AIDS prevention in rural Swaziland: a focus group analysis.' (2002) 23 *Health Care Women Int.* 173

Byrnes, A., & Bath, E., 'Violence against women, the obligation of due diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women—Recent developments (2008) 8 *Human Rights Law Review* 517

Caldwell,JC., Caldwell, P., & Quiggin, P.,'The social context of AIDS in sub-Saharan Africa (1989) 15 *Population and Development Review* 185

Cameron, E., 'Human Rights: Consequences for the HIV Epidemic-Beyond policy consensus to effective activism' (1999) 4 *Canadian HIV/AIDS Policy & Law Newsletter* 105

Cameron, E., & Swanson, E., 'Restrictions on migrant workers, immigrants and travelers with HIV or AIDS: South Africa's step forward' (1992) *ILJ* 496

Cameron, E., & Swanson, E.,'Public health and human Rights - The AIDS crisis in South Africa' (1992) 8 *SAJHR* 200

Campbell, C., 'Migrancy, masculine identities and AIDS: the psychosocial context of HIV transmission on the South African gold mines' (1997) 45 *Social science & medicine* 273

Campbell, C., 'Selling Sex in the Time of AIDS: The Psycho-social Context of Condom Use by Sex Workers on a Southern African Mines' (2000) 50 *Social Science and Medicine* 479

Carpenter, LM., Kamali, A., Ruberantwari, A., Malamba, SS., & Whitworth, AG., 'Rates of HIV-1 transmission within marriage in rural Uganda in relation to the HIV sero-status of the partners' (1999) 13 *AIDS* 1083

Carstens, P., & Kok, A., 'An assessment of the use of disclaimers by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations' (2003) 18 *SA Public Law* 430

Chenwi, L., & McLean, K., 'A woman's home is her castle?' – Poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 517

Chenwi, L., 'Taking those with special housing needs from the doldrums of neglect: A call for a comprehensive and coherent policy on special needs housing' (2007) 11 *Law, Democracy and Development* 1

Chersich,MF., & Rees, HV., 'Vulnerability of women in southern Africa to infection with HIV: biological determinants and priority health sector interventions' (2008) 22 *AIDS* 27

Chigodora, J., 'Young men and HIV/AIDS' (2001) 9 *SAfAIDS* 17

Chirwa, D., 'Minister of Health and Others v Treatment Action Campaign and Others: Its implications for the combat against HIV and AIDS and the Protection of Economic, Social and Cultural Rights in Africa' (2003) 9 *East African Journal of Peace and Human Rights* 174

Chirwa, D., 'The right to health in international Law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *SAJHR* 547

Clarke, S., 'Early marriage and HIV risks in sub-Saharan Africa' (2004) 35 *Studies in Family Planning* 149

Coetzee, D., Hildebrand, K., Boulle, A., Maartens, G., Louis, F., Labatala, V., Reuter, H., Ntwana, N., & Goemaere, E., 'Outcomes after two years of providing antiretroviral treatment in Khayelitsha, South Africa' (2004) 18 *AIDS* 887

Cohen, JC., Gyansa-Lutterodt, M., Esmail, LC., & Kurokawa, G., 'TRIPS, the Doha Declaration and increasing access to medicines: policy options for Ghana' (2005) 1 *Globalization and Health* 1

Cook, RJ., 'Exploring fairness in health care reform' (2004) 29 *Journal of Juridical Science* 18

Cook,RJ., & Bevilacqua, MBG., 'Invoking human rights to reduce maternal deaths' (2004) 363 *The Lancet* 73

Cook,RJ., & Maine, D., 'Spousal veto over family planning services' (1987) 77 *American Journal of Public Health* 339

Cooper, D., Pick WM., Myers JE, Hoffman, MN, Sayed AR., & Klopper, JM., 'Urbanisation and women's health in Khayelitsha. Part II. Health status and use of health services'(1991) 79 *South African Medical Journal* 428

Coovadia, H., Jewkes, R., Barron, P., Sanders, D., & McIntyre, D., 'The health and health system of South Africa: historical roots of current public health challenges' (2009) 374 *The Lancet* 817

Cowen, S., 'Can "dignity" guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34

Crenshaw, K., 'Demarginalising the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics' (1989) *University of Chicago Legal Forum* 139

Currie, I., 'Bill of Rights jurisprudence' (2000) *Annual Survey of SA Law* 24

Dankwa, V., Flinterman, C., & Leckie, S 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705

Davis, D., 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398

Davis, D., 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *SAJHR* 475

De Bruyn, M., `Women and AIDS in developing countries', (1992) 34 *Social Science and Medicine* 249

De Negri , FA., 'A human rights approach to quality of life and health: Applications to public health programming' (2008) 10 *Health and Human Rights: An International Journal* Available at www.hhrjournal.org. (Accessed 13 March 2011)

De Vos, P., 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court (2000) 63 *THRHR* 62

De Vos, P., '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258

De Vos, P., 'Pious wishes of directly enforceable human rights: Social and economic rights in South Africa's Constitution' (1997) 13 *SAJHR* 67

De Vos, P., 'So much to do, so little done? The right of access to anti-retroviral drugs post-*Grootboom* (2003) 7 *Law, Democracy and Development 83*

De Vos, P., 'The economic and social rights of children and South Africa's transitional Constitution' (1995) 10 *SA Public Law* 233

Derrida, J., 'The deconstruction of actuality' (1994) *Radical Philosophy* 28

Desmond, C., Michael., K., & Gow, G., 'The hidden battle: HIV/AIDS in the household and community' (2000) 7 *South African Journal of International Affairs* 39

Dunkle, KL., Jewkes, RK., Brown, HC., Gray, GE., McIntryre, JA., & Harlow, SD., 'Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection' (2004) 59 *Social Science and Medicine* 1581

Dunkle, KL., Jewkes, RK., Brown, HC., Gray, GE., McIntyre, JA., & Harlow, SD., 'Gender-based violence, relationship power and risk of prevalent HIV infection among women attending antenatal clinics in Soweto, South Africa' (2004) 363 *The Lancet* 1415

Durojaye, E., 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188

Durojaiye, E., & Amollo, R., 'Advancing adolescents' sexual health rights in Africa' (2010) 11 *ESR Review* 3

Eagly, AH., & Wood, W., 'Explaining sex differences in social behaviour: A meta-analytic perspective (1991) 17 *Personality & Social Psychology Bulletin* 306

Edward, CG., Halperin, D., Nantulya, V & Hogle, JA., 'Uganda's HIV prevention success: The role of sexual behavior change and the national response (2006) 10 *AIDS and Behavior* 347

Ewelukwa, UU., 'Post-colonialism, gender, customary injustice: Widows in African Societies' (2002) 24 *Human Rights Quarterly* 424

Eyakuze, C., Jones, DA., Starrs, AM., & Sorkin, N., 'From PMTCT to a more comprehensive AIDS response for women: A much-needed shift.'(2008) 8 *Development World Bioethics* 33

Fagan, A., 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220

Faithfull, J., HIV-positive and AIDS-infected women: Challenges and difficulties of mothering (1997) 67 *American Journal of Orthopsychiatry* 144

Farha, L., 'Is there a woman in the house?Re/conceiving the human right to housing?' (2002) 141 *Canadian Journal of Women and the Law* 118

Foreman, M., 'What makes a man' (2000) 8 *SAfAIDS* 2

Forman, L., ‘Trade rules, intellectual property and the right to health’ (2007) 21 *Ethics and International Affairs* 337

Fredman, S., Human rights transformed: Positive rights and positive duties (2009) 72 *The Modern Law Review* 1044

Fredman, S., 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 163

Fredman., F., ‘Engendering socio-economic rights’ (2009) 25 *SAJHR* 424

Fuller, L., ‘The forms and limits of adjudication’ (1978) 92 *Harvard Law Review* 353

Gabriel, A., ‘Socio-economic rights in the Bill of Rights: Comparative lessons from India’ (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 9

Garcia-Moreno, C., Jansen, H., Ellsberg, M., Heise, L., & Watts, C., ‘Prevalence of intimate partner violence: Findings from the WHO multi-country study on women’s health and domestic violence against women, (2006) 368 *Lancet* 1260

Geldenhuys, M., ‘The rights to health care and housing: Some aspects of constitutional interpretation’ (2005) 17 *SA Mercantile LJ* 182

Ghosh, S., ‘Pills, patents and power: State creation of gray markets as a limit on patent rights’ (2001) 53 *Florida LR* 789

Giesen, D., ‘Health care as a right: Some practical implications’ (1994) 13 *Medicine & Law* 285

Gilligan, C., 'In a different voice: Women's conceptions of self and morality' (1977) 47 *Harvard Educational Review* 481

Glynn, JR., Carael, M., Auvert, B., Kahindo, M., Chege, J., Musonda, R., Kaono, F., Buve, A., & the Study Group on the Heterogeneity of HIV Epidemics in African Cities., ‘Why do

young women have a much higher prevalence of HIV than young men? A study in Kisumu, Kenya, and Ndola, Zambia' (2001) 15 *AIDS* 51

Gollub, EL., 'The Female Condom: Tool for Women's Empowerment' (2000) 90 *American Journal of Public Health* 1377

Gordon, G., & Kanstrup, C., 'Sexuality-the missing link in women's health' (1992) 23 *AIDS Bulletin* 29

Gorgen, R., Mohamed, LY., Marx, M., & Millimounou, D., 'Sexual behavior and attitudes among unmarried urban youths in Guinea' (1998) 24 *International Family Planning Perspectives* 65

Gostin, L., 'Public health, ethics, and human rights: A tribute to the late Jonathan Mann' (2001) 28 *Journal of Law, Medicine & Ethics* 121

Govender, M., 'Domestic violence: Is South Africa meeting its obligations in terms of the Women's Convention?' (2003) 16 *SAJHR* 663

Gregson, S., Nyamukapa, CA., Garnett, GP.,Mason, PR., Zhuwau, T., Caraël, M., Chandiwana, SK., & Anderson, RM.,'Sexual mixing patterns and sex-differentials in teenage exposure to HIV infection in rural Zimbabwe' (2002) 359 *The Lancet* 1896

Gruskin, S., Ahmed, S., & Ferguson, L., 'Provider-initiated HIV testing and counselling in health facilities - What does this mean for the health and human rights of pregnant women?'(2008) 8 *Development World Bioethics* 23

Halperin, D, Steiner, M., Cassell, M., Green, EC., Hearst, N., Kirby, D., Gayle, H., Cates, W., et al., [149 signers in total]. 'The time has come for common ground on preventing sexual transmission of HIV' (2004) 364 *Lancet* 1913

Halperin, DT., & Epstein, H., 'Why is HIV prevalence so severe in Southern Africa? The role of multiple concurrent partnerships and lack of male circumcision: Implications for AIDS prevention' (2007) 26 *The Southern Africa Journal of HIV Medicine* 19

Hannum, H., 'The UDHR in national and international law' (1998) 3 *Health and Human Rights* 145

Heise, L., & Elias, C., 'Transforming AIDS prevention to meet women's needs: a focus on developing countries.' (1995) 40 *Social Science and Medicine* 933

Heise, L., Ellsberg, M., & Gottemoeller, M., 'Ending violence against women' (1999). *Population Reports Series* I

Hendriks, AC., 'Patients' rights and access to health care' (2001) 20 *Medicine & Law* 371

Heywood, M., 'Human rights and HIV/AIDS in the context of 3 by 5: Time for new directions?' (2004) 9 *Canadian HIV/AIDS Policy & Law Review* 1

Heywood, M., 'Preventing Mother-To-Child HIV Transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278

Himonga, C., 'Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice' (2001) 9 *The International Journal of Children's Rights* 89

Hoffman, M., Pick WM., Cooper D., & Myers JE., 'Women's health status and use of health services in a rapidly growing peri-urban area of South Africa' (1997) *45 Social Science & Medicine* 149

Hornby, P., & Perera, HSR., 'A development framework for promoting evidence-based policy action: Drawing on experiences in Sri Lanka '(2002) 17 *The International Journal of Health Planning and Management* 165

Hunter, LK., **'**Condom use of female college students as a function of information versus role play and modeling' *Electronic Journal of Human Sexuality*, 1 November, 10

Iles, K., 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *SAJHR* 448

Jochelson, K., Mothibeli, M., & Leger, JP., 'Human immunodeficiency virus and migrant labour in South Africa' (1991) 21 *International Journal of Health Services* 157

Joseph, S., 'Pharmaceutical corporations and access to drugs: The "fourth wave" of corporate human rights scrutiny' (2003) 25 *Human Rights Quarterly* 425

Kaganas, F., & Murray, C., 'Law and women's rights in South Africa: An Overview' (1994) *Acta Juridica* 12

Kalichman, C., Simbayi, LC., Cain, D., Cherry, C., Henda, N., & Cloete, A., 'Sexual assault, sexual risks, and gender attitudes among South African men' (2007) 19 *AIDS Care* 20

Kaniye-Ebeku, SA., 'A new hope for African women: Overview of Africa's Protocol on Women's Rights' (2004) 13 *Nordic Journal of African Studies* 264

Katz , I., & Low-Beer, D., 'Why has HIV stabilised in South Africa, yet not declined further? Age and sexual behaviour patterns and counselling' (2008) 11 *AIDS* 1045

Khoza, S., 'Reducing Mother to Child Transmission of HIV: The Nevirapine Case' (2002) 3 *ESR Review* 2

Kilian, HD., Gregson, S., Ndyanabangi, B., Walusaga, K., Kipp, W., Sahlmuller, G., Garnett, GP., Asiimwe-Okiror, G., Kabagambe, G., Weiss, P., & von Sonnenburg, F., 'Reductions in risk behavior provide the most consistent explanation for declining HIV-1 prevalence in Uganda.'(1999) 13 *AIDS* 391

Kirby, M., 'Human rights and the paradox' (1996) 348 *The Lanchet* 1217

Kirby, M., 'The never ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 163

Kirigia, JM., Sambo, LG., & Mwase, T., 'Determinants of health insurance ownership among South African women' (2005) 5 *BMC Health Services Research* 1

Klausner, JD., Wamai, RG., Bowa,K., Agot,K., Kagimba, J., & Halperin, DT., 'Is male circumcision as good as the HIV vaccine we've been waiting for?' (Editorial) (2008) 2 *Future HIV Therapy* 1

Knobelsdorf, V., 'Zimbabwe's Magaya decision revisited: Women's rights and land succession in the international context' (2006) 16 *Columbia Journal of Gender and the Law* 749

Krieger, N., 'A vision of social justice as the foundation of public health: Commemorating 150 Years of the Spirit of 1848' (1998) 88 *American Journal of Public Health* 1603

L'Heureux-Dube, 'Making a difference: The pursuit of equality and a compassionate justice' (1997) *SAJHR* 335

Laga, M., Schwartlander, B., E Pisani, E., Sow, PS., & Carael, M., 'To stem HIV in Africa, prevent transmission to young women' (2001)15 *AIDS* 931

Langa, P., 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 360

Lary, H., Maman, S., Katebalila, M., McCauley, A., & Mbwambo, J., 'Exploring the association between HIV and violence: Young people's experiences with infidelity, violence and forced sex in Dar es Salaam, Tanzania. International' (2004) 30 *Family Planning Perspectives* 200

Lastarria-Cornhiel, S., 'Impact of privatization on gender and property rights in Africa' (1997) 25 *World Development* 1317

Leary, V., 'The right to health in international human rights law' (1994) 1 *Health and Human Rights* 25

Leckie, S., 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights (1998) 20 *Human Rights Quarterly* 81

Leclerc-Madlala, S., 'Crime in an epidemic: The case of rape and AIDS' (1996) 9 *Acta Criminologica* 31

Leclerc-Madlala, S., 'Infect one, infect all: Zulu youth response to the AIDS epidemic in South Africa' (1997) 17 *Medical Anthropology* 363

Leclerc-Madlala, S., 'On the virgin cleansing myth: Gendered bodies, AIDS and ethnomedicine' (2002) 1 *African Journal of AIDS Research* 87

Leclerc-Madlala, S., 'Protecting girlhood? Virginity revivals in the era of AIDS' (2003) 56 *Agenda* 16

Leclerc-Madlala, S., 'Cultural scripts for multiple and concurrent partnerships in Southern Africa: Why HIV prevention needs anthropology' (2009) 6 *Sexual Health* 103

Lewis, D., 'Feminism and the radical imagination' (2007) 72 *Agenda* 19

Liebenberg, S., 'Advancing equal access to socio-economic rights: The new equality legislation' (1999) 2 *ESR Review* 12

Liebenberg, S., 'Needs, rights and transformation: Adjudicating social rights' (2006) 1 *Stell LR* 5

Liebenberg, S., 'Social citizenship - A precondition for meaningful democracy' (1999) 40 *Agenda* 59

Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development* 159

Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1

Liebenberg, S., & Goldblatt, B., 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 351

Lindan, C., Allen, S., Carael, M., Nsengumuremyi, Van de Perre, FP., Serufilira, AJ., Black, TD., Coates, T., & Hulley, S., 'Knowledge, attitudes, and perceived risks of AIDS among urban Rwandan women: Relationship to HIV infection and behavior change' (1991) 5 *AIDS* 993

London, L., Orner, LJ., & Meyer, L., 'Even if you're positive, you still have rights because you are person: Human rights and the reproductive choice of HIV-positive persons' (2008) 8 *Development World Ethics* 11

Low-Beer, D., 'HIV-1 incidence and prevalence trends in Uganda [letter]' (2002) 360 *Lancet* 1788

Loxley, W., 'Sluts' or 'sleazy little animals'?: Young people's difficulties with carrying and using condoms' (1996) 6 *Journal of Community and Applied Social Psychology* 293

Lule, K., Joseph, K., Sewankambo, N., & Morris, M., 'Adolescent sexual networking and HIVtransmission in rural Uganda' (1997) 7 *Health Transition Review* 89

Lurie, MN., & Rosenthal, S., 'Concurrent partnerships as a driver of the HIV epidemic in sub-Saharan Africa? The evidence is limited' (2009) 14 *AIDS and Behavior 17*

MacNaughton, G., 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11 *Health and Human Rights: An International Journal* 47

MacPhail, C., & Campbell, C., 'I think condoms are good but, aai, I hate those things': Condom use among adolescents and young people in a Southern African township (2001) 52 *Social Science and Medicine* 1613

Mah, TL., & Halperin, DT., 'Concurrent sexual partnerships and the HIV epidemics in Africa: Evidence to move forward' (2008) *AIDS and Behavior* Published online July 22 DOI 10.1007/s10461-008-9433-x. (Accessed 12 December 2008).

Maharaj, A.,'Virginity testing: a matter of abuse or prevention?' (1999) 41 *Agenda* 96

Mamashela, M., 'New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act' (2004) 20 *SAJHR* 616

Manicom, L., 'Ruling relations: Rethinking state and gender in South African history' (1992) 33 *The Journal of African History* 443

Mann, J., 'Health and human rights: If not now, when? Human rights and the new public health' (1997) 2 *Health and Human Rights* 118

Marmot, M., 'Achieving health equity: from root causes to fair outcomes' (2007) 370 *Lancet* 1153

Marston, G., & Watts, R., 'Tampering with the evidence: A critical appraisal of evidence-based policymaking' (2003) 3 *The Drawing Board: An Australian Review of Public Affairs* 143

McColgan, A., 'Principles of equality and protection from discrimination in international human rights law' (2003) 2 *European Human Rights Law Review* 157

McFadden, P., 'Contesting sexualities in the remaking of African female bodies as sites of power' (2007) 4 *Sexuality in Africa Magazine* 4

McFadden, P., 'Sexual pleasure as feminist choice' (2003) 2 *Feminist Africa* 50

McIntyre, D., & Gilson, L., 'Putting equity in health back into the social policy agenda: experience from South Africa' (2002) 54 *Social Science and Medicine* 1637

McLean, P., 'Sexual behaviors and attitudes of high school students in the Kingdom of Swaziland' (1995) 10 *Journal of Adolescent Research* 400

Meekers, D., 'Going underground and going after women: trends in sexual risk behaviour among gold miners in South Africa' (2001) 11 *International Journal of STD & AIDS* 21

Mill,JE., & Anarfi, JK., 'HIV risk environment for Ghanaian women: Challenges to prevention' (2002) 54 *Social Science and Medicine* 325

Mitchell, DS., 'The prohibition of rape in international humanitarian law as a norm of jus cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative and International Law* 219

Modak-Truran, M., 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law and Humanities* 249

Mokomane, Z., 'Cohabiting unions in sub-Saharan Africa: Explaining Botswana's exceptionality' (2006) 37 *Journal of Comparative Family Studies* 25

Morris, M., 'Barking up the wrong evidence tree. Comment on Lurie & Rosenthal, 'Concurrent partnerships as a driver of the HIV epidemic in Sub-Saharan Africa?: The evidence is limited' (2010) 14 *AIDS and Behavior* 31

Mostad, SB., Kreiss, JK., Ryncarz, AJ., Mandaliya, K., Chohan, B., Ndinya-Achola, J., Bwayo., JJ., & Corey, L., 'Cervical shedding of herpes simplex virus in human immunodeficiency virus-infected women: Effects of hormonal contraception, pregnancy, and vitamin A deficiency' (2003) 181 *Journal of Acquired Immune Deficiency Syndrome* 58

Mswela, M., 'Cultural practices and HIV in South Africa: A legal perspective' (2009) 12 *Potchefstroom Electronic Law Journal* 21

Mubanjizi, JC., & Twinomugisha, BK., 'The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?' (2010) 10 *African Human Rights Law Journal* 105

Mwakyembe, H., & Kanja, GM., 'Implications of the TRIPS agreement on the access to cheaper pharmaceutical drugs by developing countries: Case study of*South Africa v The Pharmaceutical Companies*' (2002) 34 *Zambia LJ* 111

Nattrass, N., 'Gender and access to antiretroviral treatment in South Africa' (2008) 14 *Feminist Economics* 19

Naylor, NM., 'Cry the beloved continent…' Exploring the impact of HIV/AIDS and violence in women's sexual rights in Southern Africa' (2006) 30 *Journal for Juridical Science* 52

Nedelsky, J., 'Reconceiving rights as relationship' (1993) 1 *Review of Constitutional Studies* 1

Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1

Nelson, SJ., Manhart, LE., Gorbach, PM., Martin, DH., Stoner, BP, Aral, SO., & Holmes, KK**.,** **'**Measuring sex partner concurrency: It's what's missing that counts' (2009) 34 *Sexually Transmitted Diseases* 801

Ngwena C., 'Access to health care services as a justiciable socio-economic right under the South African Constitution. *Minister of Health and Others v Treatment Action Campaign and Others*' (2003) 6 *Medical Law International* 13

Ngwena, C.,'Access to anti-retroviral treatment therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83

Ngwena, C., 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25(1) *Journal for Juridical Science* 1

Ngwena, C., 'Accessing abortion services under the Choice on Termination of Pregnancy Act: Realising substantive equality' (2000) 25 *Journal for Juridical Science* 19

Ngwena, C., 'Constitutional values and HIV/AIDS in the workplace' (2001) 1 *Developing World Bioethics* 42

Ngwena, C., 'HIV/AIDS and equal opportunities in the workplace: The implications of the Employment Equity Act' (2000) 33 *CILSA* 96

Ngwena, C., 'Responses to AIDS and constitutionalism in South Africa' (2003) 24 *obiter* 299

Ngwena, C., 'Right of access to antiretroviral therapy to prevent Mother-to-Child Transmission of HIV: An application of Section 27 of the Constitution' (2003) 18 *SA Public Law* 83

Ngwena, C., & Cook, RJ., 'HIV/AIDS, pregnancy and reproductive autonomy: Rights and duties' (2008) 8 *Developing World Bioethics* iii

Ngwena, C., & Matela, S., '*Hoffmann v South African Airways* and HIV/AIDS in the workplace: Subjecting corporate ideology to the majesty of the Constitution' (2003) 18 *SA Public Law* 306

Nicholson, C., 'The right to health care, the best interests of the child and AIDS in South Africa and Malawi' (2002) 35 *CILSA* 351

Niëns,L., & Lowery, D., 'Gendered epidemiology: Sexual equality and the prevalence of HIV/AIDS in sub-Saharan Africa' (2009) 90 *Social Science Quarterly* 1134

Nightingale, E., Hannibal, K., Geiger, J., Hartmann, L., Lawrence, R., & Spurlock, J.,'Apartheid medicine, health and human rights in South Africa' (1990) 264 *Journal of the American Medical Association* 2102

Nunn, A., Jane F., Kengeya-Kayondo, JF., Malamba, SS., Seeley, JA., & Mulder, DW., 'Risk factors for HIV-1 infection in adults in a rural Ugandan community: A population study' (1994) 8 *AIDS* 81

Nussbaum, MC., 'Capabilities as fundamental entitlement: Sen and social Justice' (2003) 9 *Feminist Economics* 33

Nussbaum, MC., 'Human functioning and social justice: In defense of Aristotelian essentialism' (1992) 20 *Political theory* 202

Nussbaum, MC., 'Human rights and human capabilities' (2007) 20 *Harvard Human Rights Journal* 1

Nussbaum, MC., 'Nature, function and capability: Aristotle on political distribution' (1988) 145 *Oxford Studies in Ancient Philosophy* 84

Nussbaum, MC., 'Objectification' (1995) 24 *Philosophy and Public Affairs* 249

Nussbaum, MC., 'Women's bodies: Violence, security, capabilities' (2005) 6 *Journal of Human Development* 167

Nuwaha, F., Faxelid, E., Neema, S., & Hojer, B., 'Lay people's perceptions of sexually transmitted infections in Uganda' (1999) 10 *International Journal of STD and AIDS* 709

Okware, S., Opio, A., Musinguzi, J., & Waibale, P., 'Fighting HIV/AIDS: Is success possible?' (2001) 79 *Bulletin of the World Health Organization* 1113

Oloka-Onyango, J., & Tamale, S., ''The personal is political', or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691

Orubuloye, IO., Oguntimehin, F., & Sadiq, T., 'Women's role in reproductive health decision making and vulnerability to STD and HIV/AIDS in Ekiti, Nigeria' (1996) 7 *Health Transition Review* 329

Packer, CA., 'Preventing adolescent pregnancy: The protection offered by international human rights law (1997) 5 *International Journal of Children's Rights* 46

Page, S., 'Promoting the survival of rural mothers with HIV/AIDS: A development strategy for Southern Africa' (2001) 44 *Development* 40

Paglione, G., 'Domestic violence and housing rights: A reinterpretation of the right to housing' (2006) 28 *Human Rights Quarterly* 120

Parkhurst, J., 'The Ugandan success story?: Evidence and claims of HIV-1 prevention' (2002) 360 *Lancet* 78

Parkhust, J., & Louisiana, L., 'The political environment of HIV: Lessons from a comparison of Uganda and South Africa' (2004) 59 *Social Science and Medicine* 1913

Pattinson, R., 'Maternal health' (2006) *South African Health Review* Health Systems Trust

Peiris, G., 'Public interest litigation in the Indian sub-continent: Current dimensions' (1991) 40 *International and Comparative Law Journal* 66

Peltzer, K.,& Pendid, S., 'Sexuality of 16 to 17 year-old South Africans in the context of HIV/AIDS' (2006) 34 *Social Behaviour and Personality* 39

Pereira, C., 'Where angels fear to tread? Some thoughts on Patricia McFadden's "Sexual pleasure as feminist choice"' (2003) 2 *Feminist Africa* 61

Pieterse, E., & van Donk, M., 'Incomplete ruptures: The political economy of realising socio-economic rights in South Africa' (2002) 6 *Law, Democracy and Development* 193

Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383

Pieterse, M., 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796

Pieterse, M., 'It's a 'black thing': Upholding culture and customary law in a society founded on non-racialism' (2001) 17 *SAJHR* 364

Pieterse, M., 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882

Quisumbing, AR., & Maluccio, J., 'Resources at Marriage and Intrahousehold Allocation: Evidence from Bangladesh, Ethiopia, Indonesia, and South Africa' (2003) 65 *Oxford Bulletin of Economics and Statistics* 283

Rajaraman, D., Russell, S., & Heymann, J., 'HIV/AIDS, income loss and economic survival in Botswana' (2006) 18 *AIDS Care* 656

Rawls, J., 'Distributive justice: Some addenda' (1968) 13 *Natural Law Forum* 51

Reniers, G., & Watkins, S., 'Polygyny and the spread of HIV in sub-Saharan Africa: A case of benign concurrency (2010) 24 *AIDS* 299

Richards, R., O'Leary, B., & Mutsonziwa, K.,'Measuring quality of life in informal settlements in South Africa' (2007) 81 *Social Indicators Research* 375

Rifkin, J., 'Toward a theory of law and patriarchy' (1988) 3 *Harvard Women's Law Journal* 3

Robin, F., 'In search of democracy: Reconciling majority rule, minority rights and group rights in South Africa and the United States' (1996) 16 *Boston College Third World Law Journal* 65

Rudiger, A., 'From market competition to solidarity: Assessing the prospects of US health care reform plans from a human rights perspective' (2008) 10 *Health and Human Rights: An International Journal*. Available at www.hhrjournal.org. (Accessed 13 March 2011)

Ruud, KW., Srinivas, SC., & Toverud, EL., 'Antiretroviral therapy in a South African public health care setting-facilitating and constraining factors' (2009) 2 *Southern Med Review* 30

Sachs, J., 'South Africa as the epicenter of HIV/AIDS: Vital political legacies and current debates'. (2002) 3 *Current Issues in Comparative Education* 52

Sakiko, FP., The human development paradigm: Operationalising Sen's ideas on capabilities (2003) 9 *Feminist Economics* 301

Sanday, PR., 'The socio-cultural context of rape: A cross-cultural study' (1981) 37 *Journal of Social Issues* 5

Sarkin, J., 'Health' (1997/8) 8 *SA Human Rights Yearbook* 97

Schmidt, E., 'Patriarchy, capitalism, and the colonial state in Zimbabwe' (1991) 16 *Signs: Journal of Women in Culture and Society* 4

Schneider, H., & Stein, J., 'Implementing AIDS policy in post-apartheid South Africa' (2001) 52 *Social Science and Medicine* 723

Schoepf, BG., 'Women, AIDS, and economic crisis in Central Africa' (1988) 22 *Canadian Journal of African Studies* 625

Scorgie, F., 'Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention' (2002) 61 *African Studies* 55

Scott, C., & Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *U Pa L Rev* 1

Scott, C., 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall LJ* 769

Scott, C., & Alston, P., 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 206

Seidel, G., 'Confidentiality and HIV status in Kwazulu-Natal, South Africa: Implications, resistances and challenges' (1996) 11 *Health Policy Planning* 418

Seidel, G., 'The competing discourses of HIV/AIDS in sub-Saharan Africa: Discourses of rights and empowerment vs. discourses of control and exclusion' (1993) 36 *Social Science and Medicine* 175

Sen, A., 'Elements of a theory of human rights' (2004) 32 *Philosophy and Public Affairs* 319

Shelton, JD., Halperin, DT.& Wilson, D., **'**Has global HIV incidence peaked? *(*2006) 367 *Lancet* 1120

Shisana, O., Rehle, T., Louw, J., Zungu-Dirwayi, N., Dana, P., & Rispel, L., 'Public perceptions on national health insurance: Moving towards universal health coverage in South Africa' (2006) 96 *South African Medical Journal* 814

Singer, J., 'Legal realism now' (1998) 76 *CLR* 465

Stockard, J., & Johnson, MM., 'The social origins of male dominance (1979) 5 *Springer Netherlands* 199

Tamale, S., 'Eroticism, sensuality and 'women's secrets' among the Baganda: A Critical analysis' (2006) 5 *Feminist Africa* 9

Tikambenji, MG., 'Women, reproductive rights and HIV/AIDS: The value of the African Charter Protocol' (2007) 72 *Agenda* 127

Tomlinson, R., 'Housing policy in the context of HIV/AIDS and globalisation' (2001) 25 *International Journal of Urban and Regional Research* 649

Ulrich, M., 'A short topology of feminist legal theory' (1993) *Auckland University LR* 485

Van der Poll, L., 'The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective' (2009) 13 *Law, Democracy & Development* 1

Van der Walt, AJ., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253

Van der Walt, AJ., 'The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144

Vawda, YA., 'Tripped-up on TRIPS: The story of shrinking access to drugs in developing countries' (2002) 13 *Stellenbosch LR* 352

Vetten, L., 'Research into preventing intimate Femicide in the Gauteng Province' (2003) 45 *Women's Health Project Review* 14

Von Struensee, V., 'The contribution of polygamy to women's oppression: An argument for its prohibition' (2005) *Murdoch Elecronic Journal of Law.* Available at www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#fn100. (Accessed 19 October 2009)

Watchirs, H., 'A human rights approach to HIV/AIDS: Transforming international obligations into national laws' (2002) 22 *Australian Yearbook of International Law* 77

Weiser, SD., Leiter, K., Bangsberg, DR., Butler, LM., Percy-de Korte,F., Hlanze, Z., Phaladze, N., Lacopino, V., & Heisler, M., 'Food insufficiency is associated with high-risk sexual behaviours among women in Botswana and Swaziland' (2007) 4 *PLoSs Med* 260

Weiss, E., Whelan, D., & Gupta, GR., 'Gender, sexuality and HIV: Making a difference in the lives of young women in developing countries' (2000) 15 *Sexual and Relationship Therapy* 233

West, R*., 'Jurisprudence and gender'* (1988) 55 *University of Chicago Law Review* 1

Westen, P., 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537

Westendorp, I., 'Haven or hell? The effect of domestic violence on women's housing rights' (2003) *Africa Legal Aid Squarely* 8

Williams, CL., 'The glass escalator: Hidden advantages for men in the 'female' professions' (1992) 39 *Social Problems* 253

Williams, JC., 'Dissolving the sameness/difference debate: A post-modern path beyond essentialism in feminist and critical race theory' (1991) 2 *Duke Law Journal* 296

Wollstonecraft, M., 'Vindication of the rights of women' (1988) 30 *Journal of Legal Education* 3

Woods, J., 'Justiciable social rights as a critique of the liberal paradigm' (2003) 38 *Tex Int LJ* 763

Yamin, AE., 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) 10 *Health and Human Rights* 1

Yamin, AE., 'Not just a tragedy: Access to medications as a right under international law' (2003) 21 *Boston University International Law Journal* 325

Yamin, AE., & Maine, DP., 'Maternal mortality as a human rights issue: Measuring compliance with international treaty obligation' (1999) 21 *Human Rights Quarterly* 56

4. REPORTS, POLICY DOCUMENTS, PAPERS AND OTHER RESOURCES

Agarwal, B., 'Are we not peasants too? Land rights and women's claims in India' Seeds No. 21 Population Council, New York (2002)

AIDS Law Project, *'HIV/AIDS and the law: A resource manual'Aids Law Project, (1997)*

AIDS Law Project, 'Regional audit on HIV/AIDS, human rights and other relevant issues' AIDS Law Project (2000)

AIDS Law Project, Law & Treatment Access Unit, 'Joint submission of the AIDS Law Project and the Treatment Action Campaign to the Portfolio Committee on Health: Public Hearings on the National Health Bill' B32-2003, AIDS Law Project (2003)

Akeroyd, A., 'Some gendered and occupational aspects of HIV and AIDS in Eastern and Southern Africa: Changes, continuities and issues for further consideration at the end of the first decade' Occasional Paper #60, Centre for African Studies, Edinburgh University (1996)

Alston, P., ‘A Human rights perspective on the Millennium Development Goals. Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development’ (2004)

Amnesty International, ‘I am at the lowest end of all: Rural women living with HIV face human rights abuses in South Africa’ (2008)

Amollo, R., ‘The phenomenon of child headed households and orphans in the face of HIV/AIDS in sub Saharan Africa’ Unpublished paper delivered at Golder Trust for Orphans, Edmonton, Canada (2008)

Artz, L., ‘The legal landscape: sexual offences legislation (the example of South Africa) and obstacles to justice for rape survivors’ in Amnesty International (2002)

Ashton, D., Mushaandja, J., & Pomuti, A., ‘The inter-relationships and linkages among migration, food security and HIV/AIDS in Windhoek, Namibia’ (2008)

Barron, P., ‘A fifteen year review of the health sector in South Africa’ Prepared for the Department of Health (2008)

Beegle, K., & Ozler, B., ‘Young women, rich(er) men, and the spread of HIV’, World Bank, Washington, DC (2007)

Bellamy, C., ‘Facing the future together: Report of the Secretary General’s task force on women, girls and HIV/AIDS in Southern Africa’ (2004)

Berer, M., Ray, & S., ‘Women and HIV/AIDS : An international resource book: Information, action and resources on women and HIV/AIDS, reproductive health, and sexual relationships’ Appropriate Health Resources and Technologies Action Group, Pandora, London (1993)

Bezuidenhout, JB., ‘Poverty and HIV in South African urban informal settlements: Exploring the obstacles residents face in accessing basic services and health care services’. Research Elective Report, Radboud University Nijmegen, Netherlands (2009)

Bond, V., Chileshe, M., Sullivan, C., & Magazi, B., 'The converging impact of tuberculosis, HIV/AIDS, and food insecurity in Zambia and South Africa' Final Working Report (2009)

Bracher, M., Santow, G., & Watkins, SC., 'Moving and marrying: Estimating the prevalence of HIV infection among newly-weds in Malawi.' Atlanta: Paper presented at Population Association of America, Annual Meeting (2002)

Bukuluki, P., Mugumya, F., Neema, S., & Ochen, EA., 'Gender dimensions, food security, and HIV and AIDS in Internally Displaced People's (IDPs) camps in Uganda: Implications for HIV-responsive policy and programming'. Department of Social Work and Social Administration, Makerere University (2008)

CDC, 'Basic facts about condoms and their use in preventing HIV infection and other STDs' (1993)

CDC, 'Condoms and their use in preventing HIV infection and other STDs' (1999)

CDC, 'Male latex condoms and sexually transmitted diseases', Fact sheet for public health personnel (2003)

Centre for Health and Gender Equity, 'Gender, AIDS, and ARV therapies: Ensuring that women gain equitable access to drugs within US funded treatment initiatives. (2004)

Charlton, S., 'An overview of the housing policy and debates, particularly in relation to women (or vulnerable groupings) A research report written for the Centre for the Study of Violence and Reconciliation (2004)

Chenwi, L 'Claiming economic, social and cultural rights at the international level' Community Law Centre, University of the Western Cape (2009)

Christofides, N., Muirhead, D., Jewkes, R., Penn-kekana, L., & Conco, N., 'Including Post-Exposure Prophylaxis to prevent HIV/AIDS in South Africa: Costs and cost effectiveness to user preferred approaches to provision. Pretoria, Medical Research Council (2006)

Christofides, N., Webster, N., Jewkes, R., Penn-Kekana, L., Martin, L., Abrahams, N., & Kim, J., 'The state of sexual assault services: Findings from a situational analysis of services in South Africa' The South African Gender-based Violence and Health Initiative (2003)

Clacherty, A., & Potter, A., 'Water Services and HIV/AIDS: Integrating health and hygiene education in the water and sanitation sector in the context of HIV/AIDS.' Research Report No.TT 316/07. South African Water Research Commission (2007)

Clacherty, A.,& Potter, A., 'Water services and HIV/AIDS: A guide for local government councillors and officials responsible for water, sanitation and municipal health services.' Research Report No.TT 317/07. South African Water Research Commission Coalition for Health Promotion and Social Development and Panos Eastern Africa 'In defence of national interest: A report on Uganda's reform process for the industrial property legislation' (2007)

COHRE, 'Sources 5 'Women and housing rights - 2nd ed' Centre on Housing Rights and Evictions (2008)

COHRE,'Women and housing right'. Centre on Housing and Evictions (2000)

Combrinck, H., 'Living in security, peace and dignity: The right to have access to housing of women who are victims of gender-based violence' Community Law centre, University of the Western Cape (2009)

Combrinck, H., & Chenwi, L., 'The role of informal community structures in ensuring women's rights to have access to adequate housing in Langa, Manenberg and Mfuleni' Community Law Centre, University of the Western Cape (2007).

Commission on Human Rights: Report by Special Rapporteur on violence against Women; Policies and procedures that impact women's reproductive rights and contribute to, cause or constitute violence against women, Ms. Radhika Coomaraswamy E/CN 4./1999/68/Add.4 (1999)

Cook,RJ., and Dickens, B., *Advancing safe motherhood through human rights.* Geneva: World Health Organisation (2001)

Dairiam, S., 'The relevance of the links between human rights, the Beijing Platform for Action and The Millennium Development Goals, paper prepared for the Expert Group Meeting on the achievements, gaps and challenges in linking the implementation of the Beijing Platform for Action and the Millennium Declaration and Millennium Development Goals,' (2005)

Department of Health 'HIVAIDS/STD Strategic Plan for South Africa 2000-2005 (2000)

Doyal, L., Gender and health: Technical Paper. Geneva, World Health Organization (1998)

Edwards, L., 'HIV/AIDS, poverty and patriarchy: A gendered perspective. Research Report, Nara Training Center

Egal, F & Vlastar, A., 'HIV/AIDS and nutrition: Helping families and communities to Cope' FAO, Food, Nutrition, and Agriculture 25 (1999)

FAO, 'Focus: Women and food security: Women hold the key to FOOD security.' Food and Agricultural Organisation (1996)

FAO, 'HIV/AIDS and agriculture: Impacts and responses – Case studies from Namibia, Uganda and Zambia' FAO (2003)

FAO., 'Reclaiming our lives: HIV and AIDS, women's land and property rights, and livelihoods in southern and East Africa' FAO (2006)

FAO, 'The state of food insecurity in the world: monitoring progress towards the world food summit and millennium development goals.' Rome (Italy): Food and Agricultural Organisation, United Nations (2003)

Ferguson, A., 'Water reform, gender, and HIV/AIDS: Perspectives from Malawi.' Paper delivered at the Society for Applied Anthropology Meetings, Portland (2003)

Fleishman, F., 'Fatal vulnerabilities: Reducing the Acute Risk of HIV/AIDS Among Women and Girls' Washington, CSIS (2003)

Frederick, M., Scherer and Jayashree Watal, 'Post-TRIPS options for access to patented medicines in developing countries,' Commission on Macroeconomics and Health Working Paper WG 4, no.1 June (2001)

Garcia Moreno, C., 'Violence against women' Global Health Equity Initiative Working Paper no 15. Harvard Centre for Population and Development Studies (1999)

George, ER., 'Like a virgin? Virginity testing as HIV/AIDS prevention: Human rights universalism and cultural relativism revisted' *International & Comparative Law Colloquium Papers.* Paper 4 (2008)

Gillespie, S., (ed), AIDS, Poverty, and hunger: Challenges and responses, Washington, DC, International Food Policy Research Institute (2006)

Gillespie, S., & Kadiyala, S., 'HIV/AIDS and Food and Nutrition Security: From Evidence to Action. Washington, DC, International Food Policy Research Institute (2005)

Global Strategy for Shelter to the year 2000 (1988)

Gordon, P., & Crehan, K., 'Dying of sadness: Gender, sexual violence and the HIV Epidemic' UNDP Issues Paper (1999)

Government of Uganda, 'Uganda participatory poverty assessment process: Kampala District Report' Ministry of Finance, Planning and Economic Development, Kampala (2000)

Gray, L., & Kevane, M., 'Land tenure status of African women' World Bank Project on gender and property rights in Africa (1996)

Greene, ME., & Merrick, T., 'Poverty reduction: Does reproductive health matter? HNP discussion paper, World Bank, Washington DC (2005)

Gupta, GR., 'Gender, sexuality, and HIV/AIDS: The what, the why, and the how' Plenary Address, XIII International AIDS Conference, Durban, South Africa (2000)

Gupta, GR., ‘Gender, sexuality, and HIV/AIDS: The what, the why, and the how’ in Global perspectives on gender, sexual health, and HIV/AIDS, SIECUS Report (2001)

Gupta, GR., Whelan, D., & Allendorf, K., ‘A review paper of the Department of Gender and Women’s Health, Family and Community Health’ World Organisation, International, Center for Research on Women, Washington DC (2003)

Harcourt, W.,‘The capabilities approach for poor women: empowering strategies towards gender equality, health and well-being’ in Justice and poverty: Examining Sen’s capability approach’ Paper presented at Von Hugel Inst., Cambridge University (2001)

Hartigan. P., ‘Communicable disease’ Global Health Equity Initiative Working Paper on Gender and Health equity No 9, Harvard Centre for Population and Development Studies (1999)

Harvey, E., & Kehler, J., 'Sex and Sexuality in the context of HIV and AIDS' A publication of the AIDS Legal Network (2005)

Henry Kaiser Family Foundation, ‘Hitting Home: How households cope with the impact of the HIV/AIDS epidemic: A survey of households affected by HIV/AIDS in South Africa’ Henry Kaiser Family Foundation (2002)

Heywood, M., & Richter, M., ‘Discrimination and HIV/AIDS Report to the Department of Health’ Johannesburg, Centre for Applied Legal Studies (2002)

Heywood, M., *The AIDS epidemic in Africa: 'Openness' and human rights*, Paper for the Xth International Conference on AIDS and STDs in Africa. Available at http://www.hri.ca/partners/alp/resource/icasa.shtml. (Accessed 23 July 2009)

HSRC, ‘South African National HIV prevalence, incidence and communication Survey’ HSRC Publishers (2008)

Human Rights Watch, ‘Just die quietly: Domestic violence and women's vulnerability to HIV in Uganda’ (2003)

Human Rights Watch, 'Policy Paralysis: A call for action on HIV/AIDS-related human rights abuses against women and girls in Africa' (2003)

Hunt, P., 'Annual report to the Human Rights Council,' UN Doc. No. A/HRC/7/11 (2008)

Hunt, P., 'Annual report to the Commission on Human Rights' UN Doc. No. E/ CN.4/2006/48 (2006)

Hunt, P., and De Mesquita, JB., 'The rights to sexual and reproductive Health', UNFPA (2007)

ICRW, 'Cross-generational and transactional sexual relations in sub-Saharan Africa.' ICRW (2002)

ICRW, 'Reducing women's and girls' Vulnerability to HIV/AIDS by Strengthening their Property and Inheritance Rights' Information Bulletin May (2006)

ICRW, HSRC, AfD, 'Women's property rights, HIV and AIDS and domestic violence: Research findings from two districts in South Africa and Uganda' HSRC Publishers (2008)

ICW, 'HIV positive women and human rights.' ICW Vision Paper 4. International Community of Women Living with HIV/AIDS (2004)

IOM, 'HIV/AIDS, population mobility and migration in Southern Africa: Defining a research and policy agenda' International Organisation for Migration (2005)

Isandla Institute and the South African Cities Network, 'Positive' spaces: Sustainable human settlements in the context of HIV/AIDS' Report of the National Seminar and Learning Event (2007)

Jurgens, R., 'Increasing access to HIV testing and counselling while respecting human Rights' Background paper, Soros Foundation (2007)

Kadiyala, S., & Gillespie, S., 'Rethinking food AIDS to fight AIDS' Washington (D.C), International Food Policy Research Institute (2003)

Kaleeba, N., 'Success of campaigns in Uganda' WGNRR (1991)

Kaleeba, N., Namulondo, J., Kalinki, D., & Williams, G., 'Open secret: People facing up to HIV and AIDS in Uganda' (Strategies for Hope Series no. 15) London, ACTIONAID (2000)

Kann, U., Moods,G., & Synder, J., (eds), *Gender dimensions of development Research*, A Report From a Workshop, NIR, University of Botswana (1986)

Karugonjo-Segawa, R., 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' Research Partnership, Danish Research Institute for Human Rights (2005)

Kassie, GT., Asfaw, W.,Zeleke, G., & Drimie, S., 'The nexus of migration, HIV/AIDS and food Security in Addis Ababa, Ethiopia (2009)

Katz, E., & Chamorro, J., 'Gender, land rights, and the household economy in rural Nicaragua and Honduras' Paper presented at the annual conference of the Latin American and Caribbean Economics Association, Pueblo, Mexico (2003)

Khoza, S., 'A Submission to the Parliamentary Ad Hoc Committee on Review of State Institutions Supporting Constitutional Democracy. The South African Human Rights Commission and its monitoring of socio-economic rights through compiling periodic reports' Community Law Centre, University of the Western Cape, (2007)

Kistner, U., 'Gender-based violence and HIV/AIDS in South Africa: *A literature review*' Centre for AIDS Development, Research and Evaluation (CADRE), Johannesburg, South Africa (2003)

Kofi Annan, Former UN Secretary-General of the United Nations to the fifty-fourth World Health Assembly, Geneva (2001)

Kothari, M., 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: Mission to South Africa' (2008)

Krug, EG., Dahlberg,LL., Mercy,JA., Zwi,AB., & Lozano,R., 'World report on violence and health' Geneva, World Health Organization (2002)

Liebenberg, S., & Pillay, K., 'Poverty and human rights report of the National "speak out on poverty" Hearings, SANGOCO, the CGE and the SAHRC, SANGOCO:Johannesburg (1998)

Luke, N., & Kurz, K., 'Cross-generational and transactional sexual relations in sub-Saharan Africa' Washington, the International Center for Research on Women (2002)

Mama, A., 'Women's studies and studies of women in Africa during the 1990s' Working Paper Series 5/96, Dakar, CODESRIA (1996)

Matasha, E., Ntembelea, T., Saidi, W., Todd, J., & Mayaud, P., 'Baseline questionnaire survey of sex and reproductive heatlh among primary and secondary school pupils in Mwanza Region,Tanzania: Report for the adolescent sexual and reproductive health project' AMREF (1996)

Matlin, S., & Spence, N., 'The gender aspects of the HIV/AIDS Pandemic' World Health Organization, Division for the Advancement of Women, Presentation at an Expert Group Meeting on "The HIV/AIDS pandemic and its gender implications", Windhoek, Namibia (2002)

Mbilinyi, M., 'Women workers and self employed in the rural sector. Paper prepared for ILO Workshop on Women's Employment Promotion in the Context of Structural Adjustment Programme in Tanzania, Dar-es-Salaam' (1997)

Medical Research Council's report, *'Understanding men's health and use of violence: Interface of rape and HIV in South Africa'* (2009)

Mike, ET., 'The phenomenon of infant rape in South Africa, MTN Centre for Crime Prevention, unpublished paper, Department of Psychology, Rhodes University

MRC, 'Understanding men's health and use of violence: interface of rape and violence in South Africa' (2009)

Murray, JL., & Lopez, AD., 'The global burden of disease: A comprehensive assessment of mortality and disability from diseases, injuries and risk factors in 1990 and projected to 2020' Summary. Boston, Harvard School of Public Health, World Health Organization (1996)

NIAIDD, 'Workshop summary: Scientific evidence on condom effectiveness for sexually transmitted disease (STD) prevention, Hyatt Dulles Airport, Hernon, Virginia (2001)

Ntuli, A., Ijumba, P., McCoy, D., Padarath, A., & Berthiaume, L., 'HIV/AIDS and health sector responses in South Africa-Treatment access and equity: Balancing the act' Equinet Discussion Paper Number 7 (2003)

Nussbaum, MC., 'Human dignity and political entitlements' in Schulman, A., & Nussbaum, M., *Human dignity and bioethics: Essays commissioned by the President's Council on Bioethics* The President's Council on Bioethics (2008)

OHCHR, 'Introduction to HIV/AIDS and Human Rights' *Office of the High Commissioner for Human Rights* (2008)

Okeyo, AP., 'Gender as a research problem' in Kann, U., Moods,G., & Synder, J., (eds) 'Gender dimensions of development research' A report from a workshop, NIR, University of Botswana (1987)

Okoth-Ogendo, H., 'The tragic African commons: A century of expropriation, suppression and subversion' PLAAS Occassional Paper No 24 (2002)

Panos Institute, 'Triple Jeopardy: Women and AIDS' Panos Publications Ltd (1990)

Parenzee, P., Artz, L., & Moult,K., 'Monitoring the implementation of the Domestic Violence Act, first report' Institute of Criminology, University of Cape Town (2001)

Pillay, K., Manjoo, R., & Paulus, E., 'Rights, roles and resources: An analysis of women's housing rights – implications of the Grootboom case –Women's Budget Initiative' Cape Town (2002)

Population Council, 'The implications of early marriage for HIV/AIDS policy' A study by Bruce, Judith and Shelley Clark, The Population Council (2004)

Population Information Program, Center for Communications Programs, The Johns Hopkins University Bloomberg School of Public Health, "Population Reports: Youth and HIV/AIDS," vol. XXIX, no. 3, Baltimore, MD (2001)

Report of the UN Secretary General to the UN General Assembly meeting issued on 16 February 2001, UN Doc.A/55/779

Richard, S., 'To have and to hold: Women's property and inheritance rights in the context of HIV/AIDS in sub-Saharan Africa' ICRW (2004)

Rivers, K., & Aggleton, P., 'Men and the HIV epidemic' New York, United Nations Development Programme (2001)

SADC press release, 'Launching of the SADC Report on the Expert Think Tank Meeting on HIV Prevention in the region' SADC (2006)

Schulman, A., & Nussbaum, MC., *Human dignity and bioethics: Essays commissioned by the President's Council on Bioethics* The President's Council on Bioethics (2008)

Scrimshaw, N., Taylor, C., & Gordon, J., 'Interactions of Nutrition and Infection' Geneva, World Health Organisation (1968)

Scully, D., and Marolla J., 'Convicted Rapists' Construction of Reality: The Denial of Rape.' Paper presented at the American Sociological Association meetings, San Francisco (1982)

Sexuality Information and education Council of the United States, 'Fact Sheet: The truth about condoms' SIECUS (2002)

Sisulu, L., 'Housing Annual Report 2007/2008' Department of Housing (2008)

South African Human Rights Commission, 'Provincial Findings in Preparation for the South African Human Rights Commission Public Enquiry into the Right to Have Access to Health Care Services' Synthesis Report, prepared by Antoinette Ntuli (2007)

South African Institute of Race Relations 'South Africa survey 376-378' Johannesburg, South African Institute of Race Relations (2003)

South African Institute of Race Relations,'Fast facts' Johannesburg, South African Institute of Race Relations (2005)

Special Rapporteur on Violence against Women, 'The due diligence standard as a tool for the elimination of violence against women' UN Doc.E/CN/2006/61 (2006)

Tallis, V., 'Treatment issues for women' Discussion Document produced for the Treatment Action Campaign (2001)

Tallis, V., 'Gender and HIV/AIDS: Overview report' Institute of Development Studies, UK (2002)

Thabo Mbeki, Address at the Inaugural Z.K. Matthews Memorial Lecture, University of Fort Hare (2001)

The Uganda AIDS Commission, 'The story of AIDS in Uganda' (2004)

Tsegaye, S., 'HIV/AIDS and the new face of orphanhood in Africa: The emerging challenge of children heading households' Unpublished paper delivered at the 3rd Annual World Conference on Children without Parental Care, Hague/Amsterdam, The Netherlands *(*2006*)*

UN Secretary-General, 'UN Secretary - general's study on violence against women, background documentation for 61st session of the General Assembly Item 60(a) on advancement of women' UN Document A/61/122/Add.1. 2006 (2006)

UN Special Rapporteur on Adequate Housing, 'Women and adequate housing.' UN Doc. E/CN.4/2006/118 (2006)

UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Intersections of Violence Against Women and HIV/AIDS (2005)

UNAIDS, 'Global Report' UNAIDS (2010)

UNAIDS, 'Report on the Global Aids Epidemic' UNAIDS (2004)

UNAIDS Meeting on women's inheritance, land and housing rights in the context of HIV/AIDS. The meeting took place at the 53rd session of the Commission on the Status on women, New York (2009)

UNAIDS, 'Accelerating action against AIDS in Africa' Geneva (2003)

UNAIDS, 'Global Report on HIV and AIDS' UNAIDS (2009)

UNAIDS, 'Global Report on the AIDS Epidemic' UNAIDS (2008)

UNAIDS, 'Report of the meeting. UNAIDS Reference Group on HIV and human rights. Seventh meeting' Geneva (2007)

UNAIDS, 'Report on the Global Aids Epidemic' UNAIDS (2006)

UNAIDS, 'Report on the Global HIV/AIDS epidemic' UNAIDS (2005)

UNAIDS, UNFPA, UNIFEM, 'Women and HIV/AIDS: Confronting the crisis' (2004)

UNFPA, ‘State of the world population: Gender inequality and reproductive health’ New York: United Nations Population Fund (2003)

UNFPA, ‘The right to reproductive and sexual health’ Statement by Dr. Nafis Sadik Executive Director, United Nations Population Fund at the Inter-Agency Symposium on Reproductive Health in Refugee Situations Geneva (1995)

UNFPA, 'Donor support for contraceptives and condoms for STI/HIV prevention’ UNFPA (2005)

UNICEF, ‘Africa’s orphaned generation’ New York, UNICEF (2003)

United Nations Centre for Human Settlements, ‘Women's rights to land, housing and property in post- conflict situations and during reconstruction: A global overview’ Nairobi, UNCHS (1999)

UNOCHA, ‘AFRICA: Focus on the "sugar daddy" phenomenon’ New York: United Nations Office for the Coordination of Humanitarian Affairs (2004)

USAID, ‘Conflict, Property Rights and Natural Resource Management in Northern Uganda’. Memo prepared by Peter Hetz and Renee Giovarelli for USAID. (2007)

USAID, ‘Women’s property and inheritance rights: A study of the impacts of USAID support in Eastern Africa’. Available at http://pdf.usaid.gov/pdf_docs/PNADT100.pdf. (Accessed 12 January 2011)

Van Nostrand, J. ‘Kampala urban study part II. Final report: Structure plan’ Kampala City Council, Kampala (1994)

Vetten, L., & Bhana, K., ‘Violence, vengeance and gender: A preliminary investigation into the links between HIV/AIDS and violence against women in South Africa’ Johannesburg, The Centre for the Study of Violence & Reconciliation (2001)

Wairimu Mwangi, E., 'Exploring linkages between agriculture and HIV/AIDS: A multilevel study of the impact of agricultural consumption regimes on women's vulnerability to HIV/AIDS in Kenya' (2009)

Walsh,J., 'Double standards: Women's property rights violations in Kenya' Human Rights Watch 15(5A) (2003)

Wellesley Center for Research on Women, 'Unsafe schools: Gender-based violence and its impact on girls' education and health: A literature review and analysis' USAID (2003)

Weiss, E., & Gupta, GR., 'Bridging the gap: Addressing gender and sexuality in HIV prevention' Washington, DC, International Center for Research on Women. (1998)

WHO, 'Closing the gap in a generation: Health equity through action on the social determinants of health' Geneva, WHO (2008)

WHO 'What do we mean by "sex" and "gender"?' Geneva, WHO (2010)

WHO, 'World report on violence and health' Geneva, WHO (2002)

WHO, 'Gender and health: A technical paper' Geneva, WHO (1999)

WHO, 'Gender dimensions of HIV status disclosure to sexual partners: Rates, barriers and outcomes' Geneva, WHO (2004)

WHO, 'Globalization, TRIPS and access to pharmaceuticals' Policy Perspectives on Medicines Series No.3 March (2001)

WHO, 'Multi-country study on women's health and domestic violence against women' Geneva, WHO (2005)

WHO, 'Nutrient requirements for People Living with HIV/AIDS: Report of a technical consultation' Geneva, WHO (2003)

WHO, ‘The world health report 2008: primary health care (now more than ever)’ Geneva, WHO (2008)

WHO, ‘The world health report’ Geneva, WHO (1998)

WHO, ‘Women and health: Today’s evidence tomorrow’s agenda’ Geneva, WHO: (2009)

WHO, 'Sexual health-a new focus for WHO’ Geneva, WHO (2004)

World Bank, ‘Uganda's AIDS Crisis: Its implications for development’World Bank Discussion Paper no.298 (1995)

WHO, ‘Health Action in Crises: UGANDA’ (2007)

Young, D., ‘Domestic violence and the spread of HIV/AIDS among married Women’ Paper presented at the annual meeting of the Law and Society Association, TBA, Berlin, Germany (2007)

Zeidenstein, S.,& Moore, K., ‘Learning about sexuality: A practical beginning’ New York, Population Council (1996)

5. INTERNET, NEWSPAPERS AND OTHER MEDIA SOURCES

Albertyn, C., ‘Prevention, treatment and care in the context of human rights’, Centre for Applied Legal Studies, University of Witswatersrand, South Africa. Available at http://www.un.org/womenwatch/daw/csw/hivaids/albertyn.html. (Accessed 12 January 2010].

Africa Recovery, ‘Africa’s capacity to deliver is huge’ *Africa Recovery*, June 2011. Available at http://www.un.org/ecosocdev/geninfo/afrec/vol15no1/15no1pdf/151aids3.pdf. (Accessed 12 March 2011)

Annan, K., ‘In Africa, AIDS has a woman's face’ *New York Times International Herald Tribune*, 29 December 2002. Available at http://www.un.org/News/ossg/sg/stories/sg-29dec-2002.htm (Accessed 10 April 2011)

Amnesty International, ‘Women, HIV/AIDS and human rights (24 November 2004) AI Index: ACT 77/084/2004. Available at www.amnesty.org. (Accessed 21 June 2009)

Cameron, E., ‘Legal and human rights responses to the HIV/AIDS epidemic in South Africa’ Available at http://law.sun.ac.za/judgecameron.(Accessed 20 September 2009)

Carol, H., "Hanisch, New Intro to "The Personal is Political" - Second Wave and Beyond". The Personal Is Political. http://scholar.alexanderstreet.com/pages/viewpage.action?pageId=2259. (Accessed 28 January 2010)

De Bruyn, M., ‘Gender, adolescents and the HIV/AIDS epidemic: the need for comprehensive sexual and reproductive health responses’, Ipas. Available at http://www.un.org/womenwatch/daw/csw/hivaids/De%20bruyn.htm. (Accessed 28 January 2010)

Dixon, R., & Nussbaum, M., ‘Abortion, dignity and a capabilities approach’ Public law and legal theory working paper No. 345, March 2011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799190 ((Accessed 19 April 2011)

Drimie, S., ‘The impact of HIV/AIDS on land: Case studies from Kenya, Lesotho, and South Africa.’ Southern African Regional Office of the Food and Agricultural Organization of the United Nations. (2002) Available at http://www.sarpn.org.za/documents/d0000147/P143_Impact_of_HIVAIDS.pdf. (Accessed 28 January 2010)

Forrest, D., ‘Behind the smokescreen’ *Mail and Guardian* (26 October 2001)

Garrett, J., ‘Martha Nussbaum on capabilities and human Rights’ (2008) Available at http://people.wku.edu/jan.garrett/ethics/nussbaum.htm. (Accessed 12 February 2010)

Green, EC., & Berman, J., 'Liaisons fuelling AIDS in Africa' *The Washington Times* (28 December 2003)

Griffin, S., 'Literature written by on Universal Access to sexual and reproductive health services. (2006) Available at http://www.realising-rights.org/docs/SRH%20Literature%20review.pdf. (Accessed 14 November 2010)

Hampton, J., 'Living positively with AIDS: the AIDS Support Organization (TASO), Uganda.' Available at http://www.cababstractsplus.org/abstracts/Abstract.aspx?AcNo=19926714066. (Accessed 12 December 2010)

ICRW 'Connecting rights to reality: A progressive framework of core legal protections for Women's Property Rights' Available at www.icrw.org. (Accessed 12 November 2010)

IWC,'Child marriage: An overview' International Women's Coalition. Available at http://www.iwhc.org/resources/childmarriagefacts.cfm. (Accessed 16 July 2007)

Leclerc-Madlala, S., 'Masculinity and AIDS in KwaZulu Natal: A treatise, (2005). Available at http://quod.lib.umich.edu/p/passages/4761530.0010.015?rgn=main;view=fulltext. (Accessed 20 January 2010)

Manuh, T., 'Women in Africa's Development: Overcoming Obstacles, Pushing for Progress.'1998. Available at http://www.un.org/ecosocdev/geninfo/afrec/bpaper/maineng.htm (Accessed 12 November 2010)

McGreal, C., 'Thabo Mbeki's catastrophe' (2002) *Prospect* 42

Mireku, O.,' Judicial balancing of parallel values: Male rimogeniture, gender equality and chieftaincy succession in South Africa' Paper available at

http://www.enelsyn.gr/papers/w14/Paper%20by%20Prof%20Obeng%20Mireku.pdf. (Accessed 2 April 2011)

Moupali, D., 'Patriarchy and Health: Women and the World AIDS Epidemic'. Available at http://www.digitas.harvard.edu/~perspy/old/issues/1996/may/wldaids.html. (Accessed 07 May 2009)

Nordenberg, T., 'Condoms: barriers to bad news' *FDA Consumer Magazine* (March-April, 1998)

Obando, A 'How effective is a human rights framework in addressing gender-based violence?' (2004) *WHRnet* available at www.awid.org/eng/Issues-and-Analysis/Library/How-Effective-is-a-Human-Rights-framework-in-addressing-Gender-based-Violence (Accessed 12 November 2010)

Sacchetti, F., 'Martha Nussbaum and the defense of "Aristotelian essentialism'. Available at http://www.imtlucca.it/_documents/courses/005794-ABF9J-.pdf. (Accessed 16 April 2011)

Stone. A., 'Essentialism and anti-essentialism in feminist philosophy'. Available at http://eprints.lancs.ac.uk/34/2/Microsoft_Word_-_E9130088.pdf. (Accessed 10 April 2011)

Vanessa, VS., 'The Domestic Relations Bill in Uganda: Potential for addressing polygamy, bride price, cohabitation, marital rape, widow inheritance, and female genital mutilation'. 2008. Available at http://www.preventgbvafrica.org/content/domestic-relations-bill-uganda-addressing-polygamy-bride-price-cohabitation-marital-rape-and. (Accessed 15 November 2009)

Vearey, J., Núñez , L., & Palmary, I., 'HIV, migration and urban food security: exploring the linkages in Johannesburg, South Africa' May 2009. Available at http://www.database.ruaf.org/ruaf_bieb/upload/3138.pdf (Accessed 12 November 2010)

6. UNPUBLISHED THESES AND DISSERTATIONS

Amollo, R., 'A critical reflection on the African Women's Protocol as a means to Combat HIV/AIDS among Women in Africa' *Unpublished master's thesis, University of Pretoria, 2006*

Combrinck, H., 'The role of international human rights law in guiding the interpretation of women's right to be free from violence under the South African Constitution' *Unpublished doctorate thesis, University of the Western Cape, 2010*

Forman., L., 'A transformative power? The role of the human right to medicines in accessing AIDS medicines: International human rights law, TRIPS and the South African experience' *Unpublished doctorate thesis, University of Toronto, 2007*

Pieterse, M., 'A benefit-focused analysis of constitutional health rights' *Unpublished doctorate thesis, University of Witwatersrand, 2005*

Salcedo, MO., 'Discourse and disease: An analysis of Thabo Mbeki's position on AIDS, 2000-2004' *Unpublished master's thesis, University of Witwatersrand, 2004*

Van der Poll, L., 'The constitutionality of pornography' *Unpublished doctorate thesis, University of Stellenbosch, 2001*

Woods, LN., 'HIV, sex and poverty in sub-Saharan Africa: Why the condom doesn't protect women from the AIDS virus' *Unpublished master's thesis*, *University of London, 2009*

7. INTERNATIONAL AND REGIONAL TREATIES, INSTRUMENTS AND DOCUMENTS

African Charter on Human and Peoples' Rights, 1981

African Charter on the Rights and Welfare of the Child, 1990

Agenda 21, 1992

Alma Ata Declaration, 1978

Beijing Declaration and Platform for Action, Fourth World Conference on Women, 1995

CEDAW General Recommendation 19: Violence against women, 1992

CEDAW General Recommendation 24: Women and Health, 1999

CEDAW General Recommendation 25: Temporary special measures, 2004

CESCR Concluding Observations: Australia, UN Doc. No. E/C.12/AUS/ CO/4, 2009

CESCR Concluding Observations: Brazil, UN Doc. No. E/C.12/BRA/CO/2, 2009

CESCR Concluding Observations: Canada, UN Doc. No. E/C.12.CAN/CO/4, 2006

CESCR Concluding Observations: Colombia, UN Doc. No. E/C.12/1/Add.74, 2001

CESCR Concluding Observations: Ecuador, UN Doc. No. E/C.12/1/Add.100, 2004

CESCR Concluding Observations: United Kingdom, UN Doc. No. E/C.12/ GBR/CO/5, 2009

CESCR General Comment 14: The right to the highest attainable standard of health, 2000

CESCR General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights, 2005

CESCR General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights, 2009

CESCR General Comment 28: Equality of rights between men and women, 2000

CESCR General Comment 3: The nature of States parties' obligations, 1991

CESCR General Comment 4: The right to adequate housing, 1991

CESCR General Comment 7: The right to adequate housing: forced evictions, 1997

CESCR, General Comment No. 11: Plans for primary education, 1999

CESCR, General Comment No. 12: The right to adequate food, 1999

CESCR, General Comment No. 13: The right to education, 1999

CESCR, General Comment No. 15: The right to water, 2000

CESCR, General Comment No. 4: The right to adequate housing, 1991

Cessation of Hostilities Agreement August 2006

Charter of the United Nations, 1945

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on the Rights of Persons with Disabilities, 2006

Convention Relating to the Status of Refugees, 1951

CRC General Comment 3: HIV/Aids and the rights of the child, 2003

CRC General Comment 4: Adolescent health and development, 2004

Declaration of Commitment on HIV/AIDS, 2001

Declaration on the Elimination of Violence Against Women, 1993

Doha Declaration on the TRIPS Agreement and Public health, WTO Ministerial Declaration on the TRIPS Agreement and public health, 2001

Global Strategy for Shelter to the year 2000, 1988

Habitat Agenda, 1996

HRC General Comment No 18: Non-discrimination, 1989

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 1994

International Conference on Population and Development, 1994

International Convention on the Elimination of all Forms of Racial Discrimination, 1965

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990

International Covenant on Economic, Social and Cultural Rights, 1966

International Covenant on Civil and Political Rights, 1966

International Guidelines on HIV/AIDS and human rights, 1997

International guidelines on HIV/AIDS: Revised Guideline 6, 2002

Istanbul Declaration on Human Settlements, Habitat III, 1996

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

Trade-Related Aspects of Intellectual Property Rights Agreement. 1994

UN Convention on the Rights of the Child, 1989

UN Millennium Development Goals

Universal Declaration of Human Rights, 1948

Vancouver Declaration on Human Settlements, 1976

Vienna Convention on the Law of Treaties, 1969

WHO Constitution, 1946

WHO Model List of Essential Medicines, March 2007

8. LEGISLATION

South Africa

Medicines and Related Substances Act No 90 of 1997

National Health Act 61 of 2003

Promotion of Administrative Justice Act 3 of 2000

Prevention of Illegal Eviction from Unlawful Occupation of Land Act No 19 of 1998

Recognition of Customary Marriages Act No 120 of 1998

Rental Housing Act No 50 of 1999

Social Assistance Act 59 of 1992

Social Assistance Act Regulations of 1998

Traditional Leadership and Governance Framework Act 41 of 2003

9. CASE LAW

African Commission on Human and Peoples' Rights

Purohit and Moore v The Gambia Communication 241/2001 (2003) AHRLR 96 (ACHPR 2003)

Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria (SERAC Case) (155/96) (2003) 10 IHRR 282 (ACmHPR)

Inter-American court of Human Rights

Velasquez Rodrigues v Honduras Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)

Australia

Department of Health v JWB (Marions's case) (1992) 175 C.L.R. 218

Canada

Andrews v Law Society of British Columbia [1989] 1 SCR 143

Miron v Trudel [1995] 2 S.C.R

R v Kapp 2008 SCC 41

India

Paschim Banga Khet Mazdoor Samity v State of West Bengal [1996] ICHRL 31 (6 May 1996) [Supreme Court of India]

People's Union for Democratic Rights and Others v Union of India and Others (1982) 3 SCC 235

Tellis and Others v Bombay Municipal Corporation and Others (1987) Law Reports of the Commonwealth (Const.) 351

South Africa

August v Electoral Commission 1999 (3) SA 1 (CC)

Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)

Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC)

City of Cape Town v Rudolf 2004 (5) SA 39 (C)

Dawood v Minister of Home Affairs 2000(3) SA 939

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa 1996 (4) SA 744 (CC)

Fraser v Children's Court, Pretoria North 1997 (2) BCLR 153(CC), 1997 (2) SA 261(CC)

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

Gumede v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC)

Hoffmann v South African Airways 2000 (2) SA 628 (W)

Jaftha v Schoeman; Van Rooyen v Stolz 2005 (2) SA 140(CC)

Kaunda v President of the Republic of South Africa 2005 (4) SA 235 (CC)

Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae) [2009] ZACC 28

Minister of Finance v Van Heerden 2004 (11) BCLR 1125 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 5 SA 721 CC

Modderklip Boerdery (Pty) Ltd v Modder East Squatters 2001 (4) SA 385 (W)

Mthembu v Letsela and Another 2000 (3) SA 867 (SCA)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008(3) SA 208 (CC)

Pharmaceutical Manufacturers' Association v President of the Republic of South Africa TPD 4183/98

Pharmaceutical Society of South Africa v Tshabalala-Msimang 2005 (2) SA 530 (C)

Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa v Minister of Health 2005 (3) SA 238 (SCA)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

President of the Republic of South Africa v Hugo 1997(6) BCLR 708 (CC)

President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd 2005 (5) SA 3 (CC)

Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail 2005 (4) BCLR 301 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister of Housing and Minister of Local Government and Housing, Western Cape 2009 (9) BCLR 847 (CC)

S v Baloyi 2000 (2) SA 425 (CC)

S v Engelbrecht 2005 (2) SACR 41 (WLD)

S v Ferreira 2004 (2) SACR 454 (SCA)

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22

S v Makwanyane 1995 (3) SA 391

S v Mamabolo 2001 (3) SA 409 (CC)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

Tongoane and Others v Minister for Agriculture and Land Affairs and Others, Case No 11678/2006

Tongoane and Others v Minister for Agriculture and Land Affairs and Others, Case No 11678/2006, North Gauteng High Court, Pretoria, 30 October 2009, unreported

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10 (11 May 2010)

Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC)

Zimbabwe

Magaya v Magaya 1999) 3 L.R.C 35

10. CONFERENCES, SEMINARS, WORKSHOPS ATTENDED BY AUTHOR

Conference: XVIII International AIDS Conference. *Organised by the International AIDS Society, Vienna, Austria, 18 -23 July 2010*

Conference: 2nd Private Sector Conference on HIV/AIDS. *Organised by the South African Business Coalition on HIV/AIDS (SABCOHA), Gauteng, South Africa, 5-6 November 2008*

Conference: Ensuring public participation in service delivery: Strengthening the realisation of socio-economic rights. *Organised by the Socio-Economic Rights project of the University of the Western Cape, Cape Town, 31 July 2008*

Conference: HIV in the workplace: African challenges, African solutions. *Organised by Intervention Africa Consultants, Johannesburg, 28 – 29 August 2008*

Conference: Reflecting on Africa's Riches: resources, conflict and exploitation. *Organised by the Humanities Centre, University of Alberta, Edmonton, Canada together with the Canadian Association of African Studies, 1-4 May 2008*

Conference: The AWID International Forum on Women and Development. *Organised by the Association of Women in Development. Cape Town, South Africa 14-17 November 2008*

Public Discussion: Recognition of Customary Marriages: Polygyny and Women's rights to Equality. *Organised by the Women's Legal Centre, Cape Town, 19 February 2010*

Public hearing: The Millennium Development Goals and the realisation of economic and social rights in South Africa. *Organised by the South African Human Rights Commission. Johannesburg, 8 – 12 June 2009*

Seminar: Women, land rights and customary law. *Organised by the Institute for Poverty, Land and Agrarian Studies. University of the Western Cape, 10 September 2009*

Seminar: Can Women Ever Become Modern. Organised by Women and Gender Studies and the Centre for Humanities Research, University of the Western Cape, *2 March 2010*

Seminar: Entering the informal settlement debate in South Africa through the perspective of HIV/AIDS. *Organised by the Institute for Land and Agrarian Studies, University of the Western Cape, 13 March 2008*

Seminar: SADC Protocol on Gender and Development. *Organised by Gender Advocacy programme and the Commission on Gender Equality, Cape Town,19 November 2009*

Symposium: Ethno-Cultural Diversity in Health and Social Care. *Organised by the Faculty Nursing, University of Alberta, April 2008*

Workshop: National Health Insurance in South Africa: Implications for Medical and Dental Practitioners. *Organised by the Colleges of Medicine of South Africa, Cape Town, 21 October 2009*

Workshop: Securing socio-economic rights in Southern Africa: Learning from practice-improving strategy. *Organised by the Norwegian Centre for Human Rights in Association with the Institute for Poverty, Land and Agrarian Studies and Legal Resources Centre. Cape Town, 31 August-2 September 2009*

Workshop: Sexual Offences: Adult Prostitution. *Organised by the South African Law Reform Commission, Cape Town 28 May 2009*

Workshop: Social movements and poverty reduction in South Africa. *Organised by the Institute for Land and Agrarian Studies, University of the Western Cape, Cape Town, 13 August 2008*

Workshop: Workshop of the Canadian Legal HIV/AIDS Network. *Organised by the Canadian HIV/AIDS Legal Network, The Canadian Working Group on HIV and Rehabilitation (CWGHR) and The Interagency Coalition on AIDS and Development. Ottawa, Canada, 16–17 June 2008*