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# TILL DEATH DO US PART: MARRIAGE, HIV/AIDS AND THE LAW IN ZIMBABWE

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## INTRODUCTION: PUTTING HIV/AIDS AND MARRIAGE INTO CONTEXT: WHAT IS THE PROBLEM?

The first AIDS case in Zimbabwe was identified in 1985.<sup>1</sup> While initially HIV/AIDS was not taken seriously, as its impact began to be felt, many initiatives on prevention, care and mitigation were put in place. Despite all these initiatives, HIV/AIDS continues to take its toll on Zimbabwean society. Statistics consistently point to one reality: the disproportionate effect of HIV/AIDS on women.<sup>2</sup> In many countries, marriage and women's own fidelity are not enough to protect them against HIV infection. Among young women surveyed in Harare (Zimbabwe), Durban and Soweto (South Africa), 66% reported having one lifetime partner and 79% had abstained from sex until at least the age of seventeen—roughly the average age of first sexual encounter in most countries in the world.<sup>3</sup> Yet, 18-

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<sup>1</sup> See UNIVERSITY OF CALIFORNIA, SAN FRANCISCO, AIDS POLICY RESEARCH CENTER, COUNTRY AIDS POLICY ANALYSIS: HIV/AIDS IN ZIMBABWE, available at [http://ari.ucsf.edu/programs/policy\\_country.aspx](http://ari.ucsf.edu/programs/policy_country.aspx).

<sup>2</sup> See *id.* The AIDS Policy Research Center develops and disseminates up-to-date analysis of HIV/AIDS in twelve USAID priority countries: Ethiopia, Kenya, Malawi, Senegal, South Africa, Uganda, Tanzania, Zambia, Zimbabwe, Brazil, Cambodia, and India. According to the statistics for the year 2000, 35% of women attending antenatal clinics in Zimbabwe were infected with HIV. The prevalence rate in 2000 was the highest at 34%. In 2001, it dropped to 30% and in 2002 to 25.7%. Based on these figures, 24.9 % of Zimbabwean adults are HIV-positive. Of the estimated 2.3 million people living with AIDS at the end of 2001, 60% were women.

<sup>3</sup> Global Coalition on Women and AIDS, *The Female AIDS Epidemic: 2005 Statistics*, [hereinafter *Female AIDS Epidemic: 2005 Statistics*] available at <http://womenandaids.unaids.org>. See also UNAIDS, 2004 REPORT ON THE GLOBAL AIDS EPIDEMIC 9, available at

20% of the young women were HIV-positive.<sup>4</sup> Many were infected despite staying faithful to one partner.<sup>5</sup> While husband and wife take vows to remain together until death, married women in Zimbabwe paradoxically are facing death from HIV/AIDS related illness more than any other group.<sup>6</sup> Marriage literally leads them to the grave. The real cause of death is rarely cited at funerals, because HIV/AIDS brings shame for its relation to sexual activity. The person living with AIDS (PLWA) is blamed for the infection; instead, the cause of death is given as “headache,” “liver failure,” “short illness,” or even witchcraft. This ignores the fact that married women are dying more than any other group from HIV/AIDS.

It is this writer’s hypothesis that laws, cultural practices and beliefs governing and surrounding marriage increase the incidence of and predispose married women to HIV infection. Sometimes semiautonomous social fields such as family and religion are so dominant that progressive laws such as the criminalization of marital rape only exist in the books.<sup>7</sup> The answer to curbing the spread of HIV/AIDS does not lie in changing or passing new laws but in gender equity and equality. Gender equity in Zimbabwe should not be looked at just from the point of view of redressing inequalities but as a radical transformation of gender relations. The objectives of this article are therefore to examine the correlation between laws, policies, and cultural practices relating to marriage that predispose women to infection, and to suggest transformative gender equity as the key to protecting women. Though curbing infection has been traditionally discussed in terms of altering power relations between men and women, no study in Zimbabwe has focused solely on marriage, HIV/AIDS, and the law.

This article is divided into six parts. Part I will examine the methodology and theoretical perspectives relevant to this article. While there are variances between feminist schools of thought, the underlying theme is that of skewed power relations. Part II will examine the marriage laws and cultural practices in Zimbabwe. Issues covered will be the different laws governing marriages, adultery, condom use, *lobola*, or bride price, virginity testing, pregnancy, menstruation, and dry sex. Part III will examine domestic violence, marital rape, and HIV/AIDS. This is an important issue, especially in view of the fact that Zimbabwe does not

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[http://www.unaids.org/bangkok2004/GAR2004\\_html/GAR2004\\_00\\_en.htm](http://www.unaids.org/bangkok2004/GAR2004_html/GAR2004_00_en.htm).

<sup>4</sup> *Id.* at 31.

<sup>5</sup> See *Female AIDS Epidemic: 2005 Statistics*, *supra* note 3.

<sup>6</sup> In 1992, over 50% of the 6,500 women who tested positive for HIV/AIDS at the National Public Health Laboratory were married. Men are more likely to have multiple partners outside of marriage and the wives have little bargaining power to negotiate condom use. Mary Basset, *Zimbabwe: The Social Roots of AIDS*, UNESCO COURIER, June 1995, available at [http://findarticles.com/p/articles/mi\\_m1310?is\\_1995?June?ai\\_17328356](http://findarticles.com/p/articles/mi_m1310?is_1995?June?ai_17328356).

<sup>7</sup> The theory of semiautonomous social fields is usually linked to Pierre Bourdieu and is often used in the social science area. For marriage, structures such as the family and the church—cultures which are not necessarily controlled by the state—can actually be more dominant and influential than laws. See Marc Angenot, *Social Discourse Analysis: Outlines of a Research Project*, 1 *Discours Social* 1 (1988), reprinted in 17 *Yale J. Criticism* 199-215 (2004).

have a specific law against domestic violence. Though the law criminalizes marital rape, it still occurs and is almost impossible to prevent. Part IV will discuss the thorny issue of confidentiality and HIV/AIDS infection. There does not seem to be consensus on such issues as spousal notification and confidentiality. Part V will examine the issue of willful transmission. While willful transmission is criminalized in Zimbabwe, there is not yet a body of jurisprudence addressing it. Part VI will look at property rights and how the marginalization of women leads them to engage in transactional sex. The paper will conclude by making a case for gender equity as the answer to protecting married women from HIV/AIDS infection.

### I. IN SEARCH OF RIGHT METHODS

Researching and writing on HIV/AIDS is not an easy task. It becomes of paramount importance to adopt an appropriate methodology and theoretical framework. As aptly stated by the Women and Law in Southern Africa (WLSA), “[t]he theoretical perspectives and attendant methodologies that are adopted for... research... determine not only the issues that are to be pursued but what will be revealed through the research.”<sup>8</sup>

The writer prefers to refer to herself as a feminist but is cognizant of the fact that there are variances in the feminist movement. Be that as it may,

there is a general consensus that the feminist methodological stance is focused on uncovering the social relations which deny the lived realities of oppressed groups, particularly women. Additionally, research is intended to be emancipatory, to enable women and others to be active agents in their own right. There is also an acknowledgment that research *for* (rather than *on*) women ought to be attentive to power relations between “subjects” and “researchers.”<sup>9</sup>

The writer has also been influenced by the WLSA brand of an African feminist framework, which moves away from the legal centrist approach and recognizes that apart from the law, there are other influences—such as the customary regimes operating in southern Africa where Zimbabwe is located—that affect women.<sup>10</sup> Taking a cue from the Scandinavian women’s law approach, WLSA further puts the woman at the center of any research.<sup>11</sup> The research for this Article

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<sup>8</sup> WLSA, PAVING A WAY FORWARD: A REVIEW AND RESEARCH PRIMER OF WLSA RESEARCH METHODOLOGIE 17 [hereinafter WLSA: PAVING A WAY FORWARD] (1997) *information available at* <http://www.wlsa.org.zm/pubs2.htm> (on file with author).

<sup>9</sup> PENELOPE IRONSTONE-CATTERALL ET AL, FEMINIST RESEARCH METHODOLOGY AND WOMEN’S HEALTH: A REVIEW OF LITERATURE, <http://www.yorku.ca/nnewh/English/pubs/workpap2.pdf>, at 7 (last visited Oct. 4, 2006).

<sup>10</sup> See WLSA: PAVING A WAY FORWARD, *supra* note 8, at 17 (describing the significance of a researcher’s perspective).

<sup>11</sup> Tove Stang Dahl is recognized as a major authority on the women’s law approach. This perspective is based on the need to juxtapose theoretical versions of the lives of women with the lived realities. See Jane E. S. Fortune, *Women’s Law: An Introduction to Feminist Jurisprudence*, 38 INT’L

also made use of traditional sources such as textbooks, journals, and case law.

For any feminist in Zimbabwe, the first major challenge lies in legal pluralism. Zimbabwe does not have a unitary legal system. Instead, Zimbabwe's sources of law are statutes, customary law, precedents and Roman Dutch Law, often referred to as general law.<sup>12</sup> The application of general or customary law depends on the particular circumstances of the case. The customary law system entails recognition of the established customs and practices of the community. These practices are recognized as laws binding on the community and as a source for part of the prevailing legal system.<sup>13</sup> Customary law is unwritten and its interpretation depends on a particular tribe. There is also the added danger that it can be interpreted to suit a particular situation, to the detriment of women. Most customary practices and norms were premised on the assumption that women are "perpetual minors," and as such women have been disadvantaged in many respects.<sup>14</sup> These cultural prejudices against women include a perpetuation of the dependency syndrome of women through their perceived incapacity to own property in their own right; lack of priority in educational and career opportunities in favor of gender roles; and lack of control over their reproductive rights, manifesting itself in practices such as payment of *lobola*. *Lobola*, simply put, is the bride price that a suitor pays to the family of the woman.<sup>15</sup> Other practices include *nhaka*—wife inheritance<sup>16</sup>—and *ngozi*—appeasing of avenged spirits by submission of the girl-child as a means of payment or compensation.<sup>17</sup>

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& COMP. L.Q. 466 (1989) (reviewing TOVE STANG DAHL, *WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (1989)), for an in depth look on the women's law approach.

<sup>12</sup> See generally CIA: The World Factbook [hereinafter The World Factbook], at <https://www.cia.gov/cia/publications/factbook/geos/zi.html#Govt>.

<sup>13</sup> Zimb. Const., Ch. 8 § 89 reads:

Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope (South Africa) on 10<sup>th</sup> June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

<sup>14</sup> For example, under customary law, women were not allowed to own land in their own right. They could only get user rights. For a discussion of land tenure rights, see generally WLSA, *A CRITICAL ANALYSIS OF WOMEN'S ACCESS TO LAND IN THE WLSA COUNTRIES* (2001) (on file with author).

<sup>15</sup> WLSA, *LOBOLA: ITS IMPLICATIONS FOR WOMEN'S REPRODUCTIVE RIGHTS IN BOTSWANA, LESOTHO, MALAWI, MOZAMBIQUE, SWAZILAND, ZAMBIA, AND ZIMBABWE* 19 [hereinafter WLSA: *LOBOLA*] (2003) (on file with author).

<sup>16</sup> *Nhaka*, or levirate marriage, is the practice whereby a widow is inherited by the brother or nephew of her late husband. The practice is generally common among African tribes in Zimbabwe, though how it is conducted differs from tribe to tribe. See University of Manitoba, *Levirate Marriage*, <http://www.umanitoba.ca/anthropology/tutor/marriage/levirate.html> (last visited Oct. 4, 2006).

<sup>17</sup> It is a cultural belief that when a person is murdered, his/her spirit will not rest: It will come back to haunt the family of the murderer. Such a family may experience unexplained deaths, loss of cattle or property, and general misfortune. The only way to stop this is to give the family of the murdered victim a young girl as compensation. See Brain Goercke, *The Impact of Traditional Shona Beliefs on HIV/AIDS Intervention* (June 3, 2004) (unpublished M.A. thesis, Duquesne University), available at

Although general law takes precedence over customary practices, some of the general laws are either difficult to implement from a practical point of view, or negated by the societal beliefs and customs in their effectiveness. For instance, although the Customary Marriages Act outlaws pledging of girls for purposes of marriage, this practice is still taking place among some tribes. In addition, general law does not apply in certain instances where its application is ousted by statute.<sup>18</sup> Several other factors such as physical/biological factors, economic factors, and cultural practices predispose women and the girl-child to HIV infection.

Case studies provide a glimpse on how courts treat women's issues and ultimately what value they place on gender. In the case of *State v. Gambanga*,<sup>19</sup> the accused person was charged with murdering his wife in cold blood.<sup>20</sup> He alleged that his wife who worked for a non-profit organization was always away from home, had engaged in an extramarital affair, and had infected him with a sexually transmitted disease.<sup>21</sup> He was sentenced to eleven years imprisonment with labor.<sup>22</sup> The court surmised that he was suffering from diminished responsibility.<sup>23</sup> The *Gambanga* case ordinarily would have resulted in a death sentence; however, the court judgment reflects gender bias and mirrors the attitudes influenced by socialization that a woman's place is in the home. Statements such as "his wife had been involved in a number of women's organizations"<sup>24</sup> pay little regard to the fact that she was doing her job and was bringing food to the table for her family.

In her article "Domestic Violence in the African Context," Cynthia Grant Bowman states that "theoretical grounding of domestic violence work has important implications for the remedial strategies chosen to address the problem, and especially whether it is seen as an aspect of a large struggle for gender equality."<sup>25</sup> She identifies five theories as having emerged from African literature: rights-based theories, feminist theories, cultural explanations, society in transition, and culture of violence.<sup>26</sup> Yet another theory which has gained credence in the

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<http://etd1.library.duq.edu/theses/available/etd-06042004-105246/unrestricted/shonaculture.pdf> (last visited Oct. 4, 2006).

<sup>18</sup> WLSA, IN THE SHADOW OF THE LAW: WOMEN AND JUSTICE DELIVERY IN ZIMBABWE 10 (2000) (on file with author).

<sup>19</sup> 1997 (2) ZIMBABWE LAW REPORT 1 [hereinafter *Gambanga*].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Gambanga* at 3.

<sup>25</sup> Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 AM. U.J. GENDER SOC. POL'Y & L. 847, 848 (2003) (citing ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 23 (2000)).

<sup>26</sup> *Id.* at 849-850. In terms of cultural theory, some things are regarded as normal and acceptable. For example, a man is expected to have multiple sexual partners. Feminist theories base their approach on inherent gender inequality between the sexes. For societies in transition, there is usually conflict between traditional and modern life. Men cannot cope with the new woman who is

United States is the dominance theory. Catharine Mackinnon has been described as “the most prominent and persistent advocate” of the dominance theory.<sup>27</sup> This approach “recognizes and challenges a pervasive system of gender hierarchy. It is a more sophisticated way of thinking about sex inequality, in that it critically examines, rather than seeks to obtain the status quo.”<sup>28</sup> Rand explains the dominance theory by contrasting it with the difference approach which “simpl[y] argues that women should be permitted to compete with men on equal terms in the public world.”<sup>29</sup> The theory presents a double standard in that while women and men should be treated the same, women demand special treatment because of their biological differences with men. Structural forces and other social inequalities are not considered; men are used as the yard stick.<sup>30</sup> Using the sameness theory for HIV/AIDS, for instance, both men and women are expected to be able to negotiate condom use within relationships. This ignores the fact that apart from the high cost of the female condom, it is not always easy for a woman to use it or to persuade her partner to wear one. Women’s subordination is due to their status as women and

Given that women are not situated similarly to men, but rather are socially unequal, looking at women one at a time rather than as women ensures that it is only the exceptional woman who escapes gender inequality enough to be able to claim she is injured by it. It seems that we already have to be equal before we can complain of inequality.<sup>31</sup>

The dominance approach is underpinned by power and identifies “the problem as not that the sexes have been treated differently, but that one group (men) has dominated the other (women). Thus, the recognition that men and women occupy unequal positions of power in society is the fundamental underpinning the dominance approach.”<sup>32</sup>

In Zimbabwe, the dominance approach is clearly illustrated within the realm of culture and religion. Due to inequalities in the economic sphere, most women find themselves at the mercy of husbands for their day to day livelihood. The dominance approach explains why society tolerates men having extra marital

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working and earning her own salary. For a culture of violence, it is accepted that African men will use violence to resolve disputes.

<sup>27</sup> Kathryn R.L. RAND, *Making a Real Difference: The Dominance Approach in the Opinions of Justice Beryl J. Levine*, 72 N.D. L.Rev. 1031, 1031 (1996) (citing Cass R. Sunstein, *Feminism and Legal Theory*, 101 Harv. L. Rev. 826, 829 (1988) (reviewing Catharine A. MacKinnon, *Feminism Unmodified* (1987)). See also KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (1993).

<sup>28</sup> See RAND, *supra* note 27, at 1031.

<sup>29</sup> *Id.* at 1032.

<sup>30</sup> See Catharine A. Mackinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286-89 (1991), for a fuller discussion on the difference/sameness theory.

<sup>31</sup> See RAND, *supra* note 27, at 1033.

<sup>32</sup> *Id.* at 1035.

relationships but not women. Women are bound to stay in a marriage at any cost, even if their husband is HIV positive. The dominance approach also has its roots in religion. It emanates from the biblical teachings that wives should submit to their husbands and that the latter is the head of the house.<sup>33</sup> Zimbabwe is predominantly a Christian country.<sup>34</sup> Many women belong to Christian groups within their churches where the message of dominance is preached. In Zimbabwe, it is difficult to compete with religion. The first port of call for an abused Zimbabwean woman, just as for the African American woman, is the church. However, “most churches are patriarchal and use the scriptures to rationalize that a woman should stay and try to work out the problems of her marriage because she is subordinate under the word of God to her husband.”<sup>35</sup> Therefore, in the discourse on marriage and HIV/AIDS in Zimbabwe, it is important to note the various perspectives as they ultimately affect how issues are viewed and dealt with.

## II. MARRIAGE AND LAW IN ZIMBABWE

### *A: The Marriage Regime in Zimbabwe*

Zimbabwe lies in sub-Saharan Africa which is the “only region in the world where more women than men are infected with HIV. More than half of people living with AIDS in this region are women. Adult women in sub-Saharan Africa are 1.3 times more likely to be infected with AIDS than their male counterparts”<sup>36</sup> As already noted, marriage does not protect women against infection. In view of this observation, it is of paramount importance to examine the marriage regime in Zimbabwe. This regime, more than any other area, exposes the challenges posed by legal pluralism.

Zimbabwe has only two forms of recognized registered marriages. The first one is the monogamous marriage entered into under the Marriage Act.<sup>37</sup> Such a marriage is monogamous and is conducted either by a church Minister who is a registered marriage officer or by a magistrate. The second registered marriage is potentially polygynous and is entered into under the terms of the Customary

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<sup>33</sup> See *Ephesians* 5:22-23. Most people conveniently forget that the verse goes on to state that husbands should love their wives. As a strategy, this fact should always be mentioned and that a husband who loves his wife will not infect her with HIV or engage in behavior that puts his wife at risk.

<sup>34</sup> The World Factbook, *supra* note 12.

<sup>35</sup> Martinson, Lisa, *An Analysis of Racism and Resources for African- American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259, 281 (2001).

<sup>36</sup> See FACING THE FUTURE: REPORT OF THE UN SECRETARY GENERAL'S TASK FORCE ON WOMEN, GIRLS AND HIV/AIDS IN SOUTHERN AFRICA at 9 (2000), available at [http://www.unicef.org/publications/files/SGs\\_report\\_final.pdf](http://www.unicef.org/publications/files/SGs_report_final.pdf) [hereinafter FACING THE FUTURE]. (“For every ten men with the HIV virus, thirteen women are infected.”).

<sup>37</sup> Zimbabwe Marriage Act, Chapter 5:11.

Marriages Act.<sup>38</sup> In simple terms, a man married under the terms of the customary marriage can marry as many wives as he wants. The third form of “marriage” is the unregistered customary law union. It meets all requirements of a customary law marriage but for the registration requirement.<sup>39</sup> In the eyes of the law it is not a valid marriage except for certain limited purposes including guardianship, status of the children, custody and inheritance under customary law.<sup>40</sup> Paradoxically, most women find themselves in unregistered customary law unions. While society treats them as “wives,” so far the law has not given them any recognition. Women in either the registered customary law marriage or the unregistered customary law union often find themselves in polygynous marriages or unions. The dangers attendant to a multiplicity of partners lies in the fact that if one person in the circle gets infected, the likelihood of all persons involved becoming infected is very high. One religious sect commonly known as Vapostori has called for an end to the practice of polygyny after the realization that it is contributing to the spread of HIV/AIDS.<sup>41</sup>

Women face a variety of challenges within marriage, the major one being infidelity. While women in a monogamous marriage have recourse through suing for adultery damages, the majority of women married under the Customary Marriages Act or those in unregistered customary law unions do not have a remedy.

#### *B: Adultery and HIV/AIDS*

As women all over the world have learned, entering into a monogamous marriage does not guarantee monogamy. The manifestation of this phenomenon is the rise in the number of adultery law suits. It is usually the wife in a monogamous relationship suing the “other woman.” In terms of the laws of Zimbabwe, if a person married under the Marriage Act goes on to have a sexual relationship with someone else while the marriage is still subsisting, the injured party can sue the third part for adultery.<sup>42</sup> Damages for adultery are recoverable in two ways: contumelia and loss of consortium. Contumelia is based on the manner in which the adultery is committed and the pain suffered by the plaintiff.<sup>43</sup> Loss of

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<sup>38</sup> Zimbabwe Customary Marriages Act, Chapter 5:07. The practice of having more than one wife is commonly referred as polygamy, the correct term is polygyny. Polygamy is gender neutral.

<sup>39</sup> Zimbabwe Customary Marriages Act, Chapter 5:07, Section 3(1).

<sup>40</sup> Zimbabwe Customary Marriages Act, Chapter 5:07, Section 3 (5).

<sup>41</sup> *See generally*, WORLDWIDE RELIGIOUS NEWS, May 9 2005, <http://www.wwm.org/article>. The Vapostori (Apostolic) sect is an Independent African church fund in Zimbabwe and some neighboring countries. It is based on the Ten Commandments and is identified with open air church services, white gowns and doeks for women and walking sticks for male members. The church allows polygyny and there have been stories of the male members of the sect taking women as wives based on a “revelation” from God.

<sup>42</sup> For a more detailed discussion, *see* Takadiini v. Maimba, 1996 (1) ZIMBABWE LAW REPORT 737 (discussing the requirements for an action of adultery to suffice).

<sup>43</sup> *Id.*

consortium is based on the premise that the plaintiff loses love, affection, comfort and other services incidental to marriage.<sup>44</sup> Furthermore, the adulterer must have known of the existence of a monogamous marriage between the plaintiff and his or her spouse.<sup>45</sup> Apart from divorce, there is no action that can be taken against an errant spouse. An action for adultery does not stop the errant spouse from continuing with the adulterous relationship.

Women who are married under the Customary Marriage Act cannot sue for adultery since their marriages are potentially polygynous. That means a man in such a marriage can have extra marital affairs without necessarily marrying the person with whom he is committing adultery.<sup>46</sup> Ironically, for women who are in an unregistered customary law union, while the law does not recognize the union as a marriage except for limited purposes, courts have extended the recognition by allowing men in such unions to sue any man who has a relationship with their “wife” for adultery.<sup>47</sup> Women in such unions cannot sue since under customary law, the man can enter into as many unions as he wants.

The dangers posed by adultery are very clear. If one person in the circle becomes infected, then all the other persons will be at risk. Moreover, it is not easy for married women to walk away from marriages. There is societal pressure to stay at all costs even in the face of HIV/AIDS. WLSA has termed this phenomenon the “Mrs. Syndrome”:

Marriage, even to working women with access to education and jobs, is also seen as yielding positive benefits... The domination of women by men in our society has created the mentality that women believe they need a man to walk them through life. A woman who is not married or who does not have some semblance of a permanent attachment to a man is viewed as incomplete.<sup>48</sup>

In a study in Zimbabwe in 1994, one in five unmarried men and one in eight unmarried women said they had casual sex – more than one sexual partner in the previous twelve months.<sup>49</sup> Of those who were married, one in eight men, but only one in one hundred women, said they had sex outside the marriage.<sup>50</sup> Over a lifetime, men are more likely to have periods when they have casual sex with different women, whereas women are more likely to be faithful to the partner they

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> This issue was discussed extensively in *Mukono v. Gwenzi*, 1991 (1) ZIMBABWE LAW REPORT 119.

<sup>47</sup> *Carmichael v Moyo*, 1994 (2) ZIMBABWE LAW REPORT 176.

<sup>48</sup> WLSA, PREGNANCY AND CHILDBIRTH JOY OR DESPAIR?: WOMEN AND GENDER GENERATED REPRODUCTIVE CRIMES OF VIOLENCE 123 (2001) (on file with author).

<sup>49</sup> SOUTHERN AFRICA HIV AND AIDS INFORMATION DISSEMINATION SERVICE (SAFAIDS), MEN AND HIV IN ZIMBABWE 8, [http://www.safaids.org.zw/publications/men\\_&\\_hiv\\_in\\_zim.pdf](http://www.safaids.org.zw/publications/men_&_hiv_in_zim.pdf) (last visited Sept. 23, 2006).

<sup>50</sup> *Id.*

are with—serial monogamy—or only have one or two partners at a time.<sup>51</sup> Men are viewed as having a right to more than one wife or partner. Marriage, instead of protecting women, puts them at the greatest risk of infection.

The law has also treated the issue of adultery with less seriousness than it deserves. In *Reith v. Antao*,<sup>52</sup> the court granted the plaintiff adultery damages, but the judge went on to comment that though adultery was not abrogated by disuse, society is now more tolerant or less shocked by adultery.<sup>53</sup> The same court decided in a later case that there is a need to award damages to serve as a deterrent measure to protect the innocent spouse against contracting HIV from the errant spouse.<sup>54</sup>

Other cultural practices place the responsibility for preventing HIV/AIDS on married women. For example, the Zimbabwe National Traditional Healers Association (ZINATHA)<sup>55</sup> states in its AIDS policy that, inter alia, women should be taught ways of preventing their husbands from engaging in extra marital affairs by using herbs, or mupfuhwira, that are applied in their husbands' food so as to keep their sexual desire in check.<sup>56</sup> This helps in preserving and protecting their marriages.<sup>57</sup> Wives should always cook the ritualistic morning meal for their husbands to prevent them from looking for other sexual partners outside their marriages.<sup>58</sup> This is a meal left over at supper that a wife keeps for her husband's morning meal the following day, which symbolizes the sexual contact the husband and wife had the previous night.<sup>59</sup> It refreshes the man and symbolically ties him sexually to his wife.<sup>60</sup> The policy places blame for adultery and consequently HIV/AIDS infection squarely at the door of the wife. It ignores the power dynamics in a marriage and assumes erroneously that if a husband becomes errant, the wife is somehow to blame. This has resulted in married women being blamed for the death of their husbands. Although ZINATHA encourages men to take herbs to increase sexual libido, women are blamed for the end result which is that if a man has a premature ejaculation, his wife will become sexually frustrated and she will

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<sup>51</sup> *Id.*

<sup>52</sup> 1991 (1) ZIMBABWE LAW REPORT 317.

<sup>53</sup> *Id.*

<sup>54</sup> *Khumalo v. Mandishona*, 1996 (1) ZIMBABWE LAW REPORT 434.

<sup>55</sup> ZINATHA is an umbrella body representing traditional healers in Zimbabwe. Traditional healers diagnose diseases and use traditional herbs to cure them. They are also viewed as custodians of culture. A large majority of the Zimbabwean population is thought to consult traditional healers. See <http://institutions.africadatabase.org/data/i14686.html> (last visited Oct. 8, 2006).

<sup>56</sup> Sifelani Tsiko, *ZINATHA HIV/AIDS Policy Approval Hangs in Balance*, THE HERALD, March 3, 2006, available at <http://www.allAfrica.com> via NewsEdge Corporation (last visited Sept. 23, 2006). (on file with author).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

look for other sexual partners and in the process “bring” AIDS into the family.<sup>61</sup> Angeline Chiwetani, an award winning Zimbabwean AIDS activist and Director of Network Zimbabwe Positive Women (NZPW +), a non profit organization representing more than 3,000 HIV positive women across the country, was accused by her in-laws of bewitching their son who died from HIV/AIDS.<sup>62</sup> Her husband had amended his will in her favor, and this did not go over well with her in-laws.<sup>63</sup> Chiwetani’s case is but one in thousands of cases in which married women bear the brunt of society’s disapproval and accusations.

### *C: Condom Use and Marriage*

Condom use has been advocated as one of the strategies to combat HIV/AIDS infection, but apart from its efficacy, married women do not find it easy to negotiate condom use within marriage. Condom use is one of the three strategies in the ABC strategy (abstinence, behavior change and condom use) to combat HIV/AIDS. The basis of the ABC strategy is that if one cannot abstain then he or she must be faithful, and if it is not possible to be faithful, one must use condoms.<sup>64</sup> Numerous studies on condom use have been carried out in Zimbabwe. In a study conducted by Mbizvo, a respected scientist in Zimbabwe, few men reported using condoms with their wives; more frequently, men reported using them with commercial sex workers.<sup>65</sup> The study found that it is considered uncultural to use a condom with one’s spouse.<sup>66</sup> Condom use gives the impression of a lack of trust in a relationship. Some women feel victorious if their partners do not use condoms with them, but use them with sex workers. This was aptly captured by SAFAIDS as follows:

Some women do not want to use condoms, because they see their relationship as long-term or “serious” and believe that condoms are only appropriate for casual sex. Other women, who want to use condoms, often keep silent rather than upset their sexual partner, who may be the only source of food and shelter for themselves and their children. Many women prefer unprotected sex to the risk of violence or

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<sup>61</sup> Tsiko, *supra* note 56.

<sup>62</sup> Isabella Matambanadzo, *Zimbabwe’s Women Acting Against AIDS*, PAZAMBUKA NEWS, June 24, 2004, <http://www.pambazuka.org/en/category/features/22725> (last visited, Sept. 23, 2006).

<sup>63</sup> *Id.*

<sup>64</sup> Christian Aid News, *Christian Aid’s HIV Unit Replaced ABC with SAVE in its Comprehensive HIV Programs*, March 21, 2006, <http://www.christian-aid.org.uk/news/media/pressrel/060321p.htm>. (SAVE stands for safer practices, available medications, voluntary counseling and testing, empowerment).

<sup>65</sup> MT Mbizvo et al., *Condom Use and the Risk of HIV Infection: Who is Being Protected?*, 40 Central Africa Journal of Medicine 294 (1994), available at <http://www.ncbi.nlm.nih.gov> (click “PubMed”; then search “Mbizvo”). MT Mbizvo is a senior scientist with UNDP/UNFPA/WHO/World Bank in Zimbabwe.

<sup>66</sup> *Id.*

being thrown out of their homes.<sup>67</sup>

Another study concluded that:

Condoms were used primarily for non marital sexual relations. Sexually active single men were more than seven times as likely to use condoms (50%) as to have relied on the pill (7%). Likewise, 50% of sexually active single men were currently using condoms, more than eight times the level among married men (6%). In contrast, while 47% of married men said their spouse relied on the pill, only 7% of unmarried men reported pill use by their partner.<sup>68</sup>

In yet another study by two Zimbabwean researchers titled, *Male and Female Condom Use by Sex Workers in Zimbabwe: Acceptability and Obstacles*, the researchers concluded that although the female condom presents a shift in power dynamics, ironically, it still requires the cooperation of male partners.<sup>69</sup> The two researchers also noted that the price of the female condom is high, costing almost \$2.50.<sup>70</sup> Maposhere and Ray also draw attention to the fact that women who are economically disadvantaged have fewer skills to negotiate safe sex to prevent sexually transmitted infections or unwanted pregnancies.<sup>71</sup>

For married women, at the heart of condom use lies a culture of silence and skewed gender relations. Ironically, single women are in a much better position to negotiate condom use than married women. For single women, the fact that the man involved has not paid the bride price means that he has no leverage over the single woman. If he does not want to use a condom, it may be easier for the single woman to refuse sexual intercourse. Married women have to contend with the socially accepted fact that men's sexuality is recognized from birth. For instance, ZINATHA has stated in its policy that "[m]others should perform the symbolic treatment of their babies' genitals with their breast milk before post – natal sexual contact with their partners. This helps to control their children's sexual desire in adolescence and prevents them from indulging in premarital sex."<sup>72</sup> Although this is supposed to be done on both boys and girls, in reality, it fails to take into account structural forces and socio-cultural inequalities between boys and girls. For

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<sup>67</sup> SAFAIDS, *supra* note 49, at 26.

<sup>68</sup> Jacob Adetunji, *Condom use in marital and non marital relations in Zimbabwe*, 26 International Family Planning Perspectives, 196-200 (2000), accessible at <http://www.guttmacher.org/pubs/journals/2619600>.

<sup>69</sup> Sunanda Ray & Caroline Maposhere, *Male and Female Condom Use by Sex Workers in Zimbabwe: Acceptability and Obstacles*, in BEYOND ACCEPTABILITY: USERS' PERSPECTIVES ON CONTRACEPTION 97 (Reproductive Health Matters for World Health Organization ed., 1997), available at [http://www.who.int/reproductivehealth/publications/beyond\\_acceptability\\_users\\_perspectives\\_on\\_contraception/ray.en.pdf](http://www.who.int/reproductivehealth/publications/beyond_acceptability_users_perspectives_on_contraception/ray.en.pdf).

<sup>70</sup> *Id.* at 98.

<sup>71</sup> *Id.* at 97.

<sup>72</sup> Tsiko, *supra* note 56.

married women, being faithful does not guarantee that they will be free from infection. The ABC strategy fails to acknowledge this fact. While a wife may stay faithful, as long as society condones men having sex outside their marriage, infection of married women will continue to rise.

*D: Lobola and HIV/AIDS*

As discussed earlier, for a customary law union to take place, the man must pay lobola, or bride price, to the family of the woman.<sup>73</sup> A customary law union is therefore between two families rather than between husband and wife.<sup>74</sup> It is also pertinent to note that although lobola is not a legal requirement for those who register their marriages, more often than not, couples first go through the traditional marriage ceremony where lobola is paid before registering their marriages. One of the major components of the lobola ceremony is when the man “asks” for permission to wed from his father-in-law. Permission is usually granted when the man pays all the lobola or at least a substantial portion. This has resulted in many women being disadvantaged. Although they do not need “permission” to register a marriage, the pull of culture is so strong that they are afraid to wed without blessings of their parents. As put by WLSA:

[V]ery few African women would dare to marry or register their marriages without the family being fully involved.... If a woman’s family discovers her marriage has taken place without their involvement, they might alienate her from the family or deny her moral and other support if problems arise in the marriage. The groom’s family would also culturally not view the woman as a wife.<sup>75</sup>

As is discussed below, non-registration of marriage affects property distribution upon divorce and death.<sup>76</sup> For most women, the registration of the marriage is not as important as the paying of lobola. When we speak of lobola, therefore, it is not only about those women in unregistered customary law unions, but also those women in either the monogamous marriage or the potentially polygamous marriage. The thread that brings the three groups of women is payment of lobola.

Before the advent of the cash economy, lobola took the form of a hoe and cows.<sup>77</sup> If the suitor could not pay, he would spend one year working in the fields of his prospective father-in-law.<sup>78</sup> The concept underpinning lobola, at least

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<sup>73</sup> See WLSA: LOBOLA, *supra* note 155.

<sup>74</sup> *Id.* at 15-16.

<sup>75</sup> *Id.* at 19.

<sup>76</sup> This is based on the writer’s own experiences having attended numerous lobola paying ceremonies.

<sup>77</sup> See WLSA: LOBOLA, *supra* note 155.

<sup>78</sup> For a comprehensive discussion, see *id.* The actual practice is not homogenous but depends on a particular country or a tribe within the country.

traditionally, was a cementing of relationships between two families.<sup>79</sup> However the cash economy and greed has distorted the cultural value of lobola. It is not uncommon to read stories where fathers demand a lot of money, cell phones and air tickets to overseas destinations.<sup>80</sup> The woman plays little or no part in the ceremony. She is asked towards the end of the process whether she “knows” the man who has paid lobola.<sup>81</sup>

As already stated, the concept of lobola, as it originally existed, was noble.<sup>82</sup> The focus has now shifted. Lobola is now seen as perpetual consent to sexual intercourse, that is the husband has purchased the right to demand sex from his wife at any time.<sup>83</sup> This explains why there has been resistance to abolishing the marital rape exemption from a cultural point of view. A woman is pressured to stay in the relationship because if she leaves, lobola may be demanded wholly or in part depending on whether or not she has borne children.<sup>84</sup> Everjoice Win, a Zimbabwean gender activist notes that:

The myth of what lobola signifies for women is one of the most enduring in Southern Africa, and needs to be shattered. Lobola does not benefit the woman. It benefits the men in her family; brothers, father, uncles. Lobola is paid for a woman’s reproductive capacity or loosely translated, it buys her uterus.<sup>85</sup>

In Zimbabwe, a woman is supposed to give birth in proportion to the number of cattle that has been paid for her.<sup>86</sup> If a woman cannot give birth in marriage, a substitute is found. This is usually the woman’s sister or niece, although neither the wife nor the substitute is consulted.<sup>87</sup>

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<sup>79</sup> See *id.*

<sup>80</sup> Benhilda Chanetsa, *Bride Price and Violence* (Apr. 24, 2005), <http://www.boloji.com/wfs3/wfs363.htm>.

<sup>81</sup> Based on the writer’s personal experience.

<sup>82</sup> See WLSA: LOBOLA, *supra* note 155 at 8.

<sup>83</sup> See Goercke, *supra* note 17 at 21.

<sup>84</sup> See *id.* at 21-22.

<sup>85</sup> Everjoice J. Win, *The Way I See it: Virginity Testing as HIV/AIDS Prevention Strategy: Clutching at Straws*, SEXUALITY IN AFRICA MAGAZINE, Vol. 1 Issue 1 2004, at 14, available at <http://www.arsrc.org>.

<sup>86</sup> See WLSA: LOBOLA, *supra* note 155 at 55.

<sup>87</sup> *Id.*

Furthermore, the control placed over a woman's sexuality through lobola does not end at the death of the woman's husband. At her husband's death, the woman is inherited by a brother or nephew of her deceased husband in the form of a levirate marriage.<sup>88</sup> This is done precisely because by paying lobola, the family of the deceased man is seen as also having paid for the widow. The inheritance is done regardless of the cause of death of the widow's husband. Often death certificates do not indicate that the cause of death is AIDS. Relatives may blame other causes such as witchcraft for the death of their relative.<sup>89</sup>

A story from a villager in Chief Nembire's village in Mt. Darwin, a rural area found in central Zimbabwe, illustrates the challenges posed by widow inheritance.<sup>90</sup> A man in a polygynous marriage died of AIDS, leaving behind two wives. His brother inherited both wives and after a few months the first of the two wives died, followed by the brother. Another brother inherited the second wife and he died leaving behind the woman who he had inherited. In another case, a man died leaving behind a wife and three children. His brother inherited the wife and he soon died of AIDS and left behind his original wife and children.<sup>91</sup> More often than not, men who inherit wives have their own wife or wives already.<sup>92</sup> The inherited wife then becomes an addition to the family. The existing wife or wives are therefore at risk of catching HIV from the husband, especially if the deceased husband of the wife he inherits was HIV-positive. If a woman refuses to be inherited, she may be chased away from her marital home.<sup>93</sup> She may also be allowed to stay, but she will be banned from having sexual relations with any other man.<sup>94</sup>

Another practice linked to the payment of lobola is that of the surrogate wife known as "chigaramapfihwa."<sup>95</sup> The surrogate wife is either a sister or a niece of the deceased woman. In this case, the man does not pay lobola because the surrogate wife is meant to replace the deceased woman. Surrogacy takes place despite the fact that the man involved may be HIV-positive. As with the lobola

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<sup>88</sup> See WLSA: WIDOWHOOD, INHERITANCE LAWS AND CUSTOMS IN SOUTHERN AFRICA: REGIONAL COMPARATIVE REPORT ON INHERITANCE 42-44 (1995) (discussing levirate marriages in Zimbabwe) (on file with author).

<sup>89</sup> Morris Nyakudya, *Zimbabwe: Wife Inheritance Tradition Spreads AIDS*, INTER PRESS SERVICE, Aug. 3, 1998, available at <http://www.aegis.com/news/ips/1998/IP980801.html>.

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *Id.* at 42.

<sup>93</sup> WLSA: LOBOLA, *supra* note 15 at 29.

<sup>94</sup> *Id.*

<sup>95</sup> According to the tradition of the author's Shona tribe, mapfihwa refers to the bricks that are laid out in a rectangular fashion in a traditional kitchen. It is a steel mesh or a metal instrument which stands on its feet and is shaped to hold cooking pots is put over the bricks, which are meant to hold it. When a wife dies, the bricks and the metal instrument are considered to have died with her. Therefore, a surrogate wife is acquired so as to revive the bricks and be able to prepare food for the household.

ceremony, women have little or no say in the decision-making process; the woman is a mere spectator.<sup>96</sup>

### *E: Other Harmful Cultural Practices*

#### 1. VirginitY Testing

In the face of disturbing AIDS prevalence rates, Zimbabwean society has grappled with how to curb infection. One figure who has taken the lead is Chief Naboth Makoni, a traditional leader presiding over an area in the Eastern Highlands of Zimbabwe.<sup>97</sup> In 2001 he controversially revived the practice of virginitY testing.<sup>98</sup> VirginitY testing is meant to ascertain a girl's sexual purity at marriage and to discourage girls from engaging in sexual activities prior to marriage.<sup>99</sup> This is considered a way to combat the spread of HIV/AIDS.<sup>100</sup> Chief Naboth Makoni claims that virginitY testing preserves African identity and culture.<sup>101</sup> Ironically, his district of Makoni has one of the highest AIDS rates in the whole country.<sup>102</sup> One can conclude that the link between virginitY testing, marriage and HIV/AIDS is not given a lot of credence. A woman is expected to get married at all costs. If she is a virgin, she fetches a "higher" price in terms of lobola. She has no control over her sexuality as it is the men who sit down and negotiate the lobola.<sup>103</sup> The perception created by virginitY testing before marriage is that womanhood is the major vehicle for HIV transmission.<sup>104</sup> Boys are not tested, leading one member of the International Community of Women Living with AIDS to comment that "Virgin Mary should marry virgin Peter."<sup>105</sup>

There is a belief that sleeping with a virgin cures HIV/AIDS and as a result, older men who may already be HIV-positive flock to virginitY testing ceremonies preying on the girls who would have been declared virgins and given certificates. The story of Ottilia Chipfatsura illustrates this practice.<sup>106</sup> As a then twenty-eight year old, she was passed off into marriage by her father to a man who was HIV-positive. This particular man only disclosed to her on his death bed that he had been advised by a traditional healer to sleep with a virgin who would cure him of

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<sup>96</sup> This is based from the author's personal experiences as a passive observer.

<sup>97</sup> See Eugene Soros, *Virgins, Potions and AIDS in Zimbabwe*, Oct. 22, 2002, <http://www.worldpress.org/Africa/770.cfm>.

<sup>98</sup> See *id.*

<sup>99</sup> See Cleopatra Ndlovu, *Zimbabwe-VirginitY Testing Widely Practiced*, THE ZIMBABWEAN, Sept. 9, 2005, available at <http://www.thezimbabwean.co.uk/9-September-2005/virginitY-testing.html>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Ndlovu, *supra* note 99.

<sup>105</sup> Soros, *supra* note 95.

<sup>106</sup> See *id.*

AIDS. The virginity testing ceremonies are a reminder of the trauma she suffered.<sup>107</sup> There are also disturbing reports that some girls are engaging in anal sex so as to pass the virginity test.<sup>108</sup> According to the World Health Organization (WHO), women are probably more susceptible to HIV/AIDS than males due to their biological makeup.<sup>109</sup> The risk of infection is greater through anal sex. The lining of the anus is more delicate than the lining of the vagina and it is more likely to be damaged during intercourse.<sup>110</sup>

Virginity testing is inextricably linked with the control of a woman's sexuality from an early age. In its AIDS policy, ZINATHA states that: (1) Girls should be given herbs, which they smoke like cigarettes, to enable them to lengthen their *labia minora*; (2) a mother should rub her breast milk on the entrance of her daughter's genitals to protect her from excessive sexual desires when she is older.<sup>111</sup> She is not supposed to have sexual feelings even when she becomes a wife. She must be groomed like a lamb to the slaughter. Indeed, the passivity in sexual matters is a major contributory factor to married women getting infected with HIV/AIDS within marriage.

## 2. Pregnancy and Menstruation

Far from being viewed as a natural process, a woman's menstrual cycle is viewed as something dirty. It is considered taboo to have sex with a wife when she is having her periods. Some men therefore look elsewhere for sex during this time further putting them and their wives at risk.<sup>112</sup> Yet other men engage in casual sex while their wives are pregnant. The reasoning behind this practice is that pregnant wives are not able to satisfy their husbands sexually.<sup>113</sup> Again, men literally get away with murder. When women question their husbands, they do so at the risk of domestic abuse. Married women are so desperate to preserve their marriages that they resort to practices that harm the reproductive system, like dry sex.

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<sup>107</sup> *Id.*

<sup>108</sup> See Ndlovu, *supra* note 99 ("To preserve their virginity, girls and young women sometimes will resort to other forms of sexual intercourse, which pose more risks of HIV infection than vaginal sexual intercourse.").

<sup>109</sup> World Health Organization (WHO), Features 2004, *Women and AIDS: have you heard us today?*, <http://www.who.int/features/2004/aids/en/index.html> (last visited Oct. 14, 2006).

<sup>110</sup> *Id.*

<sup>111</sup> Tsiko, *supra* note 56.

<sup>112</sup> PRISCILLA MATAURE, SUNANDA RAY, MARTIN FOREMAN & THOMAS SCALWAY, MEN AND HIV IN ZIMBABWE 10 (SAFAIDS, 2001), available at [http://www.safaid.org/zw/publications/men\\_&\\_hiv\\_in\\_zim.pdf](http://www.safaid.org/zw/publications/men_&_hiv_in_zim.pdf).

<sup>113</sup> *Id.*

### 3. Dry Sex

Mark Schoofs discusses dry sex in Zimbabwe in his Pulitzer Prize-winning series titled *AIDS: The Agony of Africa*.<sup>114</sup> It is not uncommon for women to use herbs or soil mixed with baboon urine to make their vaginas tighter—the herbs dry out all the fluids. This is done to please their husbands. In other words, a woman is not concerned about her own sexuality and pleasure but that of her husband. As Schoofs notes, “[r]esearch shows that dry sex causes vaginal lacerations and suppresses the vagina’s natural bacteria, both of which increase the likelihood of HIV infection... some AIDS workers believe the extra friction makes condoms tear more easily.”<sup>115</sup>

## III. DOMESTIC VIOLENCE, MARITAL RAPE AND HIV/AIDS

### A. Domestic Violence

In Zimbabwe, domestic violence is dealt with through the provisions of the Criminal Procedure and Evidence Act (CPE). If a complaint is made to a magistrate that any person:

1. (a) is conducting himself violently towards or is threatening injury to, the person or property of another; or
  - (b) has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault;
- Whether in a public or private place, the Magistrate
- (1) may order the person to appear before him; and
  - (2) if necessary, may cause that person to be arrested and brought before him; and
  - (3) When that person appears before him, shall inquire into the matter.<sup>116</sup>

What should be noted is that this procedure is not confined to domestic violence only, but also to disputes such as a quarrel between neighbors, between a wife and “mistress,” or between co-workers. To the extent that this procedure is so generalized, Zimbabwe cannot be said to have a law that deals specifically with domestic violence. Bearing in mind that domestic violence is essentially a private matter; the true statistics will never be known.

Studies in some parts of the world have found a correlation between gender-

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<sup>114</sup> Mark Schoofs, *AIDS: The Agony of Africa: Death and the Second Sex*, THE VILLAGE VOICE, Dec. 1-7, 1999, available at <http://www.villagevoice.com/news/9948,schoofs,10565,1.html> (last visited Sept. 23, 2006).

<sup>115</sup> *Id.*

<sup>116</sup> Zimbabwe Criminal Procedure and Evidence Act § 388.

based violence, HIV risk behaviors and HIV positive status.<sup>117</sup> Research conducted in Dar Es Salaam, Tanzania, Soweto in South Africa and Kigali in Rwanda revealed that women with a history of sexual coercion were more likely than those without such a history to be HIV positive.<sup>118</sup> In a study conducted in Zimbabwe, the link between gender-based violence and HIV infection was examined and the conclusion was that there is a correlation between HIV infection and violence against women.<sup>119</sup>

According to the UN Secretary General's task force report of women, HIV/AIDS in Southern Africa,<sup>120</sup> violence against women and girls makes them vulnerable to HIV in three ways:

- i) Direct transmission through forced or coerced sexual acts;
- ii) Unsafe sexual behavior in later life; and
- iii) Fear of violence within relationships.<sup>121</sup>

According to WHO, "violent or forced sex can increase the risk of transmitting HIV. In forced vaginal penetration, abrasions and cuts commonly occur thus facilitating the entry of the virus—when it is present—through the vaginal mucosa."<sup>122</sup> For women who have already experienced violence, they are often "even less able to negotiate safe sex or demand fidelity."<sup>123</sup> In a United Nations Population Fund (UNFPA) report the story of Elizabeth, a Zimbabwean woman, is recounted.<sup>124</sup> She was attacked and sexually assaulted by her husband. The assault resulted in Elizabeth not only becoming infected with HIV but also giving birth to a son who is HIV positive. Another Zimbabwean woman, Studio, was raped by her husband in front of their eldest son and was infected as a result. Both women sought assistance from Musasa Project, a women's organization in

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<sup>117</sup> See Suzanne Maman, et. al., *The Intersections of HIV/AIDS and Violence: Directions for Research and Interventions*, 40 SOCIAL SCIENCE AND MEDICINE 4, 459-478 (2000) (on file with author).

<sup>118</sup> Ariane van der Straten, et. al., *Sexual Coercion, Physical Violence and HIV Infection Among Women in Steady Relationships in Kigali*, 2 Aids and Behavior 1, 61-73 (1998) (on file with author).

<sup>119</sup> Charlotte Watts, et. al., *Women, Violence and HIV/AIDS in Zimbabwe*, Int. Conf. AIDS 1998 Jun 28-Jul 3; 12:201, (on file with author) (presenting evidence of the extent of violence against women in Zimbabwe and the link between HIV/AIDS infection and violence and concluding that there is a correlation between HIV and violence.).

<sup>120</sup> FACING THE FUTURE, *supra* note 36, at 16. In 2000, the Secretary General set up a task force to look at HIV/AIDS and the following areas: prevention of HIV among women and young girls, girls education, violence against women and girls, property and inheritance rights of women and girls. The task force targeted countries worst affected by HIV/AIDS: Botswana, Lesotho, Malawi, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> To Sleep with Anger; Domestic Violence and Rape Fuels AIDS in Zimbabwe 1/12/05, <http://www.unfpa.org/news/news.cfm?ID=725&Language=1>.

Zimbabwe focusing on domestic violence.<sup>125</sup>

### *B. Marital Rape*

Marital rape inevitably involves the use of force and violence. The Zimbabwean High Court stated in the case of *H v. H* that the marital rape exemption was no longer part of the law of Zimbabwe.<sup>126</sup> This was even before the criminalization of marital rape through the Sexual Offences Act. The court in its judgment showed commitment to uphold women's rights by stating that "the fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law."<sup>127</sup> The Court goes on to state: "[a] further factor is that the enhancement of gender equality has in general been a hallmark of the development of Zimbabwean law since independence. The continued existence of the marital rape exemption stands in stark contrast to this trend."<sup>128</sup> In granting the extraordinary remedy of an *ex parte* provisional order for judicial separation, the court is constrained to look at such factors as assault, rape or HIV infection.<sup>129</sup> The legislature followed up on this judgment by enacting the Sexual Offences Act, which became operational on August 1<sup>st</sup>, 2001.<sup>130</sup> Among the stated purposes of the Act was "to discourage the spread of the human-immuno deficiency virus."<sup>131</sup> The Act criminalized marital rape within the wider realm of deliberate transmission of HIV/AIDS.<sup>132</sup>

Although this law was a welcome development, to the writer's knowledge, no man has been prosecuted for marital rape since the Act was adopted. One problem is that the Act did not define marriage. This has the effect of excluding the majority of women who are in unregistered customary law unions. In the proposed Criminal Code, marriage is defined as "a marriage solemnized under the Marriage Act (*Chapter 5:11*) or the Customary Marriages Act (*Chapter 5:07*) or an unregistered customary law marriage and the words 'husband', 'spouse', and 'wife' shall be construed accordingly."<sup>133</sup> At the time of writing, the Code is not yet operational.

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<sup>125</sup> *Id.*

<sup>126</sup> 1999 (2) ZIMBABWE LAW REPORT 358.

<sup>127</sup> *Id.* at 367.

<sup>128</sup> *Id.* at 369.

<sup>129</sup> *Id.* at 373. (The High Court rules of Zimbabwe provide for an order of judicial separation. The court authorizes persons married to each other to separate. If there is no reconciliation, the decree of judicial separation becomes one of a divorce.)

<sup>130</sup> Zimbabwe Sexual Offences Act Chapter 9:21.

<sup>131</sup> Preamble to the Sexual Offences Act.

<sup>132</sup> Section 15 of the Sexual Offences Act. The period of imprisonment for willful transmission of HIV is twenty years.

<sup>133</sup> Section 2 of the Zimbabwe Criminal Law (Codification and Reform) Act Chapter 9:23. The Criminal Code is meant to codify all criminal law offences in Zimbabwe and is not yet law at the time of writing.

As previously noted, semiautonomous social fields play a dominant part in women's lives.<sup>134</sup> Stating that women have a choice between reporting a husband for marital rape or keeping quiet may be misleading. It is more a case of being between a rock and a hard place. Although Zimbabwe can be said to have made progress towards gender equity by criminalizing marital rape through case law and statute law, in reality such a law is difficult to enforce without first changing the underlying power relations. Discussing matters of sex with a husband is taboo such that even if the man is HIV positive, there is little that most women can do. Most are afraid that if they do not sleep with their husband, he will look for other women. Economic reality dictates that for most families, the husband is the sole or major bread winner. Charging him with marital rape may result in the family losing their source of livelihood. There is also likelihood of ostracization within the family and the community, even from their own children. No woman wants to live with the label that she sent a husband to prison.<sup>135</sup> In a move likely to sound the final death knell on marital rape, the proposed Criminal Code has put a further condition that all prosecutions of marital rape will require the consent of the Attorney General. There are no guidelines or set criteria that the Attorney General has to follow, and the assumption is that he will use his discretion.<sup>136</sup> Given the fact that women are not reporting marital rape—even without this new condition—it is more likely that even more women will not report. It would therefore seem prudent to put in place mechanisms that protect women prior to infection.

#### IV. CONFIDENTIALITY AND HIV/AIDS.

In Zimbabwe, medical personnel are ethically and morally required to keep all patients' information confidential under the Medical Practitioners—Professional Conduct—Regulations.<sup>137</sup> The principle of medical practitioner/client confidentiality is recognized.<sup>138</sup> The confidentiality clause is international in conception and is based on the belief that it is important to maintain confidentiality if medical personnel are to gain the trust of their patients.<sup>139</sup> The exceptions to

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<sup>134</sup> Angenot, *supra* note 7.

<sup>135</sup> Based on the writer's personal experiences in legal awareness programs conducted for WLSA.

<sup>136</sup> Zimbabwe Criminal Law (Codification and Reform) Act Section 68 (a).

<sup>137</sup> Statutory instrument 252/87 § 22. Statutory instruments are part of subsidiary legislation that does not go through the normal procedure of a bill. They are meant normally to deal with issues that arise from time to time which may need dealing with as a matter of emergency. They also may deal with purely administrative matters. They have the force of law and are read together with the main act.

<sup>138</sup> *Id* § 22.

<sup>139</sup> See Lawyers Collective HIV/AIDS available at [http://www.lawyerscollective.org/lc\\_hiv/aids/materials/protocols](http://www.lawyerscollective.org/lc_hiv/aids/materials/protocols) (last visited Oct. 14, 2006). The paper argues that confidentiality in HIV must be maintained, otherwise people will not come forward for testing.

disclosure are: (1) where the medical practitioner is required to make disclosure by law, (2) where the courts subpoena medical records or information, the practitioner must disclose information such as testing alleged rapists and victims for HIV,(3) where consent has been obtained from the patient to make disclosure to a spouse/partner or family, (4) where the patient is a minor and the guardian has consented to the disclosure and (5) where the patient is deceased and consent has been obtained from the executor of the estate.<sup>140</sup> What is glaringly apparent from the regulations is the prohibition of disclosure to a partner/spouse without consent of the patient. Some rural women in Zimbabwe have called for a law that makes it compulsory for disclosure to be made to a spouse or partner.<sup>141</sup> The Zimbabwe Human Rights NGO Forum<sup>142</sup> advocates spousal notification by medical personnel on the grounds that once partners know their status, they will live positively.<sup>143</sup> They will also plan for the future, for instance by writing wills.<sup>144</sup> There will be a natural progression towards making disclosure the norm.<sup>145</sup> While the Forum makes some valid observations, it presupposes that conditions are such that it will be easy for disclosure to be made. Disclosure without changing the underlying gender disparities is likely to lead to negative results for women.

In Zimbabwe, the prevalence rates of the HIV/AIDS infection are obtained from women attending ante natal clinics.<sup>146</sup> They are likely to be the first to know their status. Once disclosure is made, they may be chased away from the family home with no resources. They may also face ostracization from their families and the community.<sup>147</sup> Married women culturally are expected to submit to sexual intercourse in all circumstances, thus increasing the risk of getting infected. Some advocates have pointed out that recourse should be had to public health laws as a way of ensuring that HIV/AIDS does not spread.<sup>148</sup> In Zimbabwe, the effect of

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<sup>140</sup> See Statutory instrument 252/87, *supra* note 139, at section 23.

<sup>141</sup> Plus News: The HIV/AIDS News Service, *Zimbabwe: Women push for HIV status disclosure law*, May 20, 2005, at [http://www.plusnews.org/AIDSReport.ASP?ReportID=4828&SelectRegion=Southern\\_Africa&SelectCountry=ZIMBABWE](http://www.plusnews.org/AIDSReport.ASP?ReportID=4828&SelectRegion=Southern_Africa&SelectCountry=ZIMBABWE).

<sup>142</sup> The Zimbabwe Human Rights NGO Forum brings together twelve Non Governmental organizations working in the area of human rights. See [www.kubatana.net](http://www.kubatana.net).

<sup>143</sup> See generally Zimbabwe Human Rights NGO Forum, *Spousal notification and HIV/AIDS*, 39 Human Rights Bulletin (2006), available at [http://www.hrforumzim.com/monitor/march\\_2006.pdf](http://www.hrforumzim.com/monitor/march_2006.pdf) (written in commemoration of the International Women's Day).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> UNAIDS, *Evidence for HIV decline in Zimbabwe: A comprehensive review of the epidemiological data 5 (2005)* available at [http://data.unaids.org/Publications/IRC-pub06/Zimbabwe\\_Epi\\_report\\_Nov05\\_en.pdf](http://data.unaids.org/Publications/IRC-pub06/Zimbabwe_Epi_report_Nov05_en.pdf).

<sup>147</sup> UNIFEM: FACTS AND FIGURES ON VIOLENCE AGAINST WOMEN: HIV/AIDS AND VIOLENCE, [www.unifem.org/gender\\_issues/violence\\_against\\_women/facts\\_figures.php](http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php) (last visited Sept. 23, 2006).

<sup>148</sup> The Public Health Act Chapter 15:09 describes infection in relation to a sexually transmitted disease as "any form or state of infection [which a person suffering from or in the incubation stage of], whether the disease was transmitted through sexual intercourse or not."

declaring a disease notifiable is that contact tracing is carried out. So far, HIV/AIDS has not been declared a communicable disease. UNAIDS advocates beneficial disclosure which it views as “disclosure that is voluntary, respects autonomy and dignity of the affected individuals, maintains confidentiality as appropriate.”<sup>149</sup> UNAIDS fell short of endorsing breach of confidentiality in situations such as marriage or co-habitation. Linked to confidentiality and disclosure is the willful transmission of HIV/AIDS.<sup>150</sup>

#### V. WILLFUL TRANSMISSION OF HIV/AIDS

As previously mentioned, marital rape in Zimbabwe is contextualized in the realm of willful transmission of HIV/AIDS.<sup>151</sup> In Zimbabwe there has not been much development in case law on willful transmission. This may be due to the fact that magistrates are given discretion in ordering persons accused of sexual offences to undergo tests. Other countries have, however, developed substantial jurisprudence on willful transmission.<sup>152</sup>

For married women, criminalizing willful transmission has come a little too late. According to UNAIDS:

Criminal sanctions are perceived as serving four primary functions. The first is to incapacitate the offender from harming anyone else during the term of their imprisonment. The second is to rehabilitate the offender, enabling him/her to change his/her future behavior so as to avoid harming others. The third is to impose retribution for wrong doing—to punish for the sake of punishing. The fourth function is to deter the individual offender and others from engaging in the prohibited conduct in the future.

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<sup>149</sup> JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS) AND WORLD HEALTH ORGANISATION (WHO) OPENING UP THE HIV/AIDS EPIDEMIC: GUIDANCE ON ENCOURAGING BENEFICIAL DISCLOSURE, ETHICAL PARTNER COUNSELING AND APPROPRIATE USE OF HIV CASE REPORTING 10 (August 2000), available at <http://www.undp.org/hiv/publications/openingup.html>

<sup>150</sup> In Canada, the Supreme Court held in the *Cuerrier* case that where sexual activity poses a significant risk of serious bodily harm, there is a duty on the HIV positive person to disclose their status. Where this duty exists and no disclosure is made, this constitutes fraud. RICHARD ELLIOTT, CANADIAN HIV/AIDS LEGAL NETWORK, AFTER CUERRIER: CANADIAN CRIMINAL LAW AND THE NON DISCLOSURE OF HIV POSITIVE STATUS 6 (1999).

<sup>151</sup> The Sexual Offences Act in Section 15 criminalizes willful transmission if any person with actual knowledge that he is infected with HIV does anything or permits the doing of anything which he knows or ought to reasonably know will infect another person with HIV or is likely to lead to another person becoming infected with HIV.

<sup>152</sup> See Arryn Ketter, *Criminal Law and HIV Transmission/Exposure*, 10 CANADIAN HIV/AIDS POLICY AND LAW REVIEW 46, 61 (2005). (“In October 2004 a New Zealand man pleaded guilty in a Wellington district court to a charge of criminal nuisance brought because he had unprotected sex with his partner without telling her that he had HIV, and knowing that it could endanger her health. The woman learned that her partner was HIV-positive when a friend of the man informed her in a letter. In September 2004 an HIV-positive Zimbabwean refugee in New Zealand was jailed for three years on multiple charges of assault and criminal nuisance for failing to inform several women of his HIV status.”).

But it is not clear that these functions will make any significant contribution to preventing HIV transmission, as they offer, at best, a limited basis for resorting to the criminal law as a policy response to the epidemic.<sup>153</sup>

In the Zimbabwean context, it is doubtful whether any married women will be willing to testify in court against their husbands. The same challenges faced with marital rape hold true for willful transmission.

[F]or women... with limited ability to disclose their HIV status and/or to take precautions to reduce the risk of transmission, invoking the criminal law as a response to HIV-risking activity may not ultimately serve to protect. Rather it may impose an additional burden on those who are doubly disadvantaged by HIV infection... and by their vulnerability to violence or abuse.<sup>154</sup>

Having established the correlation between marriage laws, cultural practices and HIV/AIDS, yet another important issue to explore is property rights of married women at death of a spouse or divorce.

#### VI. PROPERTY RIGHTS AND HIV/AIDS

In Zimbabwe, the type of marriage one enters into determines property rights at death and divorce. If a woman is married in terms of the Marriage Act or the Customary Marriage Act, upon divorce, the proprietary consequences are determined by the Matrimonial Causes Act (the Act.)<sup>155</sup> While the stated aim of the Act is to reach the statutory target which is "as far as is reasonable and practicable, and having regard to their conduct... to place the spouses... in the position that they would have been in had a normal marriage relationship continued between the spouses."<sup>156</sup> In reality judges have a lot of discretion. In view of the marginalization of women within marriages, most women walk away with little in terms of property and spousal support. In the case of *Takafuma v Takafuma*<sup>157</sup> the court held that in instances where a house was jointly registered, the starting point would be to give a half portion to each party then look at what to take away from one spouse to give to the other using the guidelines in the Matrimonial Causes

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<sup>153</sup> RICHARD ELLIOTT, UNAIDS, POLICY OPTIONS PAPER: CRIMINAL LAW, PUBLIC HEALTH AND HIV TRANSMISSION 6 (June 2002), available at [http://data.unaids.org/publications/IRC-pub02/JC733-CriminalLaw\\_en.pdf](http://data.unaids.org/publications/IRC-pub02/JC733-CriminalLaw_en.pdf).

<sup>154</sup> *Id* at 9.

<sup>155</sup> The Act became law on the 10th of February 1986. The Act contains guidelines on how property should be distributed at divorce. The court is required to assess financial income of both parties, financial needs, obligations and responsibilities which each spouse and child is likely to have in the foreseeable future, standard of living of the parties, the age and physical and mental health of each spouse and child, direct and indirect contributions including domestic contributions and duration of marriage.

<sup>156</sup> *Id* § 7.

<sup>157</sup> 1994 (2) ZIMBABWE LAW REPORT 103.

Act.<sup>158</sup> For most women, however, houses are registered in the name of the husband,<sup>159</sup> which means that they have to go an extra mile to prove their entitlement. Although domestic contribution is taken into account, it is difficult to prove and value. In *Mujati v Mujati*,<sup>160</sup> a wife of seventeen years was awarded a third of the value of the matrimonial property. In *Nyamaropa v Nyamaropa*,<sup>161</sup> the wife was awarded a fifth of the value of the matrimonial home. Married women face an additional loss in the form of their husband's pensions. In terms of the Pension and Provident Funds (Amendment) Regulations, the first pension beneficiary in the case of death is the surviving spouse.<sup>162</sup> A married woman loses the spouse status at divorce and therefore will not be entitled to the pension.<sup>163</sup>

Women in unregistered customary law unions are the worst affected. Since the law gives only limited recognition to their unions, the Matrimonial Causes Act does not apply. While the Act still presents challenges, at least married women have a basis to start from.

Women in unregistered customary law unions are recognized for all intents and purposes as wives in all facets of life but the law. There is no divorce since the law does not recognize their unions as marriages. The dilemma comes upon separation. Under customary law, the "husband" would give his "wife" a rejection token usually in the form of money.<sup>164</sup> This rejection token is not recognized by the law. The issue of how to apportion property acquired during the duration of an unregistered customary law union brings out some of the disadvantages that women face due to legal pluralism. Courts have not been consistent in the apportionment. They have resorted to two principles, that of unjust enrichment and tacit universal partnership.<sup>165</sup> These are general law principles and even then, the court has to first decide whether general law applies to a customary law situation. This is done through the provisions of the Customary Law and Local Courts Act.<sup>166</sup> In the case

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<sup>158</sup> *Id* at 110.

<sup>159</sup> Women in Zimbabwe are treated as dependants and may not be landholders on their own. See HUMAN RIGHTS WATCH, *Zimbabwe: Fast track land reform in Zimbabwe* 31 <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf> (last visited Oct. 23, 2006).

<sup>160</sup> High Court of Harare -505- 87.

<sup>161</sup> High Court of Harare -66-87.

<sup>162</sup> Statutory Instrument 180/2002.

<sup>163</sup> *Id*.

<sup>164</sup> Based on the customs of the writer's own tribe.

<sup>165</sup> Unjust enrichment is a concept found in contract law and is based on the notion that one party should not benefit financially or otherwise at the expense of the other party. For a tacit universal partnership the recognized principles are that each party must bring something into the partnership or must bind himself or herself to bring something into it whether it be money, labor or skill. The business to be carried out should be for the joint benefit of the parties. The objective should be to make a profit and the agreement should be a legitimate one. See *Industrial Equity Ltd. v. Walker* 1996 (1) ZIMBABWE LAW REPORT 269 for a discussion of the doctrine.

<sup>166</sup> Section 6 of the Act contains guidelines on the choice of law process. In any civil case between Africans, unless the justice of the case requires, customary law applies where either the parties have agreed that it should apply, or where, after considering the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. One of the factors is the

of *Chapendama v. Chapendama*, the court found that applying customary law would mean that the woman would walk away with nothing as far as immovable property is concerned since the concept was unknown under customary law.<sup>167</sup> It thus applied the concept of a tacit universal partnership to award the woman a portion of the property. The judge commented, obiter, that there has been an apparent reluctance on the part of lawmakers to develop the customary law of marriage despite the fact that there were a greater number of the customary law unions than registered marriages.<sup>168</sup> In the case of *Mtuda v. Ndudzo*,<sup>169</sup> the court applied the principle of unjust enrichment. Women are doubly disadvantaged in that apart from non-recognition of the customary law union, there are no guidelines on how to apportion property at the dissolution of the union.

For inheritance matters, with the promulgation of the Administration of Estates Amendment Act, under both general and customary law, the major beneficiaries to a deceased estate are the surviving spouse and children.<sup>170</sup> Women in unregistered customary law unions are recognized as wives for purposes of the Act. The Zimbabwean Constitution, however, allows discrimination on the basis of customary law in cases, inter alia, relating to the devolution of property on death or other matters of personal law as it relates to Africans.<sup>171</sup> The case of *Venia Magaya*<sup>172</sup> provides the best example of the discrimination that is apparent in the constitution. Venia Magaya looked after her parents all her life. When her father died, she was appointed heir to her father's estate. A higher court set aside this appointment and substituted Nakayi, Venia's half brother, as the heir. The latter proceeded to sell the house Venia was living in all her life. The court surmised that "even though the practice of preferring males was discriminatory, this did not contravene Section 23 of Zimbabwe's Constitution as this provision did not forbid discrimination based on sex in the distribution of a deceased person's estate under customary law."<sup>173</sup>

Despite positive laws of inheritance, some women are afraid to embrace their rights. Often, they are threatened with death and told that the spirit of their

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lifestyle of the parties. For instance, parties living in the city who have jobs are closer to general than customary law.

<sup>167</sup> 1998 (2) ZIMBABWE LAW REPORT 18.

<sup>168</sup> *Id.*

<sup>169</sup> 2000 (1) ZIMBABWE LAW REPORT 710.

<sup>170</sup> Amendment Number 6/97. This was a major shift in the law since previously, an heir at customary law and usually male inherited immovable property in his own right. His only duty was to provide the dependents with accommodation. He could sell the property and move the dependents to a rural area as long as he provided them with alternative accommodation. The amendment applies to estates of persons who die on or after the 1st of November 1997.

<sup>171</sup> ZIMBABWE CONSTITUTION § 23.

<sup>172</sup> *Magaya v. Magaya*, 1999 (1) ZIMBABWE LAW REPORT 100.

<sup>173</sup> WLSA, *VENIA MAGAYA'S SACRIFICE: A CASE OF CUSTOM GONE AWRY* 41 (2001) (on file with author) (discussing the case of Venia Magaya).

husband will come back to haunt them should they inherit “his” property.<sup>174</sup> Discriminatory laws and practices in inheritance and property rights upon divorce lead to impoverishment and drive destitute women into a life of abuse and transactional sex. Poverty forces women to engage in transactional sex.

For many men and women, cultural values have become so distorted that relationships are interpreted in terms of what each can get from the other. Sex is seen as a mere transaction, where one commodity—sex—is exchanged for another—money, status, entertainment, clothes... food, security...<sup>175</sup>

Transactional sex is conducted with different partners, raising the risk of infection. The progression would be for instance: marriage leading to divorce; divorce leading to poverty; poverty tending to bring about transactional sex; and finally such transactional sex resulting in infection with HIV.

#### CONCLUSION: THE CASE FOR GENDER EQUITY

The Zimbabwe National Gender Policy places HIV/AIDS under the broad umbrella of health.<sup>176</sup> The policy acknowledges the low status of women with respect to access, control and ownership of economic resources, unequal power relations with regard to control of one’s sexuality as contributory factors to the spread of HIV/AIDS.<sup>177</sup> Gender mainstreaming is placed as a priority area in a bid to address gender inequality and equity. Some of the strategies are: to develop gender sensitive multi-sectoral programs for empowerment of women and girls and to enable men to assume their responsibilities in prevention of HIV/AIDS and to introduce measures to counter the exposure of women and men, including youths, to HIV/AIDS through traditional and religious beliefs and practices.<sup>178</sup> In the words of Stephen Lewis, gender is key in the fight against HIV/AIDS:

The toll on women... is beyond human imaging, it presents Africa and the world with a practical and moral challenge, which places gender at the centre of the human condition. The practice of ignoring gender analysis has turned out to be that... for the African continent, it means economic and social survival. For the women... of Africa, it’s a matter of life and death.<sup>179</sup>

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<sup>174</sup> Based on the writer’s legal awareness meetings held in Zimbabwe.

<sup>175</sup> SAFAIDS, *supra* note 49, at 17.

<sup>176</sup> Section 6.2.2 at 8. The Gender policy was launched on the 8th of March 2004 to coincide with International Women’s Day. See Gender Policy Clause 1.0: Rationale for the National Gender Policy, 1, available at [http://www.siyanda.org/docs/The\\_national\\_gender\\_policy.pdf](http://www.siyanda.org/docs/The_national_gender_policy.pdf) (last visited on Oct. 23, 2006).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Stephen Lewis, remarks at the Barcelona International AIDS Conference: The UN Secretary General’s Special Envoy on HIV/AIDS in Africa (July 2002).

In other words, there is a case to be made for adopting gender equality in the fight against HIV/AIDS. In addressing gender inequalities, care should be taken not to reinforce gender stereotypes. What is needed is a complete transformation. The advantages of such programs cannot be underestimated:

The objective of these programs is to transform gender relations between women and men so that they are equitable. They focus on radical change at the personal, relationship (including the redefinition of heterosexual relations), community and societal levels. Transformational programs address the systems, mechanisms, policies and practices that are needed to support such genuine change and include changing laws such as those governing property and inheritance, domestic violence and marital rape, changing the attitudes of men and women about male and female behavior, and empowering women to access credit, employment and other opportunities for broader development.<sup>180</sup>

The World Bank states that evidence shows that empowered women are more able to participate in the community and national decision making, are healthier and are better able to protect themselves from HIV/AIDS and other sexually transmitted diseases.<sup>181</sup> For married women in Zimbabwe, transformative gender equality would mean that laws do not harm but protect them. It is not too much to imagine what a transformative process can do. Imagine if married women in Zimbabwe are able to negotiate condom use within relationships, walk out of abusive relationships that put them risk of infection, access credit for economic empowerment, say no without any repercussions to cultural practices such as dry sex and virginity testing, say no to religious beliefs that stifle their sexuality, participate in any sexual relationship as partners and not to think only of pleasing their husbands, inherit property from their husband's deceased estates freely without fear of the spiritual world, and get an equitable share upon divorce. Marriage would then not put women at risk of HIV/AIDS infection.

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<sup>180</sup> FACING THE FUTURE, *supra* note 36, at 16.

<sup>181</sup> WORLD BANK, WORLD DEVELOPMENT REPORT: ATTACKING POVERTY 6-7 (2001), available at <http://web.worldbank.org> [click on "Topics" tab; click on "Poverty" Topic Area; Under "Features" box select WDR 2000/2001: Attacking Poverty].