

SEX, RIGHTS AND THE LAW IN A WORLD WITH AIDS

GENDER, HIV/AIDS AND THE LAW IN ZIMBABWE

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Introduction

Despite economic and social challenges, Zimbabwe has progressive laws and policies that on paper promote and protect women's rights. Zimbabwe is also a signatory to regional and international instruments such as CEDAW, the African Protocol on women's rights and more recently the SADC Protocol on gender and development. However laws are only as good as the people who use them and unless there is a radical shift in gender relations, the role of the laws and policies will remain limited in the fight against HIV and AIDS.

It is the writer's hypothesis that for the law to make to be meaningful in the era of HIV and AIDS, there has to be a radical shift towards gender equality by promoting women's economic empowerment. This entails looking beyond the law since it has limitations especially in the realm of criminal law. Although not a panacea to the HIV and AIDS epidemic, women's economic empowerment gives women options and hence better protection against HIV and AIDS effects.

This research paper is divided into 4 chapters. The introduction is followed by Chapter two that gives a brief situational analysis on HIV in Zimbabwe and the associated gender dimensions. The legal framework and its limitations will be discussed in Chapter 3. Chapter 4 will make a case for women's economic empowerment using the Gweru Women and AIDS Prevention Association (GWAPA) model as a best practice. This chapter will conclude with recommendations and a way forward.

Chapter 2

Brief situational analysis

Zimbabwe is one of the countries worst affected by HIV and AIDS. According to estimates in 2007, an estimated 1,320,739 adults and children were living with HIV and AIDS. Zimbabwe is however facing a decline in prevalence rates from 25.8% in 2004 to 17.7% in 2006 and 15.6 % in 2007. ¹ The decline is attributed to mortality and behavior change. ²

The Gender dimensions of HIV and AIDS in Zimbabwe

HIV and AIDS pose a major threat to the well being of every Zimbabwean particularly now in the era of economic hardships. Families are losing breadwinners, children losing parents, young girls and boys taking on the added responsibilities of looking after their siblings.

¹ See the Zimbabwe UNGASS report January 2006 to December 2007.

² Ibid page 4

While HIV and AIDS is not entirely a women's problem, the gender dimensions cannot be ignored. Women in Zimbabwe suffer multiple jeopardy as caregivers and also increased vulnerability due to their biological make up.

Marriage also places great risk to women as the institution is saddled with cultural practices and beliefs.³ Customary practices and norms view women as perpetual minors. Other customary practices that predispose women to HIV infection are wife inheritance, and appeasement of avenging spirits by the submission of a girl child or woman as compensation⁴. Women are literally treated as commodities that can be exchanged among male folk.

Violence against women has emerged as one of the key factors that put women at risk. Sexual violence often results in rape, leading to vaginal lacerations and infection.

Given the above factors, one would ordinarily look to the law for redress but the question to be considered is whether or not the law can act as a reprieve.

Chapter 3

The legal framework and its implications for HIV and AIDS

The Zimbabwean legal system is premised on dualism in that both customary and general law is recognized as binding systems of law.⁵ General law is ascertained from the Roman Dutch common law as applied in the Cape Colony in 1891 and subsequent laws passed by Parliament. The sources of customary law are the practices and customs that are binding on the people of Zimbabwe. It is critical to note that customary law is not homogeneous but is still based on patriarchy. In Zimbabwe there are only three pieces of legislation and one subsidiary piece of legislation that specifically mention HIV. There are laws that also have a bearing on HIV and AIDS and yet others that are completely silent such as the Constitution.

The Constitution of Zimbabwe

The Constitution of Zimbabwe is the highest law in the land. It is the law against which all other laws are measured and those that are inconsistent will to the extent of the inconsistency be declared null and void.

The Constitution contains a justiciable Declaration of rights and any person whose rights are violated can apply directly to the Supreme Court for redress.

³ Chirawu : Till death do us part: Marriage, HIV/AIDS and the law in Zimbabwe: Cardozo Journal of Law and Gender Vol 13 Number 1 at page 24

⁴ The Domestic Violence Act in Section 3 outlaws these and other related practices such as forced marriages. Pledging of women and girls for purposes of settling debts or appeasement of spirits is a criminal offence in terms of Section 94 of the Criminal Code.

⁵ Section 89 of the Constitution

Section 23 contains a list of grounds for non-discrimination and these are race, tribe, and place of origin, political opinions, color, creed, sex, gender, marital status and physical disability. However the Section 23(3) allows discrimination in matters of personal law. The effect of this is that discrimination under customary law where personal law is mostly visible is allowed by the Constitution. Women are mostly vulnerable in the social spheres perpetrated in the name of culture.

Although the Constitution does not deal specifically with HIV and AIDS, it can be argued that the Declaration of rights in some aspects covers HIV and AIDS. Section 12 of the Constitution guarantees the right to life of every individual. The right to life of those infected would entail access to treatment and relevant dietary requirements. For caregivers it entails the right to be protected from infection and access to essential provisions and training. In marital relationships, it means that spouses have a right to demand safe and satisfying sex in keeping with ICPD.

Section 20 of the Constitution guarantees the right to freedom of expression. This would mean the reinforcement of the GIPA principles. However these rights are not specific to HIV and AIDS and one has to link them, a situation which is not conducive to the protection and promotion of rights of people living with AIDS.

The Constitution is however silent on the right to health, the food and to shelter. It is also pertinent to note that the Constitution does not provide for the right to privacy that would protect persons from disclosure of information about their health status.

Given the limitations in the highest law of the land, it is clear that the role of the law in prevention, mitigation and management of HIV and AIDS is limited.

The Domestic Violence Act

On the 26th of February 2007, the Domestic Violence Act was signed into law. The act came into operation on the 25th of October 2007.

Domestic violence becomes more poignant when we consider HIV infection. According to the WLSA research, women who are in abusive relationships more often than not have little or no bargaining power. Unequal power relations reduce women to mere spectators even when their own sexual and reproductive health rights are compromised.

Women's Global Leadership colleagues succinctly state that:

*...around the world, women are facing a catastrophic assault on their bodies, rights and health as a result of the prevalence of both HIV and the unrelenting omnipresence of violence against women.*⁶

⁶ Rothschild et al –*Strengthening resistance: Confronting violence against women and HIV/AIDS*

Many of the respondents in the WLSA research while noting the benefits of a law on domestic violence, also pointed out the need to use the law in conjunction with other strategies. Essentially the same factors that kept violence against women especially in the domestic setting were still prevalent- payment of bride price, unequal power relations and bargaining power and gender inequalities.

While the WLSA legal department has since October 2007 assisted women in obtaining protection orders, it is clear that although space has been created to protect women from violence a lot more needs to be done to assist women. WLSA assisted client X to obtain a protection order against an abusive husband. In follow up meetings, X stated that all was well and that her husband was complying with the order. Months later, X called WLSA. She was at a Police Station. Her husband had burnt all her clothes and all her important documents such as passport and National Identity card. X confessed that although she had a protection order she was under so much pressure from her family and church to conform. That meant not having her husband arrested for non-compliance with the protection order.

WLSA also noted an increase in the number of cases of domestic violence that had elements of HIV and AIDS. In another case, Y's husband though legally married in terms of the Marriage Act⁷ brought another “wife” to stay with Y. She pointed out that this was illegal but she was told that the “law” has no place in the household. Y subsequently went for HIV testing and tested positive. Despite advising her husband about her status and that he should get tested, he refused and still insisted on having unprotected sex. When Y protested, her husband physically assaulted her. Y's reasons for not seeking a protection order also touch on the fact that she will be ostracized by society and she cannot be a returnee daughter at an advanced age of 36.

Criminal law and HIV and AIDS

In Zimbabwe the two laws that relate directly to criminal law and HIV and AIDS are the Criminal Procedure and Evidence Act (CPE) and the Criminal Law (Codification and reform) Act Chapter 9:23(The Code).

The Code criminalizes deliberate transmission of HIV even in instances where the accused person is married to the complainant. This includes women whose marriages are not legally registered. This is significant because all such marriages are referred to as unregistered customary laws unions and are only valid for limited purposes in terms of the Customary Marriages Act Chapter 5:07.⁸ Unregistered unions are potentially polygynous and this predisposes women to HIV infection. The inclusion of such unions for purposes of willful transmission points to the fact that the legislature was concerned with protecting women from infection.

⁷ Chapter 5: 11 – Monogamous

⁸ In terms of the Customary Marriage Act, Section 3(5) such a union is only valid for purposes of guardianship, status of children, custody and inheritance under customary law.

Section 79 of the Code reads as follows:

Deliberate transmission of HIV

- (1) Any person who-
- (a) knowing that he or she is infected with HIV; OR
 - (b) realizing that there is a real risk or possibility that he or she is infected with HIV;

intentionally does anything or permits the doing of anything which he or she knows will infect or does anything which he or she realizes involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

The law however provides certain defences in Section 79(2) of the Code as follows:

- (2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned-
- (a) knew that the accused was infected with HIV; AND
 - (b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it.

The Code also criminalizes marital rape in Section 68 of the Code by explicitly stating that it shall not be a defence to a charge of rape that the accused person and the complainant were husband and wife at the time of the commission of the offence. However all prosecutions for marital rape require the authority of the Attorney General. To the best of the writer's knowledge, no case of marital rape has been prosecuted in Zimbabwe since the 1st of August 2001 when the law on marital rape came into effect.

Laws limitations

As already discussed, the Constitution of Zimbabwe is limited especially in the area of socio-economic rights. Therefore although it is important to have a Declaration of rights, in the realm of HIV and AIDS, the Constitution does not take the issues any further. The Constitution does not explicitly mention HIV and AIDS and there have not been any test cases brought before the courts. One can only surmise that the rights enshrined therein also cover HIV and AIDS but this is a matter of interpretation.

The Domestic Violence Act though a commendable piece of legislation has its limitations. Although there has been a significant improvement in the number of cases being reported, many more cases are going unreported. The twin epidemics of violence against women and HIV infection continue unabated. In research conducted by Women

and Law In Southern Africa (WLSA) , it emerged that domestic violence remained largely a private matter due to gender inequalities and skewed power relations.⁹

Perhaps the most significant limitations lie in the criminal law arena. WLSA naively believed that just because there was a law on marital rape, women would rejoice and go to court in droves. This belief was shattered at a meeting held with a group of Catholic women that:

Most of the women were not aware that marital rape was an offence.... We expected that our revelation on this aspect would result in an earth shaking response that the women would rejoice that at last there was a law that could protect them. One respondent summed it all up: ' All the children that I have are as a result of marital rape so what's new? The fact that there is a law does not make a difference'.¹⁰

The requirement that the Attorney General authorize all prosecutions for marital rape is likely to discourage women from reporting since there are no guidelines on what the AG will consider.

As far back as 1991, the Honorable Justice Michael Kirby had already sounded a warning on placing too much faith in the enlargement of the criminal law. As aptly stated by Holland (1994):

It is trite to say that law cannot be a panacea for all social ills. Before invoking the rough instrument of the criminal law, we must be sure it will have some impact on the problem at hand. We must also be satisfied that, on the balance , the use of the criminal law will not be counter productive and that it will do more harm than good.

Apart from the evidentiary loopholes in willful transmission, women are likely to be disadvantaged since they are more likely to know their status first through antenatal clinics.¹¹ Women are therefore most likely to be victims of a law that was thought would protect them.

Given the limitations of the law in prevention, management, care and mitigation of HIV, perhaps other options need to be considered such as women's economic empowerment.

Chapter 4

Women's Economic empowerment

Women's economic empowerment is firmly on the world's agenda in line with MDG 3 – promote gender equality and empower women.

⁹ WLSA – Challenging the status quo: Gender, HIV/AIDS and the law @ 69

¹⁰ Id

¹¹ Chirawu: Till death do us part : Marriage, HIV/AIDS and the law @ 44

Defining women's economic empowerment

The United Nations Population Fund defines women's empowerment through five major components:

- (a) women's sense of self-worth
- (b) their right to have and determine choices;
- (c) their right to have access to opportunities and resources;
- (d) their right to have the power to control their own lives, both within and outside the home;
- (e) and their ability to influence the direction of social change to create a more just social and economic order, nationally and internationally.¹²

Women's economic empowerment cannot be divorced from gender parity. Integration and mainstreaming of gender issues is key to sustainable development.¹³ To that end countries in the SADC region adopted the Protocol on Gender and Development on the 19th of August 2008. The Protocol calls upon member states to adopt policies and enact laws which ensure equal access, benefit and opportunities for women and men in trade and entrepreneurship taking into account the contribution of women in the informal sector.¹⁴

The GWAPA model

Profile of GWAPA

GWAPA is a membership and community-based organization comprising single women, widows and divorcees.¹⁵ GWAPA was developed initially by the Department of Health for the Municipality of Gweru but later registered as an NGO. Its mission is to cater for those formally involved in prostitution.¹⁶ GWAPA trains peer educators on disseminating information on HIV, negotiating condom use and safe sex and also distribution of condoms. It runs a mobile clinic which offers VCT and members receive ART. GWAPA believes in women's economic empowerment and offers its members loans so that they can engage in income generating projects.¹⁷ The loan is a revolving fund with members as shareholders. GWAPA members receive training on book keeping, setting up business and investments.¹⁸ The Municipality of Gweru provided GWAPA with a farm for market gardening and poultry projects. The formation of GWAPA resulted in the formation of similar associations in nearby towns of Shurugwi – Shurugwi Women AIDS Prevention Association (SWAPA) and Zvishavane- Zvishavane Women AIDS Prevention Association (ZWAPA) both of who are affiliated to GWAPA.

¹² UNDP- Innovative approaches to promoting women's economic empowerment @ 9

¹³ Preamble to the SADC Protocol on gender and development.

¹⁴ Article 17 (1)

¹⁵ WLSA – Challenging the status quo @ 61

¹⁶ Human rights protected? Nine Southern country reports on HIV, AIDS and the law @386

¹⁷ Id

¹⁸ WLSA –Challenging the Status quo @61

Impact of GWAPA on women's sexual and reproductive health rights

As already stated, women's economic empowerment is not a panacea to HIV and AIDS pandemic. However the GWAPA model proves that with economic empowerment, women have choices especially in relation to their sexual and reproductive health rights. This becomes important since sexual intercourse is the major mode of transmission of the HIV virus.

In the WLSA research, GWAPA and SWAPA members spoke of the impact of their involvement with the organizations. Emeliah, a single mother of two used to frequent beer halls. She stated as follows:

Through a workshop organized by GWAPA for commercial sex workers and girls that frequented beer halls I gained a number of skills –survival and how to live positively. As a member of SWAPA, if I need treatment for an STI, I just go straight to the treatment desk. I don't have to stand in the long queues. Through a Z\$ 300 000 loan, I started a vegetable vending project. I am also a peer educator with the Red Cross. I respect myself and can hardly consider going back to prostitution.¹⁹

A member of GWAPA, Fungai realized the benefits of being self sufficient through using her hands;

GWAPA's focus on counseling and positive living has been very helpful. My hands are my ' husband'. I have learnt not to look to a man for subsistence. The sister-to-sister support program where we buy, exchange groceries and money lending among members has been very effective. I no longer feel alone. We share with each other the challenges we meet in life.²⁰

Emmah of SWAPA captured the impact of the GWAPA initiative as follows;

I am a peer educator. I used to be called *hure* – a prostitute – but since joining GWAPA my status in the community has changed. We are now empowered through a micro-finance scheme from GWAPA. We operate successful hair saloons. STIs among members are on the decrease. We are now assertive enough to demand condom use....We also do a lot of community mobilization on HIV and AIDS.

The other benefits from the GWAPA initiative include psychosocial support, home based care when a member becomes ill and educational support for orphaned children when a member dies.²¹ Sex is for pleasure and not a bargaining tool. Women engage in transactional sex sometimes just to access the basic commodities in life. However when they have economically viable options, there will be less incidence of transactional sex. Therefore the GWAPA initiative is holistic and all encompassing- it supports women who are already positive not to be re-infected and acts as a preventative measure for those

¹⁹Id @ 62

²⁰ Id

²¹ Id @ 63

who are negative. The voices captured above are only a tiny fraction of the GWAPA membership but they illustrate the impact of women's economic empowerment on matters of sex and sexuality, of self-esteem and of providing options to women.

In Zimbabwe the National Gender Policy recognizes that women must be economically empowered in the areas of land, agriculture and resettlement, industry, commerce and employment, mining, energy, environment and tourism. ²²The Ministry has developed a plan for the implementation of the Gender Policy. There is therefore strong support for initiatives such as the GWAPA one.

Conclusion and recommendations

While there are obvious benefits in having an expanded legal framework, the law alone is not enough to address HIV and AIDS.

Economic empowerment in addition to an appropriate legal framework provides a holistic approach to addressing HIV and AIDS. As aptly captured by UNDP;

Expanding women's engagement in economic activity has a positive effect on their status in households and society, and influences their ability to participate in decision-making. This increased economic opportunity provides a platform for tackling wider social and cultural obstacles to women's empowerment. A proactive focus on inclusion, networking and partnerships among key actors underpins these approaches.²³

Enhancing women's economic empowerment requires resources. For GWAPA, the association between it and the Municipality of Gweru gave impetus to the formation of the organization. Gweru City Council went a step further by providing GWAPA with a piece of land. Therefore this ensured that GWAPA had access to a critical resource, which is land. There is therefore a need to ensure that women have access to critical resources such as finance. This entails gender sensitive budgeting to ensure that the Ministry of Women's Affairs, Gender and Community Development receives adequate funding to enable it to carry out one of its critical mandates that is to enhance women's economic empowerment.

Women's economic empowerment is key to gender equality. As a strategy, it has worked for GWAPA and this model should be replicated elsewhere especially in societies where women are especially vulnerable to infection with HIV.

²² Section 6.1 of the National gender policy produced by the Ministry of Women's Affairs, Gender and Community Development.

²³ Innovative approaches to promoting women's economic empowerment @107