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

### **Introduction**

#### **Putting HIV/AIDS and marriage into context: What is the problem?**

The first AIDS case in Zimbabwe was identified in 1985. 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>1</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 at least until the age of 17 (roughly the average age of first sexual encounter

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<sup>1</sup> University of California : AIDS policy research center; Country AIDS policy analysis; HIV/AIDS in Zimbabwe. The project develops and disseminates online , fast download , continually updated analysis of HIV/AIDS in 12 USAID priority countries; Ethiopia, Kenya, Malawi, Senegal, South Africa, Uganda, Tanzania, Zambia, Zimbabwe, Brazil, Cambodia and India. According to the statistics, in 2000, 35% of women attending ante natal 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. See [www.ari.ucsf.edu/programs/policy\\_country](http://www.ari.ucsf.edu/programs/policy_country)

in most countries in the world)<sup>2</sup>. Yet, 40% of the young women were HIV-positive. Many had been infected despite staying faithful to one partner.<sup>3</sup> While husband and wife take vows to remain together till death, married women in Zimbabwe paradoxically are facing death from HIV/AIDS related illness more than any other group. Marriage literally leads them to the grave. The cause of death is rarely cited at funerals. The writer has lost friends, family and relatives to HIV/AIDS. At funerals, the cause of death is given as “headache”, “liver failure”, “short illness” or even witchcraft. HIV/AIDS brings shame as it is related to sexual activity. The Person living with AIDS (PLWA) is blamed for the infection. This ignores the fact that married women are dying more than any other group from HIV/AIDS.

It is the 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 semi autonomous 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>4</sup> The answer to curbing the spread of HIV/AIDS, therefore, 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 the 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. Whilst traditionally, curbing infection has been discussed in terms of altering the

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<sup>2</sup> Global Coalition on women and AIDS: *The female AIDS epidemic: 2005 statistics*: Available on [www.womenandaids.unaids.org](http://www.womenandaids.unaids.org). See also the UNAIDS 2004 report particularly the section titled “*Impact of AIDS on people and societies*”

<sup>3</sup> *Id.*

<sup>4</sup> The theory of semi autonomous social fields is usually linked to Pierre Bourdieu and is often used in the social science area. For marriage, structures such as the family, the church, cultures which are not necessarily controlled by the state can actually be more dominant and influential than laws. See Marc Angenot: Project Muse: *Social discourse analysis: Outlines of a research project* available on [www.muse.jhu.edu/journals/yale\\_journal\\_of\\_criticism](http://www.muse.jhu.edu/journals/yale_journal_of_criticism)

power relations, no study in Zimbabwe has solely focused on marriage, HIV/AIDS and the law.

This article is divided into six parts. Part 1 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 2 will examine the marriage laws and cultural practices in Zimbabwe. Issues covered will be the different laws governing marriages, adultery, condom use, lobola (bride price), virginity testing, pregnancy, menstruation and dry sex. Part 3 will examine domestic violence, marital rape and HIV/AIDS. This is an important issue, especially in view of the fact that Zimbabwe does not have a specific law against domestic violence. Marital rape involves use of force and violence. Whilst the law criminalizes marital rape, it still remains on the books and has proved impossible to enforce. Part 4 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 5 will examine the issue of willful transmission. While it is criminalized in Zimbabwe, there is not yet a body of jurisprudence addressing it. Part 6 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.

### **PART 1: 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 Women and Law In Southern Africa ( WLSA):<sup>5</sup>

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<sup>5</sup>WLSA is a multidisciplinary research organization found in seven countries of Southern Africa namely Botswana, Zambia, Lesotho, Mozambique, Malawi, Swaziland and Zimbabwe. It was formed in 1988 and it primarily focuses on research into laws and policies that affect women. Since 1989 it has produced over 90 publications on women and their intersection with the law. Its headquarters are currently in Lusaka, Zambia.

The 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>6</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>7</sup>

The writer has also been influenced by 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>8</sup> Taking a cue from the Scandinavian women’s law approach, WLSA further puts the woman at the center of any research.<sup>9</sup> The research 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 and the application of general or customary law depends on the particular

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<sup>6</sup> WLSA: Paving a way forward: A review and research primer of WLSA research methodologies @ 1  
<sup>7</sup> Ironstone- Cathertall *et al*; School of social and political thought; York University; Feminist research methodology and women’s health. A review of literature @ 7.  
[www.yorku.ca/nnewh/english/pubs/workpap.pdf](http://www.yorku.ca/nnewh/english/pubs/workpap.pdf)

<sup>8</sup> WLSA: Paving a way forward *supra* @ 17

<sup>9</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: Women’s law: An introduction to feminist jurisprudence for an in depth look on the women’s law approach.

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 of part of the prevailing legal system.<sup>10</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>11</sup> These cultural prejudices against women include a perpetuation of the dependency syndrome of women by 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 which manifests itself in practices such as payment of lobola (bride price). Lobola simply put is the bride price that a suitor pays to the family of the woman.<sup>12</sup> Other practices include nhaka (wife inheritance)<sup>13</sup> and ngozi (appeasing of avenged spirits by submission of the girl child as a means of ‘payment’/compensation)<sup>14</sup>

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<sup>10</sup> Section 89 of the Constitution of Zimbabwe 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>11</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. The WLSA countries are Botswana, Lesotho, Zambia, Mozambique, Swaziland, Malawi and Zimbabwe.

<sup>12</sup> WLSA: Lobola: Its implications for women’s reproductive rights in Botswana Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe @ 19

<sup>13</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. See [www.umanitoba.ca/anthropology/tutor/marriage/levirate](http://www.umanitoba.ca/anthropology/tutor/marriage/levirate)

<sup>14</sup> It is culturally believed 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*

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>15</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>16</sup>, the accused person murdered his wife in cold blood. He alleged that his wife who worked for a non profit organization was always away from home, had engaged in an extra marital affair and had infected him with a sexually transmitted infection. He was sentenced to eleven years imprisonment with labor. The court surmised that he was suffering from diminished responsibility. The Gambanga case ordinarily would have attracted a death sentence. The verdict mirrors the attitudes of the courts which are also influenced by socialization that a woman's place is in the home. The court judgment reflects gender bias. Such statements as "...his wife persisted with her attendance of seminars for women's organizations"<sup>17</sup> pay little regard to the fact that she was doing her job and was bringing food to the table for her family.

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*intervention*: Thesis presented to the Faculty of the graduate center for social and public policy, McNulty College and graduate school of liberal arts. [www.etdl.library.dug.edu/theses](http://www.etdl.library.dug.edu/theses)

<sup>15</sup> WLSA 2000 :In the Shadow of The Law: Women and Justice Delivery in Zimbabwe @ 10

<sup>16</sup> 1997 ( 2) Zimbabwe Law Report page 1

<sup>17</sup> *Id* @ 2

Cynthia Grant Bowman states that “.... theoretical grounding .... 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>18</sup> She identifies five theories as having emerged from African literature. These are the rights based theories, feminist theories, cultural explanations, society in transition and culture of violence.<sup>19</sup> Yet another theory which has gained credence in the USA is the dominance theory. Catharine Mackinnon has been described as “the most prominent and persistent advocate” of the dominance theory.<sup>20</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>21</sup> Rand explains the dominance theory by contrasting it with the difference approach which “simple argues that women should be permitted to compete with men on equal terms in the public world.”<sup>22</sup> The theory presents a double standard in that whilst women and men should be treated the same, women demand special treatment because of the biological differences with men. Structural forces and other social inequalities are not considered. Men are used as the yard stick.<sup>23</sup> Using the sameness theory, for HIV/AIDS for instance, men and women are expected to both be able to negotiate condom use within relationships. This ignores the fact that apart from the high cost of the female condom, it

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<sup>18</sup> Vol 11: 2 J. of gender, social policy and the law @ 848

<sup>19</sup> *Id* @ 849 -850. In terms of cultural theory, some things are regarded as normal. 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 working and earning her own salary. For culture of violence, African men are inherently seen as using violence to resolve disputes.

<sup>20</sup> Rand: *Making a real difference: The dominance approach in the opinions of Justice Beryl J. Levine* @1031. See also Bartlett *et al* : Gender and law ; Theory, doctrine ,commentary : Chapter 1 : Theorizing subordination

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

<sup>22</sup> *Id* @1032.

<sup>23</sup> See Mackinnon: *Reflections on sex equality under law*. 100 Y. Law Journal (1990-1991) @ 1286 – 1289 for a fuller discussion on the difference/sameness theory.

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>24</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>25</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 relationships but not women. Women are bound to stay in a marriage at any cost, even HIV infection. 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>26</sup> Zimbabwe is predominantly a Christian country. Many women belong to Christian groups within their churches where the message of dominance is preached. It is difficult to compete with religion for space. The first port of call for an abused Zimbabwean woman, just as for the African American woman, is the church but “Most churches are patriarchal and use the scriptures to rationalize that a woman should stay

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<sup>24</sup> Rand *supra* note 20 @ 1033

<sup>25</sup> *Id* @ 1035.

<sup>26</sup> Ephesians 5 v 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.



and try to work out the problems of her marriage because she is subordinate under the word of God to her husband”<sup>27</sup> In the discourse on marriage and HIV/AIDS in Zimbabwe, therefore , it is important to note the various perspectives as they ultimately affect how issues are viewed and dealt with.

## **PART 2: 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>28</sup> As already noted, marriage does not protect women against infection. In view of this observation , it then becomes 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 in terms of the Marriage Act.<sup>29</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 polygnyous and is entered into in terms of the Customary Marriages Act.<sup>30</sup> In simple terms, a man married in 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

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<sup>27</sup> Martison L: *An analysis of racism and resources for African- American female victims of domestic violence in Wisconsin.* 16 Wis. Women’s L.J 259 ( 2001) @ 281

<sup>28</sup> *Facing the future; Report of the UN Secretary General’s task force on women, girls and HIV/AIDS in Southern Africa.* @ 9

<sup>29</sup> Chapter 5:11.

<sup>30</sup> Chapter 5:07. The practice of having more than one wife is commonly referred as polygamy, the correct term is polygny. Polygamy is gender neutral.

all requirements of a customary law marriage but for registration.<sup>31</sup> In the eyes of the law, it is not a valid marriage except for certain limited purposes being guardianship, status of the children, custody and inheritance under customary law.<sup>32</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 with a multiplicity of partners lies in the fact that if one person in the circle gets infected, the likelihood of all persons involved being 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>33</sup> Within all marriages, women face a variety of challenges the major one being infidelity. Whilst those married under the 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 many women the world over have found out, 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

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<sup>31</sup> Section 3 (1) Customary Marriages act Chapter 5: 07

<sup>32</sup> Section 3 (5) Customary Marriages act.

<sup>33</sup> Worldwide religious news dated 9 May 2005 available on [www.wwrn.org/article](http://www.wwrn.org/article) The Vapostori (Apostolic) sect is an Independent African church fund in Zimbabwe and some neighboring countries. Its is based on the ten commandments and is identified with open air church services, white gowns and doeks for women and also 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.

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 . Damages for adultery are recoverable under two heads: contumelia and loss of consortium.

Contumelia is based on the manner in which the adultery is committed and the hurt suffered by the plaintiff. Loss of consortium is based on the premise that the plaintiff loses love, affection, comfort and other services incidental to marriage.<sup>34</sup> Furthermore, the adulterer must have known of the existence of a monogamous marriage between the plaintiff and his/her spouse.<sup>35</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 cannot sue for adultery since their marriage is potentially polygynous. That means a man in such a marriage can have extra marital affairs without necessarily marrying the person he is committing adultery with.<sup>36</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>37</sup> Women in such unions cannot sue since under customary law , the man can also enter into as many unions as he wants.

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<sup>34</sup> For a fuller discussion, see Takadiini vs. Maimba 1996 (1) Zimbabwe Law report which discusses the requirements for an action of adultery to suffice.

<sup>35</sup> *Id.*

<sup>36</sup> This issue was discussed extensively in the case of Mukono v Gwenzi, 1991 (1) Zimbabwe Law Report 119

<sup>37</sup> Carmichael v Moyo 1994 (2 ) Zimbabwe Law Report 176

For women in monogamous marriages, they face societal pressures from the fact that a trend has developed where husbands go on to “ marry” under customary law without dissolving the first marriage. This issue was highlighted when the wife of a government Minister sued the “ other woman” for adultery. In her plea , the other woman stated that she was unaware of the Minister’s marital status and even if she was , the Minister had paid lobola for her and as a result she considered herself to be “his” wife. The case was reportedly settled out of court.<sup>38</sup> Although a man who is in monogamous marriage commits bigamy when he marries another woman without dissolving the first marriage, societal attitudes do not condemn such moves. It is not uncommon to find relatives accepting the second woman. Therefore, while the law considers it a crime, society does not. Therefore, despite women married under a monogamous marriage seemingly being in a better position, in reality they are not.

The dangers posed by adultery are very clear. It takes one person in the circle to get infected and 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” and describe it as thus :

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>39</sup>

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<sup>38</sup> The case received extensive medial coverage in online newspapers. See [www.newzimbabwe.com](http://www.newzimbabwe.com) dated the 5<sup>th</sup> of February 2005.

<sup>39</sup> WLSA: Women and gender generated reproductive crimes of violence: Pregnancy and child birth: Joy or despair? @ 123

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 12 months<sup>40</sup>. Of those who were married, one in eight men, but only one in a hundred women, said they had sex outside the marriage.<sup>41</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 are with (serial monogamy) or only have one or two partners at a time.<sup>42</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 the case of *Reith v Antao*,<sup>43</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>44</sup>. The same court decided in a later case that there is need to award damages that would act as a deterrent measure to protect the innocent spouse against contracting HIV from the errant spouse.<sup>45</sup>

Other cultural practices place the responsibility for preventing HIV/AIDS on married women. For example, the Zimbabwe Traditional healers association (ZINATHA) states<sup>46</sup> in its AIDS policy states that ; *inter alia* :women should be taught ways of preventing their husbands from engaging in extra marital affairs by using herbs (mupfuhwira) that are applied in their husband's food so as to keep their sexual desire in

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<sup>40</sup> PANOS, SAFAIDS, UNAIDS : Men and HIV in Zimbabwe @ 8 available on [www.saf aids.org.zw/publications/men\\_&\\_hiv\\_in\\_zim](http://www.saf aids.org.zw/publications/men_&_hiv_in_zim)

<sup>41</sup> *Id.*

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

<sup>43</sup> 1991 ( 1) Zimbabwe Law Review 317

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

<sup>45</sup> Khumalo vs. Mandishona , 1996 ( 1) Zimbabwe Law Report 434

<sup>46</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.

check. This helps in preserving and protecting their marriages . Wives should always cook the morning meal for their husbands to prevent them from looking for other sexual partners outside their marriages. This is a ritualistic meal left over at supper that a wife keeps for her husband's morning meal the following day. The meal symbolizes the sexual contact the husband and wife had the previous night. It refreshes the man and symbolically ties him ( sexually ) to his wife.<sup>47</sup> The policy places 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 look for other sexual partners and in the process “ bring” AIDS into the family.<sup>48</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. Her husband had amended his will in her favor and this did not go down well with her in-laws.<sup>49</sup> Chiwetani's case is but one in thousands of cases where married women bear the brunt of society's disapproval and accusations.

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<sup>47</sup> Tsiko S: The Herald newspaper dated the 2nd of March 2006; *ZINATHA HIV/AIDS policy approval hangs in the balance*. Available on [www.allAfrica.com](http://www.allAfrica.com)

<sup>48</sup> *Id.*

<sup>49</sup> Matambanadzo: *Zimbabwe's women acting against AIDS*: Pazambuka news dated 04/06/2004 available on [www.pazambuka.org](http://www.pazambuka.org)

## **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 (abstinence, behavior change and condom use) strategy to combat HIV/AIDS. The basis of the ABC strategy is that if one cannot abstain then they must be faithful – if they cannot be faithful- they must use condoms.<sup>50</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 but did use them with commercial sex workers. The study found that it is considered uncultural to use a condom with one's spouse.<sup>51</sup> Condom use gives the impression of lack of trust in a relationship. Some women feel victorious if their partners do not use condoms with them but do 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 being thrown out of their homes.<sup>52</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

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<sup>50</sup> Christian AID's HIV unit replaced ABC with SAVE ( safer practices, available medications, voluntary counseling and testing, empowerment ) in its comprehensive HIV programs : dated 21 March 2006 available on [www.oneworld.net](http://www.oneworld.net)

<sup>51</sup> *Condom use and the risk of HIV infection: Who is being protected?* Central Africa Journal of medicine: 40(11) 294-299 available on [www.med.uio.no/iasam/inthel](http://www.med.uio.no/iasam/inthel) .Mbizvo is a senior scientist with UNDP/UNFPA/WHO /World Bank in Zimbabwe

<sup>52</sup> PANOS, SAFAIDS , UNAIDS *supra* @ 19

(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>53</sup>

In yet another study by two Zimbabwean researchers titled, 'Male and female condom use by sex workers in Zimbabwe: Acceptability and obstacles', they concluded that although the female condom presents a shift in power dynamics, ironically it still needed the cooperation of male partners.<sup>54</sup> The two researchers also noted that the price of the female condom is high, costing almost \$ US 2,50. 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>55</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 content with the socially accepted fact that men's sexuality is recognized from birth. For instance, ZINATHA has in its policy stated that "Mother's should perform the symbolical 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>56</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

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<sup>53</sup> Adetunji : *Condom use in marital and non marital relations in Zimbabwe* ; International family planning perspectives 2000, 26 ( 4) 196-200 accessible from [www.guttmacher.org/pubs/journals/2619600](http://www.guttmacher.org/pubs/journals/2619600)

<sup>54</sup> Ray and Maposhere: *Male and female condom use by sex workers in Zimbabwe*. Available on [www.who.int/.../publications](http://www.who.int/.../publications)

<sup>55</sup> *Id.*

<sup>56</sup> Tsiko Sifelani: *ZINATHA HIV/AIDS policy approval hang in the balance*: Herald newspaper dated 2 March 2006. Available on [www.allAfrica.com](http://www.allAfrica.com)



and girls. For 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 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 / bride price to the family of the woman. A customary law union is therefore between two families rather than between husband and wife.<sup>57</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:

....very 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>58</sup>

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<sup>57</sup> WLSA: Lobola, its implications for women’s reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe @ 15 -16

<sup>58</sup> *Id* @ 19

As is discussed below, non registration of marriage affects property distribution upon divorce and death.<sup>59</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 polygynous 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. If the suitor could not pay, he would spend one year working in the fields of his prospective father-in-law.<sup>60</sup> The concept underpinning lobola, at least in the old days, was a cementing of relationships between two families. 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>61</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>62</sup>

As already stated the concept of lobola as it originally existed was noble.<sup>63</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>64</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

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<sup>59</sup> This is based on the writer’s own experiences having attended numerous lobola paying ceremonies.

<sup>60</sup> For a comprehensive discussion, see WLSA: Lobola; Its implications for women’s reproductive rights in Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe. The actual practice is not homogenous but depends on a particular country or a tribe within the country.

<sup>61</sup> Chanetsa Benhilda: Bride price and Violence available on [www.boloji.com/wfs](http://www.boloji.com/wfs)

<sup>62</sup> Based on the writer’s personal experience

<sup>63</sup> See WLSA note 60 @ 8

<sup>64</sup> See Goercke Brian *supra* @ 21

because if she leaves, lobola may be demanded wholly or in part depending on whether or not she has borne children.<sup>65</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>66</sup>

In Zimbabwe, a woman is supposed to give birth in proportion to the number of cattle that has been paid for her.<sup>67</sup> If a woman cannot give birth in marriage, a substitute is found. This is usually the woman's sister or niece. Neither is consulted.<sup>68</sup>

Furthermore, the control placed over a woman's sexuality through lobola does not end at the death of the woman's husband. At the death of her husband, the woman is inherited by a brother or nephew of her deceased husband in the form of a levirate marriage.<sup>69</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 despite the cause of death of the widow's husband. Often death certificates do not indicate that the cause of death is AIDS. Relatives may also blame other causes such as witchcraft for the death of their relative.<sup>70</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. A man in a polygamous marriage died of AIDS, leaving behind two wives. His brother inherited both wives. After a few months, the first of the two wives died followed by the

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<sup>65</sup> *Id* page 27

<sup>66</sup> Viewpoint: *The way I see it; Virginity testing as HIV/AIDS prevention strategy: Clutching at straws.* Sexuality in Africa magazine number 13. Available on [www.arsrc.org](http://www.arsrc.org)

<sup>67</sup> See WLSA note 60 *supra* @ 55

<sup>68</sup> *Id.*

<sup>69</sup> For a discussion of levirate marriages in Zimbabwe see : WLSA: Widowed, inheritance laws and customs in Southern Africa @ 42-44

<sup>70</sup> Nyakudya M: *Zimbabwe: Wife inheritance tradition spreads AIDS*: Inter Press Service dated 3 August 1998 available on [www.aegis.com/news/ips/1998](http://www.aegis.com/news/ips/1998)

brother. Another brother inherited the second wife, and he died leaving behind the woman who he had inherited. In the second case, a man died leaving behind a wife and three children. His brother inherited the wife. He soon died of AIDS and left behind his original wife and children.<sup>71</sup> More often than not, men who inherit wives will be having their own wife or wives already. The inherited wife becomes an addition to the family. The wife or wives already existing are therefore at risk of catching HIV from the husband, especially if the 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. She may also be allowed to stay, but she will be banned from having sexual relations with any other man.<sup>72</sup>

Yet another practice linked to the payment of lobola is that of surrogate wife known as “chigaramapfihwa”.<sup>73</sup> The surrogate wife is either a sister or niece of the deceased woman. This time around, the man does not pay lobola, since the surrogate wife is meant to replace the deceased woman. Surrogacy takes place despite the fact that the man involved maybe HIV positive. As with the lobola ceremony, women have little or no say in the decision making. A woman is a mere spectator in the process.<sup>74</sup>

## **E: OTHER HARMFUL CULTURAL PRACTICES**

### **Virginity testing**

In the face of disturbing AIDS prevalence rates, Zimbabwean society has grappled with how to curb infection. One person who has taken the lead is Chief Naboth Makoni, a

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<sup>71</sup> *Id*

<sup>72</sup> WLSA note 60 *supra* @ 29

<sup>73</sup> According to the tradition of the writer’s Shona tribe, mapfihwa refers to the bricks that are laid out in a rectangular fashion in a traditional kitchen. A steel mesh or a metal instrument which stands on its feet and is shaped to hold cooking pots is put over the bricks. The bricks 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.

<sup>74</sup> This is based from the writer’s personal experiences as a passive observer.

traditional leader presiding over an area in the Eastern Highlands of Zimbabwe.

Controversially, in 2001 he revived the practice of virginity testing.<sup>75</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. This is considered as a way to combat the spread of HIV/AIDS.<sup>76</sup> Chief Makoni claims that virginity testing preserves African identity and culture. Ironically, his district of Makoni has one of the highest AIDS rates in the whole country.<sup>77</sup> The point that is perhaps not given a lot of credence is the link between virginity testing, marriage and HIV/AIDS. A woman is supposed 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 men who sit down and negotiate the lobola.<sup>78</sup> The perception created by virginity testing before marriage is that womanhood is the major vehicle for HIV transmission. 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>79</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 literally preying on the girls who would have been declared virgins and given certificates. The story of one Otilia Chipfatsura illustrates this point. As a then 28 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

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<sup>75</sup> For a discussion of the ceremony see: Soros E : *Virgins, potions and AIDS in Zimbabwe* . October 22 2002 available on [www.worldpress.org](http://www.worldpress.org)

<sup>76</sup> See [www.thezimbabwean.co.uk](http://www.thezimbabwean.co.uk) dated 9 September 2005: *Zimbabwe – Virginity testing widely practiced.*

<sup>77</sup> See Soros note 75 *supra*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

healer to sleep with a virgin who would cure him of AIDS. The virginity testing ceremonies are therefore a reminder of the trauma she suffered.<sup>80</sup> There have also been disturbing reports that some girls are engaging in anal sex so as to pass the virginity test.<sup>81</sup> According to the World Health Organization (WHO), women are probably more susceptible to HIV/AIDS than males due to their biological makeup.<sup>82</sup> The risk of infection is even greater through anal sex. The lining of the anus is more delicate than the lining of the vagina and therefore it is more likely to be damaged during intercourse.<sup>83</sup>

Virginity testing is inextricably linked with the control of a woman's sexuality from an early age. ZINATHA in its AIDS policy 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>84</sup> She is not supposed to even have sexual feelings when she becomes a wife. She must just 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.

### **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 thus further putting them and their wives at risk.<sup>85</sup> Yet other men engage in casual sex during the time when

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<sup>80</sup> *Id.*

<sup>81</sup> See [www.thezimbabwean.co.uk](http://www.thezimbabwean.co.uk) dated 9 September 2005.

<sup>82</sup> [www.avert.org](http://www.avert.org)

<sup>83</sup> *Id.*

<sup>84</sup> Tsiko Sifelani *supra*

<sup>85</sup> PANOS/SAFAIDS/UNAIDS: Men and HIV in Zimbabwe @ 10

their wives are pregnant. The basis is that pregnant wives are not able to satisfy their husbands sexually.<sup>86</sup> Yet 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 even harm the reproductive system such as dry sex.

### **Dry sex**

Mark Schoofs discusses dry sex in Zimbabwe in his Pulitzer prize winning series titled ‘AIDS: The agony of Africa’.<sup>87</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. All this is done to please husbands. In other words, a woman is not concerned about her own sexuality and pleasure but that of her husband. As Schoofs notes; “ Research shows that dry sex causes vaginal lacerations and suppresses the vagina’s natural bacteria, both of which increase the likelihood of HIV infection. ...Some AID workers believe the extra friction makes condoms tear more easily”<sup>88</sup>

## **PART 3: 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;

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<sup>86</sup> *Id.*

<sup>87</sup> *AIDS; The agony of Africa*. The article on dry sex in Zimbabwe is found in part 5; Death and the second sex dated December 1-7 1999 available on [www.village.com/news](http://www.village.com/news) .

<sup>88</sup> *Id*

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>89</sup>

What should be noted is that this procedure is not confined to domestic violence only, but to disputes such as a quarrel between neighbors, wife and “mistress”, and co – workers.

To the extent that this procedure is general, Zimbabwe cannot be said to have a law that deals specifically with domestic violence. In a study conducted in Zimbabwe, 28% of women from a nationally represented sample reported at least one episode of physical violence from their partner and in 1996, 32% of 966 women in one province reported physical abuse by a family member/household since the age of sixteen years.<sup>90</sup> 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 based violence, HIV risk behaviors and HIV positive status.<sup>91</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>92</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>93</sup>

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<sup>89</sup> Section 388 of the Criminal Procedure and Evidence Act

<sup>90</sup> Innocent Digest number 6 page 2

<sup>91</sup> See Maman S et al: *The intersections of HIV/AIDS and violence : directions for research and interventions* available on [www.who.int/entity/gender/violence/en/vawinformationbrief](http://www.who.int/entity/gender/violence/en/vawinformationbrief)

<sup>92</sup> Van Der Straten A et al: *Sexual coercion, physical violence and HIV infection among women in steady relationships in Kigali* accessible from [www.who.int/bulletin/volumes/82/4/en/299](http://www.who.int/bulletin/volumes/82/4/en/299)

<sup>93</sup> Watts C et al : *Women, violence and HIV/AIDS in Zimbabwe*. Paper presents evidence of the extent of violence against women in Zimbabwe and the link between HIV/AIDS infection and violence. It concludes that there is a correlation between HIV and violence. Available on [www.genderaids.org](http://www.genderaids.org)



According to the UN Secretary General's task force report of women, HIV/AIDS in Southern Africa,<sup>94</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>95</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>96</sup> For women who have already experienced violence, they "often find themselves unable to negotiate safer sex or insist on fidelity on the part of their partner, for fear of provoking further violence"<sup>97</sup> In a United Nations Population Fund (UNFPA) report<sup>98</sup> the story of Elizabeth a Zimbabwean woman is recounted. 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 Zimbabwe focusing on domestic violence.<sup>99</sup>

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<sup>94</sup> *Facing the future together*: The report of the UN's Secretary General's Task force on women, girls and HIV/AIDS in Southern Africa. 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, girl's 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 @ 32

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

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

<sup>98</sup> *To sleep with anger; Domestic violence and rape fuels AIDS in Zimbabwe* dated 1/12/05

<sup>99</sup> *Id.*

## **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>100</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 at law"<sup>101</sup>. A further factor "is that the enactment 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>102</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>103</sup> The legislature followed up on this judgment by enacting the Sexual Offences Act, which became operational as from the 1<sup>st</sup> of August 2001.<sup>104</sup> Among the stated purposes of the Act is "to discourage the spread of the human-immuno deficiency virus"<sup>105</sup>. The Act criminalizes marital rape within the wider realm of deliberate transmission of HIV/AIDS.<sup>106</sup>

Although this law is 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 does not define marriage. This has the effect of excluding the majority of women who are in

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<sup>100</sup> 1999( 2) Zimbabwe Law report page 358:

<sup>101</sup> *Id @ 367*

<sup>102</sup> *Id @ 369*

<sup>103</sup> *Id @ 373*. The High Court rules of Zimbabwe provide for an order of judicial separation. The court authorizes persons married to each other to go on separation. . If there is no reconciliation, the decree of judicial separation becomes one of a divorce.

<sup>104</sup> Sexual Offences Act Chapter 9: 21

<sup>105</sup> Preamble to the Sexual Offences Act.

<sup>106</sup> Section 15 of the Sexual offences Act : The period of imprisonment for willful transmission of HIV is twenty years.

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>107</sup> At the time of writing, the Code is not yet operational.

As previously noted, semi autonomous social fields play a dominant part in women’s lives<sup>108</sup>. Stating that women have a choice between reporting a husband for marital rape or keeping quiet maybe misleading. It is more a case of being between a stone and a hard rock. 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 did 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 breadwinner. Laying a charge against him of marital rape will 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>109</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

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<sup>107</sup> Section 2 of the 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.

<sup>108</sup> See note 4 *supra*

<sup>109</sup> Based on the writers personal experiences in legal awareness programs conducted for WLSA.

to follow, and the assumption is that he will use his discretion.<sup>110</sup> Given the fact that women are not reporting 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.

#### **PART 4: 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>111</sup> The principle of medical practitioner/client confidentiality is recognized.<sup>112</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>113</sup> The exceptions to 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 of family, (4) where the patient is a minor and the guardian has consented to the disclosure, (5) where the patient is deceased and consent has been obtained from the executor of the estate.<sup>114</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

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<sup>110</sup> Section 68 (a) proviso. Criminal Law ( Codification and reform) Act

<sup>111</sup> Statutory instrument 252/87 section 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>112</sup> *Id* section 22

<sup>113</sup> See Lawyers collective on confidentiality and HIV/AIDS on [www.lawyerscollective.com](http://www.lawyerscollective.com) The paper argues that confidentiality in HIV must be maintained otherwise, people will not come forward for testing

<sup>114</sup> Note 111 section 23

for disclosure to be made to a spouse or partner.<sup>115</sup> The Zimbabwe Human Rights NGO forum advocates spousal notification by medical personnel on the grounds that once partners know their status, they will live positively. They will also plan for the future, for instance by writing wills. There will be a natural progression towards making disclosure the norm.<sup>116</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 rate of HIV/AIDS infection are obtained from women attending ante natal clinics. They are likely the first to know their status. Once disclosure is made, they may be chased away from the family home with no resources. They face ostracization from families and the community.<sup>117</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>118</sup> In Zimbabwe, the effect of 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>119</sup> UNAIDS fell

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<sup>115</sup> [www.plusnews.org/AIDSreport](http://www.plusnews.org/AIDSreport)

<sup>116</sup> The Zimbabwe Human Rights NGO Forum brings together twelve Non Governmental organizations working in the area of human rights. This piece is titled : *Spousal notification and HIV/AIDS* and was written in commemoration of the International Women’s Day. Available from [www.kubatana.net](http://www.kubatana.net)

<sup>117</sup> UNIFEM: Facts and figures on violence against women : HIV/AIDS and violence available on [www.unifem.org/gender\\_issues/violence\\_against\\_women/facts\\_figures.php](http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php)

<sup>118</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.*

<sup>119</sup> *Opening up the HIV/AIDS epidemic: Guidance on encouraging beneficial disclosure, ethical partner counseling and appropriate use of HIV case reporting* @ 10 available on [www.undp.org/hiv/publications](http://www.undp.org/hiv/publications)

short of endorsing breach of confidentiality in situations such as marriage or co-habitation. Linked to confidentiality and disclosure is willful transmission of HIV/AIDS.<sup>120</sup>

## **PART 5: WILLFUL TRANSMISSION OF HIV/AIDS**

As previously mentioned , marital rape in Zimbabwe is contextualized in the realm of willful transmission of HIV/AIDS.<sup>121</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>122</sup>

For married women, criminalizing willful transmission comes 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 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. But it is not clear that these functions will make any significant contribution to preventing HIV transmission, as they offer at best ,

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<sup>120</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. : Canadian HIV/AIDS legal network; *After Cuerrier: Canadian criminal law and the non disclosure of HIV positive status @ 6*

<sup>121</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>122</sup> 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. See Canadian HIV/AIDS legal network: HIV/AIDS policy and law review. Volume 10, no 1 , April 2005 @ 61

a limited basis for resorting to the criminal law as a policy response to the epidemic.<sup>123</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. For “ 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>124</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.

## **PART 6: 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.<sup>125</sup> While the stated aim of the Act is to reach the statutory target which is “as far as is reasonably practicable, and having regard to their conduct, .....to place the spouses....in a position that they would have been had a normal marriage relationship continued between the parties ...”<sup>126</sup>; in reality judges have a lot of discretion. In view of

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<sup>123</sup> UNAIDS: Criminal law, public health and HIV transmission. A policy options paper @ 6

<sup>124</sup> *Id* @ 9

<sup>125</sup> The Act became law on the 10<sup>th</sup> 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>126</sup> *Id* section 7

the marginalization of women within marriages, most of them walk away with little in terms of property and spousal support. In the case of *Takafuma v Takafuma*<sup>127</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 the other using the guidelines in the Matrimonial Causes Act.<sup>128</sup> For most women, however, houses are registered in the name of the husband, 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>129</sup>, a wife of seventeen years was awarded a third of the value of the matrimonial property. In *Nyamaropa v Nyamaropa*,<sup>130</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. A married woman loses the spouse status at divorce and therefore will not be entitled to the pension.<sup>131</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 has 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

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<sup>127</sup> 1994(2) Zimbabwe Law Report page 103

<sup>128</sup> *Id* @ 110

<sup>129</sup> High Court of Harare -505- 87

<sup>130</sup> High Court of Harare -66-87

<sup>131</sup> Statutory Instrument 180/2002



usually in the form of money.<sup>132</sup> This rejection token is not recognized by the law. The issue of how to apportion property acquired during the subsistence 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>133</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>134</sup> In the case 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>135</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>136</sup> In the case of *Mtuda v Ndudzo*,<sup>137</sup> the court applied the principle of unjust enrichment. Women are doubly disadvantaged in that apart from non

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<sup>132</sup> Based on the customs of the writer's own tribe.

<sup>133</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 *Schroeder v Buchholz* 2001ND 36, 622 N.W 2d 202 for a discussion of the doctrine.

<sup>134</sup> Section 6 of the act contains guidelines on the choice of law process. In any civil case between African, unless the justice of the case requires, customary law applies where the parties have agreed that it should apply or regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. Some of the factors are the mode of life of the parties. For instance parties may be living in the city, have jobs and are closer to general than customary law.

<sup>135</sup> 1998 (2) Zimbabwe Law Report page 18

<sup>136</sup> *Id*

<sup>137</sup> Harare High Court -103-00, also reported in the Zimbabwe Law Report 2000 page 710

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>138</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>139</sup> The case of Venia Magaya<sup>140</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>141</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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<sup>138</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 1<sup>st</sup> of November 1997.

<sup>139</sup> Section 23

<sup>140</sup> 1999(1) Zimbabwe Law Report @ 100

<sup>141</sup> For an in-depth look at the case of Venia Magaya see: WLSA : Venia Magaya's sacrifice: A case of custom gone awry

husband will come back to haunt them should they inherit “ his” property.<sup>142</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>143</sup>

Transactional sex is conducted with different partners raising the risk of infection. The progression would be for instance – marriage → divorce → poverty → transactional sex → infection with HIV.

### **Conclusion: The case for gender equity**

The Zimbabwe National Gender Policy places HIV/AIDS under the broad umbrella of health.<sup>144</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>145</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 muliti-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

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<sup>142</sup> Based on the writer’s legal awareness meetings held in Zimbabwe.

<sup>143</sup> PANOS, SAFAIDS, UNAIDS; *supra* @ 16-17

<sup>144</sup> Section 6.2.2 page 8: The Gender policy was launched on the 8<sup>th</sup> of March 2004 to coincide with International Women’s Day.

<sup>145</sup> Gender Policy Clause 1.0 : Rationale for the National Gender policy page 1

and men, including youths, to HIV/AIDS through traditional and religious beliefs and practices.<sup>146</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 center of the human condition. The practice of ignoring gender analysis has turned out to be that ...for the Africa continent , it means economic and social survival. For the women .. of Africa, it's a matter of life and death.<sup>147</sup>

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>148</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>149</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

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<sup>146</sup> Op Cit

<sup>147</sup> The UN Secretary General's special envoy on HIV/AIDS in Africa speaking at the Barcelona International AIDS conference July 2002

<sup>148</sup> The UN Secretary General's task force on women , girls and HIV/AIDS in Southern Africa page 7

<sup>149</sup> World Bank report 2001 pages 6-7

credit for economic empowerment. , say no to 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, get an equitable share upon divorce. Marriage would then not put women at risk of HIV/AIDS infection.