

# Using Rights and the Law to Reduce Women's Vulnerability to HIV/AIDS

A Discussion Paper

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## **Using Rights and the Law to Reduce Women's Vulnerability to HIV/AIDS A Discussion Paper**

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**Une version abrégée de ce document est disponible en français.**

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# 1. Introduction

Of the 34.3 million people living with HIV/AIDS at the end of 1999, an estimated 24.5 million (71 percent) live in sub-Saharan Africa and about one in six (5.6 million) in South and Southeast Asia. Africa also accounted for about 67 percent of new infections in 1999, with S and SE Asia showing the highest regional increase. Women now represent 55 percent of people with HIV/AIDS in Africa. However, in both Africa and South and Southeast Asia, women and girls (15-24 years) experience the highest rates of infection.<sup>1</sup> In South Africa, for example, the highest proportionate increase in 1998 was among girls under 20, and women between 20 and 29 demonstrated the highest prevalence. However, in many parts of the developing world the HIV transmission rate for women and especially young women and girls has surpassed, or is about to surpass, that of men.<sup>2</sup>

These statistics reveal that it is women and girls who are increasingly bearing the brunt of the HIV/AIDS epidemic. Underlying this is the fact of women and girls' inequality that shapes their increased vulnerability to HIV infection and their disproportionately high responsibilities as caregivers for the sick and dying as well as the living. Thus, while physiology affects women's greater risk of HIV transmission, it is women and girl's lack of power over their bodies and their sexual lives, supported and reinforced by their social and economic inequality, that make them such a vulnerable group in contracting, and living with, HIV/AIDS.<sup>3</sup>

The concentration of HIV/AIDS not only within the developing world, but also within the more vulnerable groups within that world, suggests that the extent of the epidemic is directly related to the social and economic inequalities that exist globally and within particular national and social contexts. It also means that national and international strategies and mechanisms for dealing with the epidemic must have a comprehension of these inequalities at their centre.

It is therefore a fundamental assumption of this paper that (a) if we agree that changing sexual behaviour is at the core of reducing HIV infection, and (b) if efforts to change sexual behaviour require changes in the social and economic power relations in society, then our ability to address the HIV/AIDS epidemic is inextricably linked to our ability to address gender inequality at all levels. This has several broad implications. First, it seems as if, in the absence of affordable drugs, treatment, and a vaccine, we will only be able to address the AIDS epidemic effectively if we address gender inequality. Second, if we do not address gender inequality; we may face not only new cycles of infection in the future, but also a gendered backlash (already occurring in many societies, where the fear unleashed by the epidemic increases the censure and abuse of vulnerable groups) that will reverse decades of incremental progress for women in the developing world. The AIDS epidemic is already one of the greatest threats to political and

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<sup>1</sup> All international figures are from the UNAIDS *Report on the Global HIV/AIDS Epidemic* June 2000.

<sup>2</sup> These are based on statistics from the South African Department of Health, cited in SA Health Review (1999) Health Systems Trust.

<sup>3</sup> Gupta GR and Weiss E (1996) *Women and Aids: Developing a new Health Strategy* Washington: International Center for Research on Women.

economic progress in Africa. Our greatest challenge is to turn the fact of the epidemic into an opportunity to build a more compassionate, caring, and equal society. Here, there are important and often inspiring stories of women and men responding creatively and positively to HIV/AIDS. For example, women in Uganda have responded to the high numbers of deaths of children in that society by mobilizing around issues of sexuality, autonomy, and violence and empowering themselves to speak out about these issues.<sup>4</sup>

The HIV/AIDS epidemic necessarily involves greater attention to gender and global inequality, and to poverty on a national and international scale. We have a long-term task of transforming gender and economic relations in front of us. The objective of this paper is necessarily more modest – to begin to identify a variety of short-term legal and rights-based strategies that can mitigate the immediate impact of HIV/AIDS in terms of HIV prevention and improving the lives of women who are infected and affected by HIV/AIDS. These relate to (a) the opportunities (some might say the imperative) presented by the epidemic to insert gender and gender equality concerns into laws, policies, and programs that address HIV/AIDS (in relation to prevention, treatment, and care) and (b) the related need to address the status of women and girls more generally. Within this broad context, we need to identify where, and which, rights and legal strategies can make a difference in different national contexts. This paper will argue that both human rights and the law can play an important, if limited, role within a wider set of national and international strategies. Written from the perspective and experience of a gender, rather than an AIDS, legal activist, it seeks to address the intersection of legal activism on gender equality and HIV/AIDS by providing a broad understanding of the issues. It is structured as follows:

- Section 2 will analyze the nature of women’s vulnerability to HIV/AIDS and briefly indicate its relationship to human rights and the law.
- Section 3 will consider, in broad terms, the role of human rights and the law in providing an enabling rights framework for progress to gender equality. Using South Africa as a case study, it will illustrate and analyze the gaps between such a framework and the reality of poverty and high levels of HIV infection, and the potential for rights struggles and culture-breaking law reform in the area of HIV/AIDS, and look at the benefits and limitation of such strategies.
- Section 4 will provide practical examples of successful rights struggles and law reform strategies in South Africa in relation to gender equality. It will then use these to highlight a range of issues and strategies in relation to the state, civil society, and the international arena that can inform discussions about appropriate strategies in different national contexts.
- Section 5 will conclude by drawing out some of the key issues that emerge from the paper.

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<sup>4</sup> For example the work of a women’s organization called THEWA, a collaborative effort between The AIDS Support Organization and Medecins Sans Frontières,-Switzerland. I am grateful to Katherine Brown-Favrot of the HIV Impact list for drawing my attention to this.

## 2. Women's Vulnerability to HIV/AIDS

The claim that there is a causal connection between HIV/AIDS and gender equality is a deceptively simple one. The reality is much more complex. First, we need to understand that gender relations (or relations between women and men) in a society are also power relations in which women are subordinate and unequal to men. This means understanding both men's relative power and women's relative powerlessness. While this may take different forms in different national contexts, it applies to all. Second, when we talk about women's vulnerability to HIV/AIDS, it is not to deny male vulnerability; it is merely to understand how and why women are relatively more at risk. Third, although an understanding of gender relations focuses attention on the plight of women, we should seek to understand the gendered nature of HIV/AIDS so that laws, policies, and programs can address the needs and concerns of women *and* men.

Although women are more vulnerable to HIV/AIDS than men, statistics suggest that not all women are equally vulnerable to infection because women are not equal. Thus, not only is women's vulnerability to HIV/AIDS rooted in sexual, social, and economic inequality based on gender, but that gender inequality is further fragmented by a combination of factors such as race, class, urban/rural location, sexual orientation, religion, and culture. Understanding the differing vulnerability of specific groups of women and the intricate and interdependent nature of inequality is crucial, not only for (a) identifying the complex causes of women's vulnerability, but also for (b) finding effective solutions that address the many causes and manifestations of this inequality.

Demographic portrayals of the epidemic in South Africa, for example, suggest that it is the more marginalized and vulnerable groups of women that are most at risk of infection. People living with HIV/AIDS are not only more likely to be women; they are more likely to be poor, African women. Young African women and girls are increasingly at risk. However, infection rates are also particularly high among monogamous married women. Vulnerable groups also include sex workers, migrants, and refugees. In social and economic terms, African women are the most unequal within our society and have the least access to the resources and benefits of the new democracy. The available evidence on inequality within relationships, the family, the community, the workplace, and the economy confirm that African women are more vulnerable than other groups of women.

Although South Africa is wealthy within the African context, it is one of the most unequal societies in the world. The poorest 40 percent of households (equivalent to 53 percent of the people) account for less than 10 percent of its consumption, while the top 10 percent of households (a mere 5.8 percent of the population) account for over 40 percent of consumption.<sup>5</sup> Official statistics confirm the strong racial, gender, and rural bias to inequality and poverty in South Africa. Not only do African women predominate among the poor, but they also have less

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<sup>5</sup> *Key Indicators of Poverty in South Africa* Reconstruction and Development Programme, October 1995, p.7. Based on the World Development Report, 1994.

income, are more likely to be unemployed,<sup>6</sup> less likely to be educated,<sup>7</sup> and have less access to facilities and services than any other group. There is a great disparity in living conditions and access to services between the poor and the rest of the population. A third of the poor live in shacks or traditional dwellings, the vast majority has no access to electricity, running water in the household, or modern toilets. Households in rural areas also tend to be poorer than urban ones. Again, African women predominate in these households.<sup>8</sup>

Research suggests that for African women, HIV vulnerability emerges from the apartheid past, characterized by racial inequality, a migrant labour system, the disintegration of family life, and deepening racial and gendered poverty.<sup>9</sup> More immediately, it emerges from an intersection of poverty with culture, as African women are more likely to be subject to social and cultural norms that result in their having no say over sexual relations. It is widely held that men have the right to make all decisions over sexual relations. Klugman writes that “If a husband initiates sex, his wife may not refuse him; the same applies in relationships outside of marriage. This makes it impossible for women to protect themselves from HIV/AIDS by initiating non-penetrative sex ... or insisting on fidelity or condom use. Women are ... also products of this culture and may themselves have internalized ideas of manhood that make it appropriate for men to have many partners and to manage sexual relations while they accept their partner’s dominance and remain faithful.”<sup>10</sup>

Violence against women and girls plays a major role in the spread of HIV. Often, violence is so pervasive that men and women come to accept coercive, even violent, sex as “normal.” Recent research in Gauteng, South Africa found that nearly one-third of women and men surveyed agreed that forcing sex on someone you know is never sexual violence.<sup>11</sup> These findings have

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<sup>6</sup> While the unemployment rate amongst all Africans is 42.5 percent, it is 52.4 percent among African women. This exceeds that of coloured (24.1 percent), Indian (14 percent) and white (5.1 percent) women. Of those women who are employed, 57 percent of African women and 41 percent of coloured women are in elementary (unskilled) occupations. Only 6 percent of Indian women and 2.8 percent of white women fall into this category. Nearly half of all employed African women (48 percent) earn less than R500 per month (the lowest earning category). Only one quarter of African men (25.8 percent) earn this amount. *The People of South Africa Population census, 1996. Census in Brief*. Statistics South Africa. Report no. 1 03-01-11 [1996].

<sup>7</sup> More women than men have very little formal education in South Africa. In 1995, nearly one quarter (23 percent) of African women over 25 years had no formal education at all, compared to 16 percent of African men. Over a quarter (28 percent) of African women and just over one fifth (21 percent) of African men had not passed grade five. Almost all white women and men had passed grade five. *The People of South Africa Population census*.

<sup>8</sup> *Key Indicators of Poverty in South Africa* 1995, p. 17.

<sup>9</sup> See for example, B Pendry. The status of African women’s social and economic rights and their vulnerability to HIV/AIDS in South Africa. Aids Law Project, Centre for Applied Legal Studies Occasional Paper.

<sup>10</sup> B Klugman (2000) ‘Sexual Rights in Southern Africa: A Beijing discourse or a strategic necessity’ in *Health and Human Rights* 4:2, p.145 at 146-7. See also P McFadden (1992) ‘Sex, Sexuality and the Problem of AIDS in Africa’ in R. Meena (ed) *Gender in Southern Africa: Conceptual and Theoretical Issues* Sape Books, Harare.

<sup>11</sup> A study of the Southern Metropolitan Local Council of Johannesburg and CIETAfrica, reported, inter alia, in *Sunday Times* 25 June 2000. See also B Pendry (1998) ‘The links between gender violence and HIV/AIDS in *Agenda* no. 39. p. 30. and C Watts and C Garcia-Moreno ‘Violence against women: its importance for HIV/AIDS prevention and care’ in *Women’s Health News* May 2000, no. 34 (Women’s Health Project, Johannesburg).

profound implications for interventions that seek to enhance women's ability to ask for, let alone insist on, safe sex.

The intersection of poverty (or economic inequality), culture (or social inequality), and gender in increasing vulnerability to HIV is illustrated by the reality that poor women may resort to bartering sex for survival. This not only occurs under the rubric of commercial sex work, but also in other forms of "bartering" behaviour that are not seen as sex work." Here women form sexual relationships to ensure food and maintenance for themselves and their families. Thus, in many societies men provide women with desired goods in return for sexual access on a one-off, short- or long-term basis. Sex may also be traded for a job, permit, or promotion in the employment sphere, and for marks or fees in the educational sphere. Most of this sex is unsafe because women risk loss of economic support from men by insisting on safer sex.<sup>12</sup>

While it seems that African women are more vulnerable because of their greater inequality, we do not know enough about the epidemic to understand how the varied and complex interplay of economic status, social norms, and the ability (or lack thereof) to negotiate sexual relationships plays out in all communities and, indeed, in diverse communities across the world.<sup>13</sup> It is only from a clear understanding of this within discrete national and cultural contexts that we can begin to develop effective priorities and strategies for prevention, treatment, and care.

At the same time, we need to know more about men and masculinity in different cultural and national settings. The focus on gender relations means that it is important to understand the cultural and social norms that shape male behaviour. Here we need to explore the various social constructions of masculinity and how they relate to the socioeconomic context. For example, research in South Africa has suggested that increased unemployment and poverty have resulted in an "emasculatation" of male identity and increased violence in some communities.

Gender-specific roles combined with poverty and social and cultural attitudes toward women mean that women bear the burden of caring for people who are sick. This burden of care also falls disproportionately on girls. A Zimbabwean study found that 76 percent of children who left school to care for sick people were girls. This study also found that when women are HIV-positive they face discrimination in health care, education, and legal rights. They are also more likely to be blamed, stigmatized, and even abandoned by their families. Rural women are particularly at risk.<sup>14</sup>

It is this intersection and overlap of different aspects of gender inequality with HIV vulnerability that has prompted many working on gender and HIV/AIDS to call for a more integrated and

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<sup>12</sup> See for example, Weiss and Rao Gupta (1998) *Bridging the Gap. Addressing Gender and Sexuality in HIV Prevention* ICRW and 'Gender-Related Vulnerability and Obstacles to prevention and coping' prepared by the Royal Tropical Institute (KIT) and the Southern Africa Aids Information Dissemination Service (1995/6).

<sup>13</sup> Although South Africa is used as an example, this seems to be true across many developing countries. See, for example, the recent report commissioned by UNIFEM. Gender related socio-economic impact of HIV/AIDS in Zimbabwe. Harare, April 2000. See also the references in the previous footnote.

<sup>14</sup> UNIFEM (2000) op cit note 14.



holistic approach to HIV prevention and care.<sup>15</sup> This involves a focus both on risk reduction and the removal of social, cultural, and economic barriers to effective prevention behaviour. It also means addressing the health, social, and economic needs of those who are already HIV-positive or living with AIDS, as well as protecting people with HIV/AIDS from discrimination and stigma. Easing the burden of care through a variety of health, economic, and social measures is also critical. Importantly, to address HIV vulnerability in this context, one has to move beyond questions of health and science to address critical questions of poverty, development, and human rights. While some of this relates to issues of national and global economic policy beyond the scope of this paper, there is a range of legal and human rights issues that can be identified and will be discussed during the course of this paper. Given the multiple levels of inequality that converge to shape women's particular vulnerability to HIV/AIDS, these issues can be categorized according to "levels of gender inequality" rather than the more conventional division of prevention, treatment, and care. This type of model could serve as a basis for a more extensive comprehension and audit of gender equality and its relationship to HIV/AIDS within particular national settings (complete with indicators or progress!). It is set out very briefly here.

- **Women's personal autonomy.** By this I mean women's actual autonomy over her "self," physically, mentally, and morally. It not only relates to (and is measured by) decisions and choices about reproduction and sexuality; it also relates to moral autonomy more broadly and to freedom from physical or emotional violence. This area is particularly, but not exclusively, addressed by a range of rights and laws encompassed in reproductive and sexual rights and violence against women. It relates directly to women's ability to protect themselves from HIV infection in sexual relationships.
- **Women in relationships and the family:** Women still do not enjoy equal rights within relationships, including marriage and the family in many countries. In some, women are still subject to forced arranged marriages, often at an early age. Women may also be denied equal rights to marital property and may lack the authority or equal ability to initiate or oppose divorce. Inequality within the family emerges from and is reinforced by subordinating stereotypes of women that render them vulnerable to violence and coercive sex within marriage. Such inequality reinforces women's powerlessness in sexual relationships and their economic dependence on men.

In India, the legal status of women in practically all spheres of law – eg, consent to sex, marriage, divorce, maintenance, and inheritance – is subordinate to that of men on the basis of profound gender discrimination. A woman's ability to protect herself from unsafe, forcible sex depends on the balance of power in the relationship with her partner. We all know that gender is about power. In terms of power, the woman is the subordinate partner.<sup>16</sup>

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<sup>15</sup> See for example Rao Gupta and Weiss (1996) and Q Abdul K arrim (1998) 'Women and AIDS – the Imperative for a gendered prognosis and prevention policy' *Agenda* no. 39. p. 15.

<sup>16</sup> M Dhaliwal "Creation of an Enabling and Gender-Just Legal Environment as a Prevention Strategy for HIV/AIDS among women in India" in *Canadian HIV/AIDS Policy and Law Newsletter* vol. 4 no. 2/3 Spring 1999 86 at 88.

This pattern is reflected in different settings across the world.

Women's position within the family or household also shapes their burden of caring for the sick, and the stigmatization (or abandonment) they suffer as a result of their HIV status.

- **Cultural inequality:** Many cultural and social attitudes and practices undermine and negate women's equality, and directly or indirectly increase women's vulnerability to HIV/AIDS. These vary between different countries. In South Africa, the practice of bridewealth or *lobola* has been linked not only to patriarchal attitudes of "ownership" of women, but also to increased violence (and hence vulnerability to HIV/AIDS).<sup>17</sup>

In Africa there is an increasing concern to develop sociocultural institutions to support women and families living with HIV/AIDS. This may involve legal activism within customary law – but the degree of cultural variation means that the strategies will be very specific to particular contexts.

- **Socioeconomic inequality:** As discussed above, women's economic inequality and their dependence on men is a central factor in influencing their greater vulnerability to HIV infection and the increased burdens that relate to living with HIV or AIDS or caring for those who are sick or dying. This category encompasses a broad range of issues. Some of these include:
  - Women's capacity for economic empowerment is linked to the extent to which their basic needs are met, including access to education, health-care, food security, housing, etc. Access to these basic needs becomes even more critical where women have HIV or AIDS (often in addition to caring for other sick family members).
  - Women need access to resources for economic advancement, including jobs, land, property, and credit. They also require this to cope with their increased burden of care arising from HIV/AIDS. One of the more visible legal barriers to resources in Africa is the patrilineal system of inheritance, which means that women often lose their homes and livelihoods on the death of their husbands.
  - Women's actual predominance in the lower levels of the economy and the informal sector increases their economic vulnerability. Legal reform and other measures that target these sectors, including the informal sector and small and medium-sized enterprises are critical to women's greater empowerment.
  - Within the formal sector, economic policies are increasing women's vulnerability as atypical workers (falling outside traditional labour law protection) and as migrant

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<sup>17</sup> White, C (1993) Close to Home in Johannesburg- Gender Oppression in Township Households in *Women's Studies Int. Forum*, Vol. 16, No. 2, 149. See also P Mthembu (1998) 'A positive view' in *Agenda* no.39 26. More generally, see M Pieterse (1999) 'The impact of customary laws and practices on HIV/AIDS' Occasional paper for the Aids Law Project, Centre for Applied Legal Studies, University of the Witwatersrand.

workers (increasing their vulnerability to exploitative work conditions and sexual risks).<sup>18</sup> Increased legal protection is critical.

- Women's predominance among the poor necessitates effective rights to, and delivery of, social welfare grants. Again, women's burden of care, often with dwindling resources, enhances this need.
- **Women's political equality, equal status, and citizenship.** This is a general category that can be used to identify and assess the extent to which women are accepted as equal to men within a particular society and nation, and in terms of its laws, policies, and programs.
- It includes the extent to which women are equally protected by human rights and the law in a society generally, and particularly with reference to the areas set out above. Important here is the extent to which there is an enabling legal framework of principles and rights that affirms gender equality. As I shall argue below, the extent to which gender equality is recognized as a principle and a right within a political context influences the opportunities for effective political and legal advocacy for change at any of the levels set out above.
- A second aspect of this is the extent to which gender is integrated into a government's policies and programs. In other words, is the commitment to gender equality translated into effective policies and programs with (i) a sufficient allocation of resources and (ii) a system of monitoring and evaluation to ensure that the gendered objectives of the particular policy or program are met? This measures women's programmatic vulnerability.

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<sup>18</sup> I am grateful to Geeta Rao Gupta for this point.

### 3. The Role of Human Rights and the Law in Advancing Gender Equality and Reducing Vulnerability to HIV/AIDS

In the previous section, I looked at the complex nature of women's vulnerability and how it related to all levels of women's inequality. I suggested that it was useful to disentangle these various levels to use as a model to identify the key issues in a particular national context and to form the basis for an audit of the relationship between gender equality and HIV/AIDS. Within each of these levels or areas there is, in theory, enormous scope for legal activity to advance women's equality and reduce their vulnerability to HIV/AIDS. However, this is based on the assumption that human rights and legal change do matter and can make a difference to women's lives. In this section, I look at whether, and how, the presence or absence of an enabling framework of human rights and basic legal rights can facilitate the task of advancing gender equality (and reducing HIV vulnerability), and what the broad constraints on this are. I use South Africa as an example because it has apparently shown such contradictory developments in gender equality and HIV infection rates.

#### 3.1 The South African Case<sup>19</sup>

In the past decade, South Africa has experienced a transition to democracy that has resulted in significant gains for women in terms of their political and legal status. In the ten years since 1990, when the bans on the African National Congress (ANC) and other political organizations were removed, South Africa has achieved:

- A **constitution** that is widely regarded as one of the most women-friendly documents in the world and gender neutral in both principle and content. Gender equality or non-sexism is a founding principle of the new state. The bill of rights includes a strong equality protection; rights to freedom and security of the person that are explicit on bodily autonomy, freedom from violence, and reproductive choice; a prohibition against expression that amounts to advocacy of gender-based hatred and constitutes incitement to harm; and a range of socioeconomic rights.
- **Enhanced political representation.** More than a quarter (27 percent) of the members of the national parliament are women, and increased numbers of women have been elected or appointed to political office, including 8 of 29 cabinet ministers (including Foreign Affairs and Mineral and Energy Affairs) and 8 of 13 deputy ministers (including Trade and Industry and Defence).

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<sup>19</sup> The summary of the rights gains of South African women and the context in which they occurred is taken from C Albertyn et al (1999) *Engendering the Political Agenda: A South African Case Study* Centre for Applied Legal Studies, Johannesburg. The research is also available from the United Nations Institute for Research and Training for the Advancement of Women (INSTRAW).

- A range of **institutional mechanisms** to integrate women into the budgetary allocations, policies, laws, and programs of the state. In the early 1990s, South African women recognized the need for a network of structures within and outside government to promote gender equality. The following are now in place: (1) an Office on the Status of Women in the President's Office, with similar structures at the provincial level; (2) a Parliamentary Women's Group and Parliamentary Committee on the Improvement of the Quality of Life and the Status of Women; and (3) an independent watchdog body, the Commission on Gender Equality. Although these structures have been plagued by the perennial problems of a lack of political authority, budgets, and technical resources, some have played an important role in the development of policies and laws to enhance the status of women.
- A series of **laws enhancing the status of women** have been passed in areas of marriage, violence, abortion, employment, and maintenance, while others are in the process of being finalized.

These gains occurred within a broad enabling environment. A positive history of political and gender struggle, driven by political claims for self-determination and inclusion, inspired a broad understanding of a participatory, inclusive, and accountable democracy that embraced all previously marginalized and disadvantaged groups. This allowed women in the liberation movements in exile and inside the country to advocate for the inclusion of women in the new democracy from the 1980s. By 1990, a clear sense of objectives about women's political inclusion and human rights had developed. During the early 1990s, women in South Africa organized to unite across race, class, and creed to form the Women's National Coalition and to advocate for the political inclusion of women and for gender equality in the new South Africa. Here politicians joined forces with women's organizations, gender activists, and academics to place their constitutional and policy claims on the national agenda. The transition to democracy and the writing of a new constitution provided the political moment that South African women were able to utilize to secure their claims. This paid off not only in terms of the constitution, but also in terms of women's political representation in the new democracy.

After the 1994 elections, the unity on gender equality – signified by the Women's National Coalition – dissipated. However, women united around particular sectoral issues such as reproductive rights and violence. Women's organizations in civil society thus maintained an ability to form alliances and intervene strategically at key moments in policy and law reform processes. This was complemented by the accession of the ANC to power as a government politically committed to translating the promise of gender equality into reality for women. This continued to create the positive conditions necessary for gender activists (within and outside government) to place gender issues on the national agenda and to hold government accountable.

The 1990s were also a period in which there were enormous strides in advancing women's human rights at the international level. South Africa's new government came to power in the same year as the International Conference on Population Development in Cairo (1994) and one year before the Fourth United Nations World Conference on Women in Beijing (1995). This created a positive international climate for South African women to make policy and law reform demands within the country.

In summary, a positive constitutional framework and political representation, combined with (i) a relatively strong civil society, (ii) political commitment by the ANC, and (iii) a positive international environment shaped the institutional and legal advances of the first five or six years of democratic government. As a result, by 2000, South African women enjoyed an unprecedented political and legal equality in the form of formal political participation and new human and legal rights.

At the same time, these advances were accompanied by deepening poverty and spiraling HIV infection rates (by the end of 1999 South Africa had overtaken India in having the highest number of people with HIV/AIDS in a single country). It is this combination of factors that throws the role of human and legal rights for women into sharp focus. In seeking to explain this, it is useful to compare, briefly, developments in women's human and legal rights with those in the AIDS sector.

The open environment of the transition also shaped the coming together of the African National Congress (ANC), the Department of Health under the apartheid government, and civil society individuals and organizations to formulate a progressive National AIDS Plan. This process was characterized by "broad mobilization (typical of the general political processes of the time) [and] consensus on the need for a non-discriminatory approach on AIDS."<sup>20</sup> The Plan was formulated within a political context of human rights and political inclusion. It embraced women's sexual rights as a cross-cutting theme and was carefully costed, with a clear design for multisectoral implementation.<sup>21</sup>

The achievement of a rights-based policy framework was not dissimilar to achievements in the gender sector. Moreover, after 1994, AIDS organizations and activists were successful in securing legal rights for people with HIV/AIDS against discrimination in the workplace<sup>22</sup> and other sectors,<sup>23</sup> as well as access to private medical aid schemes.<sup>24</sup> Indeed, in relation to both gender and HIV/AIDS, the state, often together with civil society, was able to (i) develop significant policy frameworks based on human rights, (ii) enact progressive laws, and (iii) entrench important human rights. The fact that this has not arrested deepening poverty, women's socioeconomic inequality and spiraling HIV infection rates (from an estimated 0.76. percent prevalence in 1990 to 22 percent in 1999<sup>25</sup>) is less about these policies and laws than about the inability of the state to implement them. In other words, we need to consider not only the nature of rights; but also the political and economic context in which these rights are sought, including

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<sup>20</sup> H Schneider and J Stein 'Implementing AIDS Policy in post-apartheid South Africa' in *Women's Health Project Newsletter* May 2000, No. 34. 11 p.12.

<sup>21</sup> Schneider and Stein p.12.

<sup>22</sup> Section 6 of the Employment Equity Act of 1997 prohibits unfair discrimination on the basis of HIV status in the workplace.

<sup>23</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>24</sup> The Medical Schemes Act of 1998.

<sup>25</sup> Department of Health, RSA statistics.

questions about the nature of the state and the problems of implementation, as well as broader issues of economic and developmental policy.

In 1994 many in South Africa overestimated the capacity of the new government to “deliver” in a phase of transition to democracy. Schneider and Stein write that “With hindsight, the AIDS Plan had a fundamental flaw in that it over-estimated the implementation capacity of the new government during a transition period.”<sup>26</sup> The same point applies to policies and laws within the gender sector and the ability of the state to develop and deliver comprehensive poverty and development programs. In all these respects, the new government faced two basic obstacles. First, it inherited a bureaucracy that was “concerned much less with social delivery than with a political system of divide and rule.”<sup>27</sup> Second, and related to this, it had to reorient an entire political system from one based on perpetuating inequalities to one able to engage in redistributive and development strategies for a more egalitarian society.

The capacity of the new government to deliver was also constrained by the global economic climate that, in turn, influenced the South African government’s move to greater fiscal discipline and more tightly controlled (and reduced) social spending. The political and economic objectives of reconstruction and development became subject to new priorities of growth and job creation in accordance with rigid policies. Addressing socioeconomic inequalities was seen as a long-term project that would emerge from a stronger economy rather than from increased social spending. Welfare and health budgets were curtailed. Financial constraints affected the full implementation of “women’s laws,” such as those relating to violence<sup>28</sup> and improving the collection of private maintenance.<sup>29</sup> At the same time, problems of institutional capacity also affected the ability of government to spend the money that was allocated to issues such as HIV/AIDS and poverty.

Thus, even while there was a broad enabling political will for gender equality, the presence of the kind of institutional barriers described briefly above meant that this was difficult to translate into reality in the first years of government. Where there have been advances in terms of increased access to water and housing, gender quotas in public development projects and a variety of other projects to meet women’s (and men) basic needs, these have been insufficient in number and time to have had an impact on national poverty levels.

The AIDS sector has been particularly badly affected by problems relating to the transition and the institutional capacity of government. As a result, the multifaceted AIDS Plan was limited to a health and biomedical framework carried out by low-level and often underqualified personnel. The lack of coherence and coordination has been exacerbated by problems of political leadership (the HIV–AIDS link being the most recent example).<sup>30</sup>

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<sup>26</sup> At p. 13.

<sup>27</sup> Schneider and Stein, p.11.

<sup>28</sup> The Domestic Violence Act of 1998.

<sup>29</sup> The Maintenance Act of 1998.

<sup>30</sup> Schneider and Stein, p.12.

In conclusion, South Africa has been relatively successful in translating the human rights and democratic values of its new constitution into new policies and laws. The real problem has been one of implementation and enforcement.

The key lesson about rights and laws is that they provide a necessary, but not a sufficient, step in addressing social, economic, and cultural problems of inequality (and hence reducing vulnerability to HIV/AIDS). They are limited for at least two reasons:

- First, although rights and laws are often meaningless to the majority of women if they are not effectively implemented and enforced, there is little that the law can do to address gender equality and HIV/AIDS if it is not realized in practice.
- Second, implementation of laws depends on a range of factors largely beyond our control (and often that of the government), including: the institutional capacity of the state; available human, financial, and technical resources; and economic policy frameworks.

Ultimately, this means that any strategy based on rights and law must not see itself ending at the point of writing the law. Ideally, legal strategies should not be developed in isolation from a range of additional (and usually non-legal) strategies for implementation and for holding government accountable to its commitments. At the same time, there may be value in securing a law or a right in the absence of immediate opportunities for implementation, even if this is largely symbolic.

The South African experience warns us, once again, that it is important to be very clear about the value and limitations of strategies based on human rights and the law, especially as they relate to gender equality and HIV/AIDS. We cannot always assume that they are effective instruments of progressive social change for women. Nor can we determine appropriate strategies without an understanding of the broader legal, political, and economic context.

In the next two sections, the role of rights and the law is interrogated in more detail, illustrated by examples relating to gender equality and HIV/AIDS.

**A note about terminology:** Although human rights and legal strategies overlap, they are not necessarily the same. In this paper the terms “rights” or “rights strategies” are used to refer to political and legal struggles that take place under the broad umbrella of human rights norms and frameworks. They will usually involve both legal and non-legal strategies. Legal strategies refer to the law and specific law-based strategies, such as law reform and litigation. These distinctions will become clearer in the next two sections.

### **3.2 Human Rights – A Political and Legal Tool**

Human rights have played an important role in global and national struggles for gender equality. At an international level, the past decade has seen an enormous advancement in the claim that women’s rights are human rights, with particular progress in broadening the interpretation of



rights to include women's concerns around violence,<sup>31</sup> reproduction,<sup>32</sup> and sexuality.<sup>33</sup> Such international standards and frameworks can provide important political and legal tools for advancing these issues in national settings. Human rights have also been a significant tool in national struggles. Recently, rights have been harnessed by women to achieve inclusion within the emerging democracies of transitional societies such as South Africa<sup>34</sup> and Brazil.<sup>35</sup> These and other struggles have demonstrated both the advantages and the limitations of human rights for women. These are set out briefly below, together with some examples of how to use rights within the intersection of gender equality and HIV/AIDS concerns.

***Human rights can mobilize and unite groups around political and normative claims.***

Rights can be an important political resource for mobilizing groups. This was illustrated in South Africa in the early 1990s when hundreds of thousands of women united across racial, class, cultural, and religious divides around gender equality and the principle of inclusion in the new democracy. Similarly, as will be discussed in more detail below (section 4), women's organizations used reproductive rights as a political resource to create an alliance to promote a woman's right to choose to terminate her pregnancy.

In the area of HIV/AIDS, there are several areas of rights that could potentially be used to mobilize people, groups, and communities. A range of first-generation rights (equality, dignity, privacy, security of the person) can be used as part of a broader call for reproductive or sexual rights or the right to be free from violence. Here the campaign could focus specifically on women and HIV/AIDS, or on women more generally. A particular campaign targeted at the reproductive health of HIV-positive women could include a wide range of issues relating to pregnancy, birth, and freedom from discrimination in health care. Sexual and reproductive rights could frame campaigns for increased access to female condoms, and research and development of microbicides.

Equally relevant to the developing world (although not as widely recognized within international women's rights) are women's basic needs captured in social and economic rights. While access to health care (for prevention and treatment requirements) is an obvious choice for a campaign, rights to food security (relating to nutrition and treatment requirements), housing (for people with HIV/AIDS and for care), and social welfare (to secure welfare needs for women infected and affected by HIV/AIDS) are all critical issues.

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<sup>31</sup> See in particular, the UN Declaration on the Elimination of Violence Against Women.

<sup>32</sup> See in particular the Cairo Programme of Action of the International Conference on Population Development (ICPD).

<sup>33</sup> These were first captured in the Beijing Platform for Action of the Fourth World Conference for Women (paragraph 96).

<sup>34</sup> See C Albertyn (1994) 'Women and the Transition to Democracy in South Africa' in C Murray (ed) *Gender and the South African Legal Order* Juta and Co.

<sup>35</sup> N Craske "Remasculinisation and the neo-liberal state in Latin America" in V Randall and G Waylen (1998) *Gender, Politics and the State* Routledge.

Creatively used, the right to equality can found a campaign for sexual, cultural, and economic equality. Insofar as violations of women's political, civil, social, and economic rights constitute the roots of women's vulnerability to HIV/AIDS, an "umbrella" right such as equality can be a useful mobilizing tool.

Rights campaigns require careful framing of the issues, broad-based support, a range of legal and non-legal strategies, and sufficient resources. These considerations are discussed in more detail below (section 4).

***The entrenchment of rights in constitutions and the law can provide important political and legal space for activism on specific issues. Rights also constitute norms and standards against which the government can, in appropriate circumstances, be held accountable.***

Rights campaigns are most effective where they entrench or seek to advance rights (already entrenched) within constitutions and the law. Where rights are entrenched in national laws, they can serve both as a catalyst for change and a defensive strategy against constraints that states or its citizens seek to impose on the rights of persons or groups. For example, the entrenchment in the South African constitution of the rights to equality, dignity, and especially freedom and security of the person, gave women's organizations room to engage in political and legal struggles for the entrenchment of one aspect of reproductive rights – the right to choose whether to terminate an unwanted pregnancy. These rights framed both women's advocacy for progressive legislation and the defensive strategy of protecting the law once it was in place, and was challenged by anti-choice organizations. (This is discussed as a case study in more detail below, in section 4.)

In relation to HIV/AIDS, rights to privacy and non-discrimination have framed legal struggles relating to HIV testing and the prevention of stigmatization and abuse. Where social and economic rights are entrenched in constitutional texts, such as in India (as directive principles) and South Africa (as rights), such rights provide important space for legal struggles. Although the question of "available state resources" can limit such claims, action in terms of social and economic rights can highlight issues and help ensure state accountability.

Ultimately, the development of a rights culture can structure and permit a culture of criticism and accountability that allows groups to criticize and challenge government policy. This open climate of critique and debate is the key to successful policy implementation in any area.<sup>36</sup>

***Rights can create a gap between "elite" rights activists and grass-roots struggles.***

Rights can create, extend, and even entrench a gap between rights activists in NGOs and the communities they seek to serve. This can occur when rights become an end in themselves and are not implemented to benefit women. It can also occur when the choice of rights, the language of rights, and the experiences that inform the interpretation of rights do not emanate from the lived reality of women, people with HIV/AIDS, or the group that the rights are supposed to assist and protect.

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<sup>36</sup> Schneider and Stein (2000) p. 15.

Where rights fail to resonate with communities, they can lose their ability to mobilize. Thus, the way in which their content and message is framed is very important. This has been identified as a particular problem in countries with strong religious and cultural traditions,<sup>37</sup> where attempts are made to marginalize rights claims as “foreign” or “Western.” Women have sought to resist this by referring to international standards or by contesting such claims from within their cultural context (see section 3.2 above).

***Rights can individualize problems and prevent them from being seen as a social issue.***

The way in which rights can individualize problems and mystify the broader social and economic context in which rights are violated has been debated in legal literature.<sup>38</sup> The particular danger to people with HIV/AIDS is that a focus on the rights of individuals with HIV/AIDS or of women can feed into a public understanding of people with HIV/AIDS as “different” or of women as “to blame” for HIV/AIDS. The way in which rights, and the message that accompanies them, are framed is very important. For example, it may be preferable to link HIV/AIDS to social issues of inequality and poverty rather than to individual discrimination. However, the “correct” message will depend on the particular national context.

***As rights do not have a fixed meaning, they can be interpreted and used conservatively.***

Rights can be narrowly interpreted both politically and legally. In Canada, in the first few years after the entrenchment of rights in the constitution, women found that these rights were used to reverse political and legal gains made by women in the legislative arena.<sup>39</sup> It took further political mobilization and engagement to reverse this trend. Quite simply, rights can work against progressive causes. It becomes extremely important to ensure that rights are given a political and legal content that is informed by those who are disadvantaged and vulnerable. This raises the questions of the need for research, mobilizing strategies, etc.

Ultimately, **the value of human rights lies as much in our capacity to use them strategically as it does in the norms and values that they espouse.** The next few subsections will begin to look at what this means in more detail.

### **3.3 The Law and Social Change**

Although law has been at the centre of many progressive struggles, there is no necessary relationship between law and social transformation. The law is a complex and contradictory

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<sup>37</sup> See R Coomaraswamy (1994) ‘To bellow like a cow: women, ethnicity and the discourse of rights’ in R. Cook (ed) *Human Rights of Women: National and International perspectives* (1994) University of Pennsylvania Press, 39.

<sup>38</sup> E Schneider “The Dialectic of Rights and Politics. Perspectives from the Women’s Movement” in K Bartlett and R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (1991) Westview Press, 318.

<sup>39</sup> J Fudge “The Effects of Entrenching a Bill of Rights upon Political Discourse: Feminist demands and Sexual Violence in Canada” in (1989) 17 *IJSL* 445 at 457.

institution that can reinforce a conservative status quo or be harnessed to seek progressive ends. To engage the law in the cause of social change requires a clear understanding of this contradictory nature and the limits and possibilities of its role.

As a potential instrument of social change, law's claim is particularly compelling for at least two reasons.

- First, it provides the rules for regulating the allocation of goods and resources, rights and responsibilities, remedies, and punishments in any society.
- Second, the law polices the moral, cultural, and social boundaries of society – separating the permissible from the impermissible, the norm from the abnormal.

Changing the legal rules through legislation or litigation has been a primary method of ensuring or denying a fairer distribution of society's goods and resources. In South Africa, for example, apartheid laws used race as a basis to deny access to political and economic resources, while laws enacted from the early 1990s sought to remove these racial barriers. The law can be used to prevent, permit, or protect marriage by women who are HIV-positive.<sup>40</sup> It can permit or prohibit employment testing for HIV status. Legal rules can outlaw all discrimination on HIV status or permit such discrimination through implicit or explicit rules. In any society, the law provides an important mechanism for securing a basic threshold of such rights (or for denying those rights) for all persons and groups in that society. This in itself makes it important to engage the law.

At the same time, law is more than a set of legal rules. Equally important is the administration and enforcement of these rules. Here the law consists of a multitude of diverse rules and practices in a variety of state and non-state institutions, including courts, tribunals, government departments, quasi-judicial bodies, and independent agencies. For many marginal, disadvantaged, and excluded groups, this has proved to be a particularly difficult area. For example, in South Africa, while all persons over a certain age have the right to a pension, this is effectively negated for many old people through corrupt and inefficient bureaucratic procedures. Women have secured the right to decide whether to have an abortion in the first 20 weeks of pregnancy, but are not always able to access the facilities to exercise this right. Challenging the legal rules may sometimes be less important than finding the means to ensure that they are enforced and implemented. Here the role of the law is constrained by other factors such as resources and the institutional capacity of the state (see section 3.1 above).

But law is also more than rules made by parliament or the courts and the practices of administrative and enforcement agencies. Law is a powerful and authoritative language that reflects and reinforces the dominant norms and values of a society. In this way, it is able to make claims to truth and to define and even censure alternative claims. For example, in many countries, and in South Africa before 1996, the law defined abortion (entirely or in certain circumstances) as immoral and even criminal. In others, and in South Africa after 1996, abortion is seen as a woman's right to decide on a significant issue affecting her life. The ability of the

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<sup>40</sup> For examples of this, see the 1998 judgement of the Supreme Court of India that sought to prevent people who are HIV positive from marrying and the judgement of the Kenyan court that ordered an ill HIV positive women to be looked after within the family home (reported in Sunday Independent, 6 August 2000)

law to set new social norms makes it a potentially powerful tool for advancing the rights of women who are vulnerable to HIV/AIDS infection, as well as people with HIV/AIDS. The extent to which the law succeeds in doing this depends in part on how successful we are in framing the issues, highlighting the underlying values and assumptions, securing a positive content in law reform processes, litigating strategically, and building consensus around the law.

### *Law and gender*

There are particular concerns for women that are worth highlighting. Feminist legal scholars have uncovered deep gender biases and inequalities within the law. First, researchers have revealed how women's experience is absent from, or distorted within, the content of the law. Research has also demonstrated that deeply gendered stereotypes of women inform the formulation, application, and enforcement of the law. These stereotypes have been particularly obvious in laws relating to violence against women, but they are also found in most areas of law, including delict/tort, family law, employment law, contract law, and criminal law.<sup>41</sup> For example, sexual stereotypes of "good" and "bad" women have informed the content and the application of rape law.<sup>42</sup>

Gender bias within the law is not limited to its content and application, and the norms and values that inform these processes. Researchers have also demonstrated how the conceptual foundations of the law, especially its fundamental liberal principles, have negated many of women's concerns.<sup>43</sup> For example, the concern with "individualism" has meant that it has been difficult for the law to accommodate women's role in the family and their being disadvantaged as a group.<sup>44</sup>

In other words, legal struggles that seek to enhance the status of women cannot merely concentrate on changing the content and enforcement of the law, but also have to worry about challenging the assumptions, concepts, and principles that underlie the law. As a result, engagement with the law inevitably involves addressing one or more of the following: the content, application, or enforcement of the law; the norms and values inherent within the law; and the conceptual and doctrinal foundations of the law.

Using the law to raise the status of women or to advance gender equality can challenge deeply held gender relations in society. But to do so, the law has to be used creatively and in a way that challenges the values and assumptions that underpin the law. In areas such as reproduction, violence, and employment, legal activists have constantly pushed the boundaries of the law to try

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<sup>41</sup> See L Findlay "Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning" 1989 *Notre Dame Law Review* vol 64, no 5, 886.

<sup>42</sup> For one of the best, if dated, discussions of this see S Estrich (1986) "Rape" in *Yale Law Journal* 1087.

<sup>43</sup> See for example, S Fredman (1997) *Women and the Law*, chapter one, Oxford UP. J Nedelsky "Reconceiving autonomy: Sources, thoughts and possibilities" in AC Hutchison and L Green (eds) *Law and Community. The End of Individualism* 1989 Carswell.

<sup>44</sup> See S Fredman (1997).

to do this.<sup>45</sup> This “culture-breaking” value of law is discussed later. The following looks at the relationship between law, culture, and religion.

### ***Women and law in the developing world – law, culture, and religion***

In the developing world, the impact of legal liberalism on women has been complicated by a colonial history and the ongoing dominance of large corporations, international agencies, and local ethnic, religious, and tribal power brokers. These introduce additional challenges to the task of using the law to address women’s inequality.

Many developing countries are characterized by plural legal systems, where religious and customary laws exist alongside the civil law. This civil law, usually inherited from the former colonial power and amended in the post-colonial era, provides inadequate legal protection for women. At the same time, the religious and customary systems discriminate against women in both content and form, drawing on patriarchal cultural and religious principles to sustain and defend male dominance in the family and the community.

For women in these countries, legal struggles to enhance women’s status have to be waged on several fronts – within the civil law and the customary or religious system, as well as in the choice of law situations (ie, deciding which system of law applies).

Some legal scholars and women’s activists argue for a parallel strategy in which women’s legal status in customary and religious systems should be challenged from within at the same time as women’s access to legal rights in the civil law is extended through legislation. These strategies are influenced by the understanding that women in many developing countries live within both systems. The objective is to ensure that women who oscillate between systems have a basic threshold of rights in both systems.

In southern Africa, the primary method for doing this has been to engage in research that seeks to understand the practice of customary law in community life.<sup>46</sup> Such research has excavated practices that differ from the customary law that is codified in statutes and applied by the courts. While the latter was a product of colonial interaction with customary law, the former more closely reflects the lives of people. The challenge for these researchers and activists has been to influence the reform and application of customary law, as well as the choice of law situations, in such a way as to draw on the positive practices of communities.<sup>47</sup>

Tradition, or the customs of the past, incorporated values and protections which, although gendered, were in many ways in the interests of women. We can correct the incorrect versions of customary law, by restating it in ways that emphasize the

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<sup>45</sup> See M Thornton “Feminism and the Contradictions of Law Reform” (1991) *International Journal of the Sociology of Law* vol 19, 453.

<sup>46</sup> The Women and Law in Southern Africa research project is the primary source of this work. It is run with interdisciplinary research groups in Zimbabwe, Zambia, Mozambique, Botswana, Lesotho and Swaziland.

<sup>47</sup> A Weis Bentzen, A Hellum, J Stewart, W Ncube and T Agersnap *Pursuing Grounded Theory in Law - North South Experiences in developing Women’s Law* 1998 Mond Books.

protections and rights offered to women rather than the control offered to men. When men say that women do not inherit we say that widows and their children were taken care of.... We point out their errors and restate the customary law – we take over the discourse of customary law.<sup>48</sup>

Taking over the discourse of customary law also involves challenging the patriarchal assumptions and principles of culture and finding ways of giving indigenous meaning to the international norm of equality within plural legal systems. It also means that an exclusive focus on the reform of state law is not the only solution, that it is important to address the

enduring structures of power embedded in other normative orders – such as the lineage, the clan or groups engaged in the informal sector of the economy – which [are not] characterized as law. In consequence, other sources which generate law, the ways in which they secure compliance and their effects have been neglected.<sup>49</sup>

However, addressing the legal systems that operate parallel to state law is not necessarily a task that operates independently of the state and its values. It often entails giving meaning to “external” reference points such as democracy and equality within the customary system. This in turn leads to resistance to “Western” notions of rights and gender and to attempts to exclude women’s claims. Women seek to counter this by distinguishing between the discriminatory religious or customary rule and the content of the culture that sustains the rule. For example, women may argue that their experience of the rule (eg, primogeniture in inheritance) is discriminatory and that the application of the rule in the current socioeconomic context distorts accepted cultural values (provision for the needy within the extended family).

The need to develop such arguments to ensure that existing sociocultural institutions and practices support women infected and affected by HIV/AIDS has been identified as a particular need for women in Africa.<sup>50</sup>

### ***Rule-making and/or culture-breaking law reform***

Given the nature of the law, the choice to engage with the law and the way in which we do this is a particularly important one. Strategic engagement with the law in a manner that is clear about objectives and works within the constraints of the particular political and legal national context can have significant results. Importantly, this can achieve not only “rule-making,” but also “culture-breaking” results.<sup>51</sup>

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<sup>48</sup> A Armstrong (1995) Rethinking customary law in Southern Africa. What relevance for action? *Women and Law in Southern Africa Research Project Newsletter*. 7,2 Harare at 5.

<sup>49</sup> A S Manji Imagining Women’s Legal World: Towards a Feminist Theory of Legal Pluralism in *Social and Legal Studies* 8,4 1999 435 at 439.

<sup>50</sup> See UNIFEM (2000) Gender related socio-economic impact of HIV/AIDS. Harare.

<sup>51</sup> T Stoddard (1997) ‘Bleeding Heart: Reflections on using the law to make social change’ *New York University Law Review* 72:5 p. 267.

Stoddard argues that the law offers the opportunity to challenge the prevailing norms and values in a way that is “agenda-setting” or “culture-breaking.” An example of this is the shift in the values underlying abortion in South Africa. Here the change in the law was accompanied by a shift in the dominant public discourse on abortion, from that of immorality and crime to that of women’s rights (although many in society remained opposed to abortion). What is significant here (and discussed below) is that legal strategies for changing the law took place within a broad human rights context and were accompanied by a range of non-legal (political, educational, media) strategies targeted at the same objective. This was critical, as legal change does not in and of itself change the public understanding of an issue, let alone attitudes within society. Ideas as to how this could be achieved are given in the next section.

Often we have to be satisfied with **making or changing a rule**, which may or may not instill new values in the law, but does not affect public discourse on the issue. This is a far more common occurrence than a culture-breaking process. Such laws may establish a symbolic norm that takes time to influence the general attitudes and values of the population. For example, South Africa has recently passed a law that equalizes the status and rights of women and men in customary marriage. It is apparent that this law will face significant opposition from men who oppose equality with their wives. It will require a range of additional legal and non-legal strategies to make it work.

Finally, there are areas of people’s lives that the law cannot reach, often because the social, political, or economic context offers little or no space for activism and/or is resistant to change. In many countries, laws protecting gay and lesbian rights are not yet possible because of social resistance. In Africa and South Asia, there are also many examples of cultural and religious resistance to laws enshrining women’s rights. Here, one option is to develop strategies for change within customary or religious law, as discussed above. Another is to work politically to create a context that allows for legal change.



## 4. Using Rights and the Law Strategically – Some Ideas from South Africa<sup>52</sup>

Having considered the broad nature of rights and the law, this section becomes more concrete in describing two case studies of law reform in South Africa. The first concerns the enactment of a progressive abortion law within a broader framework of reproductive rights, and the second is about the reform of the customary law of marriage.

### 4.1 The Context

The 1990s in South Africa were a period of democratic transition and reconstruction. In 1994, political negotiations resulted in the creation of a constitutional democracy based on human rights. However, the familiar features of a formal liberal democracy co-existed with a more substantive vision of democratic inclusion, participation, and accountability, the reconstruction of society along egalitarian lines, and the redistribution of its resources and benefits. Throughout the 1990s, this political and legal context offered enormous opportunities for political action around gender. As a government in waiting, the ANC sought to develop new policy positions on all major issues.<sup>53</sup> After 1994, human rights and the law became major tools for shaping the new society in line with these positions. Within this context, and with a combination of broad government commitment and political and technical resources in civil society, gender activists within and outside government were afforded unique opportunities to advance laws that enshrined rights for women.

### 4.2 Reproductive Rights<sup>54</sup>

In 1994, the ANC government inherited an abortion regime that criminalized abortion except in a few limited circumstances. As access was structured along race, class, and urban/rural lines, the law was also intensely discriminatory. Within two years the new government had passed the 1996 Choice on Termination of Pregnancy Act, which granted women the right to choose whether to terminate an unwanted pregnancy in the first 20 weeks of the term.<sup>55</sup> At the same time, the discourse surrounding abortion changed from one that presented abortion as a criminal

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<sup>52</sup> This section is derived from a broader research project undertaken by the Gender Research Project at the Centre for Applied Legal Studies for the UN International Institute for Research and Training for the advancement of women. C Albertyn et al (1999) *Engendering the Political Agenda*

<sup>53</sup> This resulted in the *Reconstruction and Development Programme*, (ANC 1994), the ANC's election platform.

<sup>54</sup> See C Albertyn (1999) 'Reproductive health and the right to choose - policy and law reform on abortion' in C Albertyn et al, footnote 53.

<sup>55</sup> The act provides for termination on request in the first twelve weeks and on certain broadly defined grounds between 12 and 20 weeks.

and immoral act of killing a “child” to one that placed women’s rights at the centre of the issue, especially rights to reproductive autonomy and equality. This law, and the shifts in discourse, were the result of more than four years of consultation, alliance building, research, legal drafting, advocacy, and defensive litigation strategies by women and men in civil society and in the ANC.

First, the political climate of human rights and gender equality provided an enabling framework for political and legal activism on abortion. Within this, the first important step was to secure reproductive choice as part of the ANC’s pre-election policies. This was achieved through the work of women within the ANC and key non-government organizations. The second important achievement was the inclusion of reproductive rights within the 1996 constitution. Again, this was the result of coordinated efforts in civil society and collaboration between ANC women and NGOs. This meant that reproductive choice was secured as an issue on the new policy agenda of the government and given constitutional protection in the Bill of Rights.

Second, there were resources and support within civil society for policy and law reform on abortion. By the time the ANC came to power in 1994, women’s health and human rights NGOs had developed a set of policy objectives for women’s health (through a broad-based Women’s Health Conference held by the Women’s Health Project)<sup>56</sup> and a draft abortion law (through the work of the Abortion Reform Action Groups, supported by a range of health and rights NGOs). These initiatives (and others) culminated in the formation of the Reproductive Rights Alliance, a network of organizations committed to the single issue of abortion law reform and that secured funding to advocate for its objective.

The accession to key positions in parliament (portfolio committee on health) and government (Minister of Health) of leading women’s health and reproductive rights proponents meant that the issue was placed on the political agenda soon after the accession to power of the ANC. A special committee was established in parliament to investigate the old abortion law. NGOs worked hard, and with substantial success, to promote the ARAG draft bill within this committee. The matter was referred to the Department of Health, and the bill subsequently presented to Parliament reflected the key provisions and framework of the ARAG bill.

An important aspect of NGO work during this period was also the defensive strategy of lobbying the state to keep criminal charges under the old law from getting to court. This succeeded in avoiding a constitutional trial on the old legislation and preserving the parliamentary avenue for the development of a new law. It was believed that a trial at that stage could delay the law reform process, divert energies, and might establish the wrong precedent, as it would not be able to rely on the progressive rights enshrined in the 1996 constitution.

During parliamentary hearings on the new law, NGOs (and the RRA in particular) worked hard to ensure that the voices of poor and rural black women were heard in parliament. They were also able to rely on established relationships with key women and men in parliament in their advocacy strategies. This meant that they had privileged access to key committees. During these

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<sup>56</sup> D Budlender (1995) *The Women’s Health Policy Conference* The Women’s Health Project. Johannesburg. See also B Klugman, (1999a) “Empowering women through the policy process: the making of health policy in South Africa” in Presser H and Sen G (eds). *Publication of Conference Papers from the Seminar on female empowerment and demographic processes: moving beyond Cairo*. IUSSP Committee of Gender and Population, Oxford UP.

hearings the anti-choice submissions of predominantly white men were fiercely challenged by black women parliamentarians. At the same time, the broad membership of the RRA gave it legitimacy, as it spoke for a “constituency” rather than individuals or groups.

Ultimately the law was passed, with the ANC adopting a three-line whip<sup>57</sup> to ensure a vote according to party policy, rather than conscience. Crucially, the commitment of the ruling party to women’s rights ensured a smooth passage for the bill. This process of law reform is a sterling example of civil society activism that included legal research, legal drafting, lobbying the state on prosecutions, alliance building, widespread advocacy in the media and to politicians, and active involvement in promoting the voices of marginalized women at key moments. It resulted in “culture-breaking” law reform that changed the public interpretation of the issue.

The law was implemented early in 1997, at a time when it was clear that full implementation would take time and was tied to the extent to which the health department was able to develop an effective primary health-care system. There remain real problems of implementation (skewed to urban areas) linked to institutional capacity, health worker resistance, and resources. However, more than 100,000 women have accessed legal terminations of their pregnancy in the past three years, and government and civil society continue to work together to overcome obstacles to full implementation. In particular, the RRA and many of its member organizations reassessed their role once the law was enacted to shift to a focus on facilitating aspects of implementation and monitoring progress.

### **4.3 Customary law<sup>58</sup>**

Before 1994, women in customary marriages in South Africa were accorded the legal status of minors and had virtually no control over the resources and property of their marriage. Women were unequal to men within the norms of the patriarchal customary setting. There was some hope among organized rural women that this would change in the new South Africa, and the eradication of discrimination within customary law was included in the 1992 list of demands of the Rural Women’s Movement (RWM), a rights organization with a membership of rural women.

The first test of the future government’s commitment to gender equality within a cultural setting came during the writing of the interim constitution. Traditional leaders, who had delegate status at the negotiations, asked that customary law be excluded from the operation of the Bill of Rights, especially the equality clause. Women delegates and politicians united with academics and women’s organizations in the Women’s National Coalition to prevent this from occurring.<sup>59</sup>

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<sup>57</sup> This meant that all MPS had to attend the debate and vote according to the ANC caucus line. Absence from the Assembly was subject to disciplinary measures.

<sup>58</sup> This section is based on B Goldblatt and L Mbatha “Gender, Culture and Equality. Reforming Customary Law” in C Albertyn et al (1994).

<sup>59</sup> See C Albertyn (1994) ‘Women and the Transition to Democracy in South Africa’ in C Murray (ed) *Gender and the South African Legal Order* Juta, Cape Town.

When the ANC came to power in 1994, the constitutional framework that sought to harmonize equality and cultural rights<sup>60</sup> provided the backdrop for the customary law reform processes that followed.

Law reform in the area of customary law was primarily located within the South African Law Commission (SALC), the state legal research body that had been changed to include more progressive commissioners. In particular, Professor Thandabantu Nhlapo (an expert on customary law and women's rights) was to drive the customary law reform process and ensure that it equalized the rights of women and men in customary marriage. Engaging with the SALC process (which invited public comments at two stages) were a few research institutions and NGOs in civil society. Unlike the abortion law reform process, there was no broad-based alliance. A legal research and advocacy organization, CALS, had engaged in the only local community-based legal research into marriage and had strong links with the Rural Women's Movement mentioned earlier. By doing this research, forming a partnership with the RWM and engaging in advocacy with the SALC (based on its research), CALS was able to influence the process of law reform to promote equality for women in customary marriages. The partnership meant that (1) the CALS research process was given legitimacy by a constituency of rural women, and (2) rural women were able to access and inform a largely technical process of law reform.

The parliamentary process was uncontroversial and the relevant parliamentary committees engaged actively with the bill to inform parliamentarians (especially women) about its content and to hear public submissions.

The Recognition of Customary Marriages Act gives women equal status and equal control over property in customary marriages. It also provides for consent of both parties and a minimum age. Its retention as a separate customary institution was driven by the historically unequal status of customary law and African culture. Its rights components were shaped by the rights-based democracy of the new South Africa. Its passage demonstrates the importance of the congruence of an active engagement by civil society with gender-sensitive persons in key public positions in government and parliament.

However, two years later the Act has yet to be implemented. The obstacles to implementation relate to the drafting of regulations that will frame the extended role of the state in registering marriages, adjudicating property division in polygyny and in divorce. They also relate to the institutional capacity of the departments of justice and home affairs to meet their commitments under the Act. Much work needs to be done in terms of training magistrates and educating communities about the new law. In the meanwhile, women under customary law remain minors.

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<sup>60</sup> This was achieved through constitutional recognition of customary law as a system of law at the same time as the right to culture was made subject to other rights in the Constitution.

## **4.4 Lessons and Strategies**

The law reform processes around abortion and customary law are examples of different, although “successful” processes that achieved rights for women within the law. With the rights in place, both laws are facing problems of implementation. These are linked to the broader points discussed in section 3 above. Here the work of government and civil society remains incomplete. Nevertheless, these processes provide some examples of legal strategies (and the conditions they require) that could be harnessed in different countries and by organizations working on gender and HIV/AIDS. These will be discussed in relation to issues affecting (i) the state, (ii) civil society, and (iii) the international arena.

### **4.4.1 The State**

#### *Democratization of the state*

One of the most important factors in successful legal and other strategies by women was the constitutional entrenchment of a rights-based democracy that opened up political and legislative processes to civil society. Linked to this was the entrenchment of gender equality as a key principle of the new state. This opened up space for all policy and law reform activity. If South Africa is a unique example of the opportunities provided by constitutional reconstruction, it also points to a broader issue relating to the benefits of a democratic political context. Rights and legal strategies require such a context and are unlikely to be effective where this is absent or minimal – in situations of war (eg, Democratic Republic of Congo, Eritrea, Ethiopia, Angola, Somalia) or military rule (eg, Pakistan, Afghanistan).

The nature of the democratic framework, including the degree of openness and accountability within a society, will largely determine that society’s ability to engage in rights struggles in respect of disadvantaged groups.

#### *Understanding the state*

One key to successful legal strategies is the ability to engage the state. This in turn requires an understanding of the state and its institutions, and the best point at which to access the state (eg, parliament, courts, government departments, etc). One of the keys to successful legal strategies in South Africa has been to target “sympathetic” areas of the state and key individuals within the state. It also means being able to identify the political opportunities that emerge within the state.

Just as different countries face different issues in relation to women’s human and legal rights, so different national contexts offer different opportunities for legal action to advance gender equality. In South Africa, the transition to democracy and the reconstruction of the state and society in the wake of apartheid provided a positive context for claims to gender equality.

The challenge for those of us seeking to advance legal strategies on HIV/AIDS is to find these opportunities and the points of access. Here, in some countries, the severity of the HIV/AIDS

epidemic itself is beginning to generate legal and political opportunities for advancing women's rights within the context of HIV/AIDS. The challenge is to identify and use these opportunities.

#### **4.4.2 Civil Society**

The "received wisdom" of many gender activists is that a strong civil society is vital to effective legal strategies. However, effective legal strategies are also dependent upon the manner in which civil society is able to organize within and across sectors. Indeed, if law is not the sole agent of social change, and if gender inequality is reproduced in multiple sites (the family, religious institutions, the media, schools), then legal strategies should always be part of wider political, social, and educational strategies. This logic is equally true of issues affecting women and HIV/AIDS.

It is part of the argument of this paper that gender-equality concerns need to be placed at the centre of HIV/AIDS strategies. This requires strategic partnerships between AIDS and gender activists and organizations. On the issues of gender and HIV/AIDS, there are many opportunities for cross-sectoral strategies that will unite the skills and experience of both sectors to advance particular issues. Based on the South African experience of parallel activities, alliances would need to be created around clear activities and objectives.

##### ***Building relationships within the state***

The building and maintaining of relationships by civil society organizations with people within the state has been important in South Africa because it generates continuing knowledge of, support for, and loyalty to issues such as gender equality.

##### ***Working in political parties***

Critical to ensuring that the ANC (as major opposition force and then ruling party) was held accountable for delivery on gender equality was (and is) the personal commitment of senior ANC people to gender issues.

Working within political parties and building the capacity of people within political parties to advance key issues remains an important long-term strategy. Involving key women in strategies for change by providing information and arguments in support of change has also been important in the South African context.

##### ***Resources and expertise***

The studies demonstrate that it is the NGOs that are able to harness both expertise and funding that are best able to engage with policy and law reform processes. Technically skilled gender activists committed to substantive gender equality can make a significant impact on policy and law reform processes. That said, the nature of their partnerships and alliances was also important.

##### ***Partnerships and alliances***

The research suggests that the capacity of NGOs to intervene was enhanced by the nature of their partnerships or alliances. These included:

- **Broad-based coalitions committed to a single issue**, such as the Women’s National Coalition. A large degree of constituency-based representation through political parties, labour, and community-based organizations can give particular legitimacy to such coalitions, but they need to have clearly defined objectives.
- **Alliance building through informal and formal sectoral networks** such as the Violence against Women networks and the Reproductive Rights Alliance. These brought together a range of skills and expertise with a degree of constituency or community-based representation. Again, these were successful where they formed around clear objectives and issues and engaged in a variety of legal and non-legal strategies.
- **Partnerships between NGOs and communities**. These can take a variety of forms. One example given above is a partnership of a research institution and a rural women’s organization around identified research and law reform objectives. The grounded nature of the information collected through the research process was used to influence law reform in a manner that gave a voice to rural women. A second example was that of the Women’s Health Conference. Here a consultative process was undertaken before the conference, in which organizers held workshops with community-based health workers across the country to enable them to develop informed policy positions.

In both partnerships, access to otherwise technical and elitist forms of policy development and law reform was given to community-based women. They were symbiotic relationships to the extent that each lent authority to the other’s voice. For example, the fact that CALS research spoke with the voice of rural women enhanced its value to the law reform process; whereas the “authority” of CALS research gave additional weight to the individual voices of rural women.

### *Getting as close as possible to the process of law reform*

The case studies demonstrate the various ways in which NGOs sought to interact with the process of law reform, in particular to influence the drafting of policy or law.

- Some civil society–based initiatives sought to develop actual policy positions or draft laws. In the abortion law reform process, the work of the WHP in developing a broad set of policy principles and of ARAG in actually developing a draft law was critical.
- Activists and NGOs have also succeeded in having key people appointed to influential committees. For example, Violence against Women activists insisted upon being appointed to project committees of the SALC to ensure that they were able to influence the process from the inside to create a more woman-centred law.
- Other examples in South Africa include appointments to White Paper (government policy) and legislative drafting committees.

### *Political and technical expertise*

The studies also show that civil society organizations need to engage both politically and technically with policy and law reform processes. Not only is political pressure and support

needed to force an issue onto the agenda and ensure that it is addressed; but technical knowledge is required to ensure that the content of policies and laws reflect the needs of women on the ground.

### ***Doing the right research***

Research conducted by civil society has been important to many law reform processes. The Medical Research Council research on incomplete abortions provided the state with a critical piece of evidence that it could use to justify abortion law reform. The CALS research on marriages in rural communities was vital to supporting the process of the Recognition of Customary Marriages Bill. Such research equips civil society with the expertise to intervene authoritatively in policy processes.

### ***Understanding the process***

Policy development and law reform can be complex processes. The case studies also illustrate how policy and law reforms can comprise multiple streams of activity within civil society and the state, with varying sites of pressure and action that diverge and converge at different times. Different strategies were used to get issues onto the policy agenda, then to give content to the policy and develop legal frameworks, and lastly to engage with the processes of developing and enacting laws.

The changing sites of power and influence mean that it is particularly important for gender activists to be able to identify and access the appropriate point of the process, and have the relevant knowledge and expertise to make an impact. Negotiating with respect to institutions within the policy process requires a clear understanding of what can be achieved in each institution.

### ***4.4.3 The International Environment***

The international arena played a role in the law reform processes in terms of (i) international visibility and action, which provided opportunities for local advocacy and policy work; (ii) international guiding principles, language, and frameworks that could be adapted to local conditions; and (iii) funding from international agencies for local work.

The case studies suggest that the international arena is most influential where there is a synergy of national and international activities, as was the case with reproductive rights. Here international documents provided broad guiding principles for sectoral work. However, there has to be a vibrant civil society within the country to take up the issues that are important to that country.



## 5. Conclusions and Recommendations

This paper has sought to achieve a number of objectives. First, it identified the nature of the relationship between HIV/AIDS and gender inequality. It has argued that this is a complex and multi-layered relationship in which women's inequality at all levels affects their vulnerability to HIV/AIDS in terms of prevention, as people with HIV/AIDS, and as caregivers for the sick. Given (a) the fact that HIV/AIDS occurs in differing political, economic, and social contexts for women across the developing world and at the margins of the First World, and (b) the many ways in which gender inequality impacts on HIV/AIDS, there can be no uniform set of priorities or strategies across all countries and even for all women within a particular country. Domestic strategies have to be tailored to the needs of diverse groups of women within any country and be mindful of the opportunities offered by that country's political culture, economic policies, legal system, and cultural and religious values.

This paper has therefore sought to provide a broad understanding not only of the relationship between HIV/AIDS and gender equality (section 2), but also of the nature (and limits) of rights and the law (section 3). It has also drawn from the South African experience of rights and legal activism (section 4) to suggest a range of issues and strategies that can serve as a basis for identifying effective local strategies. It is hoped that the paper can generate a productive interchange on national experiences of gender, HIV/AIDS, and the law that can ultimately assist each country or region to develop their own priorities and strategies.

This final section of the paper will do two things. First, it will summarize some of the key rights and legal issues that emerge from the links between HIV/AIDS and gender inequality. Second, it will highlight some of the key strategic concerns about rights and the law that emerge from this paper.

### 5.1 Key Legal and Rights Issues

Based on an understanding of the way in which gender inequality impacts on HIV/AIDS in the developing world (and Africa in particular), the following issues are some of those that can be addressed through rights and legal struggles. This list is not exhaustive and the solutions to the issues raised are not necessarily entirely met by a rights strategy or the law. However, it provides a basis for thought and discussion in particular national contexts.

#### ***Rights to personal autonomy and equality within relationships***

The autonomy that women have over their bodies is at the core of their ability to protect themselves from HIV infection. This autonomy includes the ability to decide when and whether to have sex, to engage in certain sexual practices, and to use contraception. It also implies good reproductive health and the ability to make reproductive choices. Importantly, it means that women should be free of violence and coercive sex.

Clearly, the development of rights campaigns under the “umbrella” of sexual or reproductive rights, the right to be free from violence, and the right to equality are all highly relevant to the question of HIV/AIDS. Such campaigns would bring together legal and non-legal strategies and could include the following critical gender areas:

- access to the female condom and microbicides;
- a focus on male practices and attitudes (including raising awareness of the unlawfulness of some common forms of behaviours);
- access to information about safe-sex practice and reproductive health services;
- access to prevention of parent-to-child transmission (PTCT); and
- access to post-exposure prophylaxis for rape survivors.

While all these issues can be framed in rights terms and can form the basis of advocacy, research, education, and other strategies, they are less likely to be the subject of legal strategies such as law reform or litigation. An exception to this is in legal contexts where it is possible to advocate for law reform or litigate on the basis of socioeconomic rights, such as the right to health care (see the discussion of socioeconomic rights below). Law reform and litigation initiatives could be targeted at the following issues:

- Ensuring a legal framework for protection against violence and effective enforcement of the law. Here, partnerships and alliances can be built with women’s organizations working in the area.
- Ensuring a legal framework of equal rights within the family in marriage, divorce, guardianship, and custody of children.
- Ensuring an appropriate legal framework for sex work (decriminalization, but without punitive measures).
- Ensuring the right to choice, both in terms of termination of pregnancy and in terms of the rights of HIV-positive women to have children.
- Drafting regulations for, and enforcement of, a right for rape survivors to be informed by the police/district surgeon about the need to access antiretroviral drugs to prevent possible HIV transmission.
- Legal action may be possible to access drugs to reduce parent-to-child transmission if it is possible in a national context to rely on a right of access to health care, and if the state has previously been providing the treatment.
- The development of comprehensive rights against discrimination through the amendment or reinterpretation of existing laws or the development of new ones.

### ***Cultural equality***

In Africa particularly there is increasing recognition of the need to develop sociocultural institutions to support women and families living with HIV/AIDS. This may involve legal

activism within customary law, but the degree of cultural variation means that the strategies will be very specific to particular contexts.

The customary law of inheritance will be dealt with in the next section.

### ***Social and economic equality***

Women economic inequality, coupled with their sexual inequality, shapes their vulnerability to HIV/AIDS. Contracting and living with HIV/AIDS or caring for the sick also deepens women's poverty and their need for basic services from the state. As a result, there are numerous areas in which legal and non-legal interventions can be used both to reduce women's economic dependence on men and to ensure equitable access to the services to meet their basic needs.

Many of these issues relate to women's social and economic rights. Opportunities should be sought to participate in the development of policy frameworks, laws, and regulations that shape women's access to, and enjoyment of, these rights. However, it is often difficult to litigate issues that involve choices about policies or the allocation of resources by the state. For this reason, some argue that social and economic rights are not justiciable. Despite this, there are many examples of the innovative and creative use of the law and various enforcement mechanisms to hold governments accountable for the delivery of social and economic rights.

For example, if an anti-discrimination law is in place, it could be used or extended to address discrimination with respect to access to these rights – for example, discriminatory treatment of HIV-positive women by the health-care system. One could also think about using a *mandamus*, that is, an order requiring the state to perform its functions. This kind of legal procedure may be useful to compel proper delivery of social welfare grants. The removal of an existing service could also found a legal case if socioeconomic rights are entrenched in some form in the legal system. It is, however, perhaps most difficult to use the law to enforce the provision of services that do not exist and require additional resources. Some countries have sought to rely on the notion of a basic minimum content of the right, while others have sought to develop mechanisms to engage the state in a dialogue over the delivery of these rights.

### ***Access to health care***

The health-care needs in relation to prevention are largely listed under the section on personal autonomy above. People with HIV/AIDS need access to proper health care for opportunistic infections and for access to drugs that are currently unaffordable to them. This also touches on the needs of women who care for those who are sick, such as access to gloves and equipment.

Campaigns on socioeconomic rights relating to treatment and health care are central to all women's needs. Here direct legal action is possible, although difficult. It is partly dependent on the extent to which the country permits legal action on the basis of socioeconomic rights. However, there are positive international frameworks respecting health rights in both the Cairo Platform for Action<sup>61</sup> and the Outcomes Document of the Beijing+5 review<sup>62</sup> that can be used by advocates in this area.

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<sup>61</sup> The Cairo Programme of Action of the International Conference on Population Development, 1994.

<sup>62</sup> See <http://www.un.org/womenwatch/daw/followup/finaloutcome.pdf>

### ***Access to nutrition, clean water, and sanitation***

Inextricably linked to the right to health, access to clean water, sanitation, and adequate nutrition are necessary for people with AIDS to maintain their health status and for caregivers to carry out their duties.<sup>63</sup>

### ***Access to social security***

For women caring for people who are sick, research has shown that one of their most urgent needs is for the resources to do so.<sup>64</sup> Where countries can afford social welfare systems, legal activities can be devised to ensure that the right to social grants caters to the needs of this group of women (eg, that there is a child-maintenance grant that is payable to a surviving cousin or aunt or a special cash grant to those involved in home-based care). Legal action can also help to ensure the efficient delivery of these grants. However, these legal activities would have to be accompanied by broader advocacy and monitoring work to ensure rights and effective payments. Legal rules could also be developed to provide rights and protections for those involved in home-based care.

### ***Access to housing***

Shelter and housing for women who lose it upon becoming sick (because it is tied to work, often her husband's work, or her husband's family throws her out of her home) is also a critical need. Legal action has proved effective here. For example, in Kenya a court enforced the right of a wife living with AIDS to remain in the family home.<sup>65</sup> In South Africa, in a slightly different context, a woman was permitted to stay in the house attached to the work that both she and her husband did on a farm, after her husband had been dismissed.<sup>66</sup>

### ***Access to education***

Girl children have often been removed from school to carry out household work or care for the sick. The AIDS epidemic has increased this trend, with girls being taken out of school to help care for people with HIV/AIDS. This has critical consequences for development, in view of the positive returns on an investment in the education of girls.

### ***Access to resources through inheritance***

In Africa, women's access to resources through inheritance is also critical, and the removal of legal barriers to this should be a priority. In customary law, women have no right to inherit from their husbands and fathers but are entitled to maintenance from the (male) heir. However, the customary protection of widows and children via such maintenance obligations of the heir has largely broken down, and many women and their families are left destitute after the death of a father or husband. This has devastating consequences for women living with HIV/AIDS or caring for those who are sick. In addition, the economic vulnerability of widows makes them particularly susceptible to sexual demands by male relatives, thereby increasing their

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<sup>63</sup> See for example, paragraphs 9 and 107d of the outcomes document of Beijing+5 cited in footnote 64.

<sup>64</sup> UNIFEM (2000) Gender related socio-economic impact of HIV/AIDS.

<sup>65</sup> Reported in the *Sunday Independent* 6 August 2000.

<sup>66</sup> See the decision of the South African Land Claims Court in *Hanekom v Conradie* LCC/8R/99, (22/04/99).

vulnerability to HIV. This is a key area of legal action. Litigation and law reform have proved successful in different contexts.<sup>67</sup>

### ***Reducing women's economic dependence on men***

Given the intersection of poverty and vulnerability, there is a need to ensure a proper legal framework to reduce the economic dependence of women on men. There are a variety of areas for legal intervention here, including:

- Greater legal protection for women in the informal sector and vulnerable categories of workers in the formal sector.
- Access to credit for the establishment of, as well as legal protection for, small and medium enterprises.
- Anti-discrimination measures in the workplace must protect against discrimination on the basis of gender and HIV status.

## **5.2 Key Strategic Questions**

Sections three and four include a variety of strategic questions and suggestions on the use of rights and the law. Perhaps one of the most important points emerging from these sections is the need to develop rights and legal strategies that are “culture-breaking.” In other words, we should try to identify rights and legal strategies that shift public discourse on gender equality and HIV/AIDS. For example, we may choose issues and formulate strategies that challenge fundamental assumptions about women’s identity (often reinforced and reproduced in and through the law), such as sexuality and violence, or we may seek to develop strategies that shift the understanding of HIV/AIDS and its relationship to inequality and poverty.

Such rights strategies are more likely to be successful (based at least on the South African experience) when they are pursued by a broad alliance or network of organizations committed to clear goals and engaged in a variety of legal and non-legal strategies. These include alliance building, research, media, law reform and litigation, education, lobbying, etc. The objectives should also be framed by a “rights message” that resonates with the community for whom it speaks.

Ideally, if the strategies include law reform, they should also address the issue of implementation. At the same time, the paper has recognized the value of laws in and of themselves, at least at a symbolic level and for the space they offer for further work. If a law or right is in place, strategies to achieve its implementation or enforcement should be based on a clear understanding of the barriers that exist to this. Many NGOs in South Africa, for example, have chosen to work in partnership with government to overcome obstacles.

There also needs to be more alliance building within civil society across the gender and HIV/AIDS sectors within countries and internationally. At present, a wealth of expertise and

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<sup>67</sup> In South Africa, a process of law reform will, hopefully, see women access property through inheritance. See the Discussion paper of the South African Law Commission <http://www.law.wits.ac.za/salc/salc.html>

resources is being wasted as these sectors work alongside (and sometimes against) each other. The links between gender inequality and HIV/AIDS demonstrate that the broad objectives of each sector are the same. One of the particular challenges that emerges from this paper is to achieve a better synergy between the two sectors.

Such a synergy would allow for a better understanding of the issues and a greater capacity to share strategies about how to take the process forward. Partnerships could be built at the community, national, and international levels and be based on process (“how” to do it) and/or substance (“what” the issues are). For example, strategic alliances around violence, human rights, and poverty issues would promote the objectives of both sectors. In this, there is a need to go “back to basics,” to reinvigorate activism, to close the gap between women and “experts,” and to bring legal expertise together with political and other forms of knowledge. This will allow for a better identification of short- and long-term goals and of the best strategies to get there. Importantly, these strategies should always be located within a framework that refers to the different levels of women’s inequality. For example, in relation to microbicides,

in the short term the work must focus on mobilising existing networks toward activism and toward securing political commitment to make microbicides available. However, in the long term, this is only the first step. Activism then requires attention to cultural, social, economic and political inequalities, as well as inequalities in personal autonomy relationships as these relate to access and use of microbicides once they did become available.<sup>68</sup>

Within the international arena, the links between HIV/AIDS and gender equality have been recognized within the UNAIDS program.<sup>69</sup> More recently, in a speech to the UN General Assembly Special Session on the follow-up to the Fourth International Conference on Women (Beijing+5), Peter Piot, Executive Director of the Joint United Nations Programme on HIV/AIDS (UNAIDS) argued that gender inequality is a fundamental driving force of the AIDS epidemic and must therefore be addressed centrally in responding to the epidemic. He went on to say:

The slow, piecemeal reform we have seen in the past is not sufficient if women’s rights and needs are to be taken seriously. Equity in all fields – health, education, environment, the economy – are essential if women are to act to protect themselves when it comes to HIV and AIDS.<sup>70</sup>

Similarly, at the African regional preparatory conference for Beijing+5, HIV/AIDS and poverty were identified as the two key emerging issues that

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<sup>68</sup> Report of the Commission on the vulnerability of women at the international conference “Putting Third First – Critical Legal issues and HIV/AIDS,” Durban, July 2000.

<sup>69</sup> The 1996 HIV/AIDS and Human Rights International Guidelines identify women as a vulnerable group (Guideline 8). The programme of the 1999 International Partnership Against HIV/AIDS in Africa goes further to call specifically for the strengthening of the status of women through legal and other means to reduce their vulnerability (policy area 10).

<sup>70</sup> <http://www.unaids.org/whatsnew/press/eng/newyork050600.html>

have become pervasive and life threatening to the entire African society. In most African countries, the level of poverty is growing annually as the number of people who are living below the poverty line increases by the millions. The strength of the extended family to take care of these people, a role that largely falls on women, has been eroded to bare bones as evidenced by the number of street children and beggars of all ages in the cities. The question of where the responsibility lies for helping the victims of HIV/AIDS and of poverty must be answered and acted upon as a matter of urgency, before the situation is accepted as a normal way of life and eventually becomes the demise of Africa.<sup>71</sup>

Inherent in this is the acceptance of the links between the HIV/AIDS and women's empowerment.

Unfortunately, the central place accorded the relationship between HIV/AIDS and gender in the work of UNAIDS and within the African region did not find its way into the final document of Beijing +5. While the language on health included positive and progressive statements on HIV/AIDS, areas relating to poverty, development, and human rights were disappointingly silent. HIV/AIDS remains largely ghettoized within health. While it is clearly appropriate to include HIV/AIDS concerns in this sector, and the progressive women's health and rights sector has ensured that a broad range of concerns are addressed, it does not capture the multidimensional nature of the relationship between HIV/AIDS and inequality. This is only apparent in a draft resolution on HIV/AIDS and women proposed by Zambia.<sup>72</sup>

This expresses an ongoing dissonance between the activities clustered around "gender" and "HIV/AIDS" at the international level (with the sole exception of the health sector). This is unfortunate at a time when the partnership of "gender" and "HIV/AIDS" needs to be deepened and extended. Importantly, it needs to move beyond issues of women's health and sexual and reproductive rights to include broader developmental and human (especially socioeconomic) rights concerns. Inherent in this is a greater emphasis on the experiences and context of women (and men) in the developing world who live directly in the shadow of the epidemic and who are often most dependent upon international norms for leverage back home.

For these women, the HIV/AIDS epidemic has the capacity not only to reinforce, but to widen both global inequalities as well as socioeconomic inequalities based on gender, race, and class. In the developing world, if not the First World, the failure to address gender issues means that we have to face the possibility that the HIV/AIDS epidemic will undermine much of what we have achieved toward gender equality and to reverse many of our hard-won gains. It is time to act.

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<sup>71</sup> The African Plan of Action.

<sup>72</sup> This draft resolution 'Women, the girl child and the human immunodeficiency virus/acquired immunodeficiency syndrome' was presented to the 44<sup>th</sup> Session of the Commission on the Status of Women, 28 February 2000–2 March 2000. (<http://www.un.org/womenwatch/daw/csw/200016.htm>).