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An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa

By John Cantius Mubangizi¹

Abstract

Sexual and reproductive rights of women are widely violated and abused in Africa, partly because of numerous gender-based cultural and traditional practices. All these practices exist to varying extents in many African countries—including South Africa. The Bill of Rights in the South African Constitution has several provisions that relate to the protection of sexual and reproductive rights of women, but the Constitution also provides for the right to culture, which allows for traditional and cultural practices—some of which violate certain human rights norms including the sexual and reproductive rights of women. International and constitutional protection notwithstanding, such rights can only be realised and enjoyed if they are given force through constitutional, legislative and judicial measures. This paper explores these three measures. A conceptual understanding of sexual and reproductive rights is presented, before the international dimension of those rights is discussed. The constitutional and legislative framework relating to the relevant cultural practices is then interrogated—before case law from the application and interpretation of that framework in relation to women's sexual and reproductive rights is analysed. The paper argues that despite the constitutional, legislative and judicial attempts to minimise the clash between cultural practices and the sexual and reproductive rights of women in South Africa, the violation and abuse of such rights still abounds. The paper concludes that legislative intervention does not go far enough, that the courts should be more proactive and assertive on the issues concerned, and that a much more holistic approach—including advocacy, human rights education, a change of patriarchal mind-sets, and political will—is urgently needed.

Key Words: Sexual and Reproductive Rights, Women, South Africa.

Introduction

In traditional African societies, matters of sexuality are usually not openly discussed in public. Issues of sexual and reproductive health are seen as being strictly private and are only dealt with through well-defined channels like public health officials and health providers. This might be one of the reasons why sexual and reproductive rights of women are widely violated and abused in Africa. The other reason relates to the existence of numerous gender-based cultural and traditional practices that are harmful to women. The cultural and traditional practices reviewed in this paper include female genital mutilation (FGM), marriage by abduction

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(*ukuthwala*), virginity testing, early/child marriages, polygamy and other practices that are inherently harmful—including those that directly or indirectly result in violence against women. All these practices, which have the potential of violating sexual and reproductive rights of women, exist in varying extents in many African countries, including South Africa.

There is no shortage of pronouncements in international human rights instruments on women's human rights generally, and their sexual and reproductive rights specifically. In addition, many countries have constitutions that provide for the protection of such rights. The Bill of Rights in the South African Constitution² contains several provisions that relate to the protection of sexual and reproductive rights of women. These include the rights to equality,³ human dignity,⁴ privacy,⁵ bodily and psychological integrity,⁶ and health care⁷—to name but a few. At the same time, however, the Constitution also provides for the right to culture, which allows for traditional and cultural practices—some of which clearly violate certain human rights norms including sexual and reproductive rights of women. This calls into question the extent to which these competing constitutional interests can be balanced, without jeopardising the realisation of women's sexual and reproductive rights. This has to be seen in the context of the fact that international and constitutional protection notwithstanding, such rights can only be realised and enjoyed if they are given force at national level—not only through constitutional means, but also through legislative and judicial measures.

The purpose of this paper is to explore the various legislative and judicial attempts to minimise the clash between the said harmful cultural practices and the sexual and reproductive rights of women in South Africa. The paper begins by providing a brief conceptual understanding of the various harmful cultural practices that violate women's sexual and reproductive rights in the country. A conceptual understanding of sexual and reproductive rights is also given—before the international dimension of those rights is discussed. The constitutional and legislative framework relating to the relevant cultural practices is then interrogated, before analysing the case law that has emanated from the application and interpretation of that framework in relation to women's sexual and reproductive rights. The paper argues that despite the constitutional, legislative and judicial attempts to minimise the clash between cultural practices and sexual and reproductive rights of women in South Africa, the violation and abuse of the same rights, and through the same practices, still abound. The paper has three conclusions. Firstly, the legislative intervention does not go far enough. Secondly, the courts—particularly the Constitutional Court—should be more proactive and assertive on the issues concerned. Finally, a lot more than just legislation and litigation is needed: namely a more holistic approach that includes advocacy, human rights education, a change of patriarchal mind-sets and political will.

Conceptual Issues

In order to have a clear understanding of how harmful cultural practices violate sexual and reproductive rights of women, it is important to have, first of all, a conceptual understanding of the relevant issues. To begin with, harmful cultural practices have been defined as “all

² The Constitution of the Republic of South Africa, 1996.

³ Section 9.

⁴ Section 10.

⁵ Section 14.

⁶ Section 12(2).

⁷ Section 27(1).

practices done deliberately by men on the body or the psyche of other human beings for no therapeutic purpose, but rather for cultural or socio-conventional motives and which have harmful consequences on the health and the rights of the victims.”⁸ These cultural practices—which exist in different forms and variations—“wear down the physical and psychological health and integrity of individuals, especially women and girls.”⁹ Some of them “cause excruciating pain while others subject women to humiliating and degrading treatment.”¹⁰ They also have the effect of subordinating women in society and legitimising and perpetuating gender-based violence.¹¹

It is clear from the foregoing definition and description that harmful cultural practices are not only a serious form of violence against women, but also amount to gross and serious violations of women’s rights. In the particular context of sexual and reproductive rights of women in South Africa, there are a number of cultural practices that need to be highlighted. Female genital mutilation (FGM)—which is sometimes erroneously referred to as female circumcision—involves the incision and removal of parts of the most sensitive female external genitalia. The reasons given for this practice vary from community to community. FGM is not widespread in South Africa, as it is believed not to be originally a South African custom—but rather one that was ‘imported’ by immigrants from other South African countries.¹² A harmful South African custom, however, is *‘ukuthwala’*—which refers to the practice of marriage by abduction. This involves the waylaying or capturing of a girl and taking her to a man’s home in marriage. The ‘capturing’ is usually done by a group of people, one of whom is the future husband.¹³ This practice is prevalent in the Eastern Cape Province of South Africa.

Closely related to the custom of *ukuthwala* is the equally abhorrent practice of early/child marriages. This involves the marrying-off (or giving away girls for marriage) at an early age of sometimes 11, 12 or 13 years—sometimes even as young as 6 years of age.¹⁴ Such child brides then become victims of domestic violence, premature and undesired pregnancies, and sexual health risks like exposure to sexually transmitted infections including HIV/AIDS. This practice is quite common in South Africa, particularly in poor rural communities. Also common is the practice of virginity testing. This involves the physical examination of a girl’s genitalia—usually by older women in the community—in order to determine whether the hymen is still intact. Girls whose hymens are found broken will have failed the test, and those whose hymens are still intact will be considered to be virgins. This practice, which is prevalent among the Zulu people (mainly found in the KwaZulu-Natal Province), had apparently died away in the middle of the 20th century, but re-emerged in the last two decades—reportedly as one of the defences against the

⁸ See: Morissanda Konyate, “Harmful Traditional Practices against Women and Legislation”, Paper prepared for the United Nations Division for the Advancement of Women. Available from: http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Morissanda%20Kouyate_.pdf.

⁹ See: Nelly Lukale, “Harmful Traditional Practices: A Great Barrier to Women’s Empowerment”, in: End Fistula (ed.), *Gender Equality, Gender Based Violence*. Available from: <http://girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment/>.

¹⁰ See: Newman Wadesango, Symphoroza Rembe and Owence Cabaya, “Violation of Women’s Rights by Harmful Traditional Practices” 2011 13(2) *Anthropologist* 121.

¹¹ Ibid.

¹² See John C Mubangizi, “A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions” 2012 12(3) *Journal of International Women’s Studies* 36.

¹³ Ibid. at 39.

¹⁴ See: Wadesango, Rembe and Cabaya (note 10 above) 123.

spread of HIV/AIDS.¹⁵ Indeed, this is one of the reasons given by those who support the practice. Other advantages are said to include identifying children who are sexually abused, and, also, preventing unwanted pregnancies.¹⁶

Polygamy is another traditional practice that is quite widespread—not only in South Africa but in the rest of Africa and beyond. It is also hotly debated and contested, with proponents arguing that those who enter into polygamous marriages do so freely and consensually and that those who reject them merely do so “more on the basis of its threat to the Christian marriage norm than its implications for women.”¹⁷ Some would also argue against the notion that polygamy violates sexual and reproductive rights of women. It is submitted, however, that polygamy exposes women to the risk of sexually transmitted infections—including HIV/AIDS—as a result of the women’s involvement in multiple sexual relationships through the husbands concerned.

The cultural practices discussed above are not the only ones that violate sexual and reproductive rights of women in South Africa. Others that are less widespread include dry sexual intercourse, sororate marriage practices (where a deceased wife is replaced by her young sister) and levirate marriage practices (where a man marries his deceased brother’s widow). They also include harmful practices relating to childbirth, and dietary taboos during pregnancy and lactation.

Conceptually, the notions of sexual rights and reproductive rights usually tend to be conflated and used interchangeably even though they do not mean the same thing. Central to the two concepts, however, is that they are rooted in the most basic human rights principles—particularly those relating to women’s health. It is for that reason that the World Health Organisation (WHO) has defined sexual rights to include:

- “... the right of all persons, free of coercion, discrimination and violence, to:
- the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
 - seek, receive and impart information related to sexuality;
 - sexuality education;
 - respect for bodily integrity;
 - choose their partner;
 - decide to be sexually active or not;
 - consensual sexual relations;
 - consensual marriage;
 - decide whether or not, and when, to have children; and
 - pursue a satisfying, safe and pleasurable sexual life.”¹⁸

WHO goes on to say that “sexual rights protect all people’s rights to fulfil and express their sexuality and enjoy sexual health, with due regard for the rights of others and within a framework of protection against discrimination.”¹⁹

¹⁵ See: Lucinda Le Roux, “Harmful Traditional Practices (male Circumcision and Virginitly testing of Girls) and the Legal Rights of Children”, Unpublished LLM Thesis, University of the Western Cape (2006) 13.

¹⁶ See: Wadesango, Rembe and Cabaya (note 10 above) 127.

¹⁷ See: Melissa Steyn, “A New Agenda: Restructuring Feminism in South Africa” 1988 21(1) *Women’s Studies International Forum* 46.

¹⁸ WHO, *Defining Sexual Health: Report of a Technical Consultation on Sexual Health, 28-31 January 2002*, Geneva: Adopted by WHO in 2006.

Reproductive rights, on the other hand, have been described as:

“[Those rights that rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions regarding reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”²⁰

It is important to note that both definitions are prefixed by an acknowledgement that sexual rights and reproductive rights are already recognised in national laws, international human rights documents, and also other consensus documents. This is because sexual and reproductive rights are human rights first. It should also be noted that both definitions are working definitions which have been developed through consultative processes building on international consensus documents like the International Conference on Population and Development (ICPD) Programme of Action,²¹ and the Beijing Platform for Action.²² Because there are no universally recognised definitions of these concepts, the working definitions are aimed at contributing to a better understanding of the field of sexual and reproductive health. It is in that context that a South African Department of Health document has stated that:

“Sexual and reproductive rights exist when all people have control over and can decide freely and responsibly on matters related to their sexuality—including sexual and reproductive health—free of coercion, discrimination and violence. These rights are embedded in the South African Constitution and in South Africa’s commitment to implement international human rights treaties.”²³

From the working definitions, it can be concluded that the concepts ‘sexual rights’ and ‘reproductive rights’ encompass two broad principles—the right to sexual and reproductive health care and the right to sexual and reproductive self-determination. For that reason these concepts cover a wide range of rights that can be summarised to include the right to exercise control over one’s body; the right to choose whether, when, where, and with whom to have sex; the right of access to modern family-planning methods; the right to maternal, new-born and child health-care services; the right to safe, legal and accessible abortion services; freedom from gender-based violence and the right to appropriate medical, counselling and legal services; and the right of access to sexual education and information.²⁴ Although the list of relevant rights is fairly comprehensive, it is certainly not *numerus clausis* or exhaustive. However, it provides a

¹⁹ WHO, “Sexual and Reproductive Health”. Available from: http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/.

²⁰ WHO (note 18 above) 4.

²¹ Adopted in Cairo on 13 September 1994.

²² Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women, in Beijing, on 15 September 1995.

²³ Department of Health (RSA) *Sexual and Reproductive Health and Rights: Fulfilling our Commitments, 2011–2021 and Beyond*, Pretoria (2011) 2.

²⁴ See: Ben Kiromba Twinomugisha “Beyond ‘Malaya’ or Prostitute: Interrogating Sexual and Reproductive Health Rights of Young Female Sex Workers in the Context of HIV/AIDS in Uganda” *Working Paper No. 37*, March 2012.

broad understanding of the ambit covered by the concepts 'sexual rights' and 'reproductive rights'.

It is against that conceptual background that international, constitutional and legislative frameworks relating to those rights have to be understood. It is to the international dimension that we now turn our attention.

International Dimension

Of all the international human rights instruments that recognise women's rights generally, the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁵ is probably the most profound. In the specific context of sexual and reproductive rights, CEDAW recognises the principle that such rights are important to women's wellbeing, and, hence, states parties must take affirmative measures to ensure that reproductive health care is available and accessible to all women. Accordingly, CEDAW enjoins all states parties to "take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."²⁶ Furthermore, and more importantly, Article 16 requires states parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations." Of particular importance is the obligation on states parties to ensure "on a basis of equality of men and women...the same right to enter into marriage²⁷ ..., to choose a spouse and enter into marriage only with their free and full consent²⁸ ..., and to decide freely and responsibly the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."²⁹

Under Article 16(2) of CEDAW, the betrothal and marriage of children are prohibited, and states are required to take all necessary action to specify a minimum age for marriage. It is in that same vein that the 1989 Convention on the Right of the Child (CRC)³⁰ contains protection against "all forms of sexual exploitation and sexual abuse." In particular, states parties are obliged to take appropriate measures to prevent the "inducement or coercion of a child to engage in any unlawful sexual activity³¹ [and] to prevent the abduction, the sale or traffic in children for any purpose or in any form."³²

In the specific African context, sexual and reproduction rights are acknowledged through the right to physical integrity—which is given formal recognition in Articles 4 and 5 of the African Charter on Human and People's Rights³³ which provide for respect of the integrity of the person and the right to respect for human dignity respectively. Article 18(3) categorically provides for the elimination of discrimination against women and the protection of their rights. The Protocol to the African Charter on Human and People's Rights on the Rights of Women³⁴ is

²⁵ UN General Assembly Resolution 34/180 of 18 December 1979.

²⁶ Article 12(1).

²⁷ Article 16 (1) (a).

²⁸ Article 16 (1) (b).

²⁹ Article 16 (1) (e).

³⁰ UN General Assembly Resolution 44/25 of 20 November 1989.

³¹ Article 34(a).

³² Article 35.

³³ Also known as the Banjul Charter, it was adopted by the 18th Assembly of the Heads of State and Government of the OAU on 17 June 1981, and came in force on 21 October 1986.

³⁴ Adopted on 11 July 2003.

much more specific and detailed. Not only does Article 2 of the Protocol provide for the elimination of discrimination against women, it also enjoins states parties to “commit themselves to modify the social and cultural patterns of conduct of women and men...with a view to achieving the elimination of harmful cultural and traditional practices and all practices which are based on the idea of the inferiority or the superiority of either of the sexes on the stereotyped roles of women or men.”³⁵ The rights to human dignity, life, integrity and security of the person, are also protected.³⁶ More importantly, however, the Protocol obliges states parties to “prohibit” and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.³⁷ The Protocol also requires states to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. This is to be done by taking legislative measures to guarantee that no marriage takes place without the free and full consent of both parties, ensuring that the minimum age of marriage is 18 years, and that monogamy is encouraged as the preferred form of marriage.³⁸

Apart from the above binding international treaties, several pronouncements have been made in other non-binding instruments on the protection of women’s sexual and reproductive rights. Most prominent among these is the 1993 Vienna Declaration and Programme of Action,³⁹ which called for the elimination of “gender-based violence and all forms of sexual harassment and exploitation including those resulting from cultural prejudice...”⁴⁰ The Declaration also recognised “the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span.”⁴¹ Also prominent is the ICPD Programme of Action,⁴² chapter seven of which deals entirely with reproductive rights and reproductive health. The chapter specifically recognises the rights of women “to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.”⁴³ Similar recognition is found in the Beijing Declaration and Programme of Action,⁴⁴ which provides quite extensively for the rights relating to women’s sexual and reproductive health. In the African context the Maputo Declaration,⁴⁵ for example, categorically recommends, *inter alia*, the eradication of discriminatory and harmful practices against women that expose them to dying during pregnancy and birth.⁴⁶ It has to be mentioned that although the non-binding instruments lack the formal legal force of international conventions, they nevertheless have a profound impact in furthering and protecting women’s rights, because, by adopting them, states make a political commitment to implement and enforce them.

There are several other relevant binding and non-binding international human rights instruments to which we can only make reference. These include the International Convention on

³⁵ Article 2 (2).

³⁶ Articles 3 and 4.

³⁷ Article 5.

³⁸ Article 6.

³⁹ UN. Doc. A/CONF. 157/23. Adopted by the UN General Assembly on 12 July 1993.

⁴⁰ Part 1 Section 18 of the Declaration.

⁴¹ Part 1 Section 41 of the Declaration.

⁴² See note 21 (above).

⁴³ Para 7.3.

⁴⁴ Adopted at the Fourth World Conference on Women, Beijing, on 15 September 1995.

⁴⁵ The Maputo Declaration on Gender Mainstreaming and the Effective Participation of Women in the African Union.

⁴⁶ Para E (3).

Marriage Consent, Minimum Marriage Age and Registration of Marriages,⁴⁷ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁸ the United Nations Declaration on Violence Against Women,⁴⁹ and several declarations on the elimination of FGM.⁵⁰

Constitutional and Legislative Framework in South Africa

International human rights instruments, binding or not, can play an important role in the legal system of any country—but only if they are ratified and incorporated in the domestic law of that country. South Africa has ratified most, if not all, the human rights instruments discussed above. It has also incorporated international law into its municipal (domestic) law through sections 39(1) and 232 of the Constitution. It is through constitutional and national legislative mechanisms, however, that protection and enforcement of rights can best be effected. It is for that reason that most international human rights instruments oblige states parties to take legislative and other measures to achieve certain ideals. For example, the United Nations Economic and Social Council's Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children⁵¹ requires states to draft legislation prohibiting such practices.

Before looking at the pertinent South African legislation, it is important to highlight the extent to which sexual and reproductive rights are embedded in the South African Constitution. Firstly, section 9 provides for the right to equality and prohibits discrimination based on gender, sex, pregnancy, marital status, sexual orientation and culture—among other things.⁵² Section 10 provides for the right to human dignity, and section 11 protects the right to life. Under section 12(1) everyone has the right to freedom and security of the person—including freedom from all forms of violence, and the right not to be treated in a cruel, inhuman and degrading way. Section 12(2) provides for the right to bodily and psychological integrity—including the right to make decisions concerning reproduction and the right to security in, and control over, one's body. Under section 15 the right to privacy is guaranteed.

It is perhaps section 27(1)(a) that has the most direct relevance to sexual and reproductive rights. It states that: "Everyone has the right to have access to health care services including reproductive healthcare." It has been opined that this right "...entitles both women and men to have the freedom to decide if and when to begin a family and the right to be informed of and to have access, if they choose, to safe, effective, affordable, and acceptable family planning."⁵³ It

⁴⁷ United Nations General Assembly Resolution 1763 A (XVII) of 7 November 1962.

⁴⁸ United Nations General Assembly Resolution 39/46 of 10 December 1984.

⁴⁹ United Nations General Assembly Resolution 48/104 of 20 December 1993.

⁵⁰ Such as the 1999 United Nations Resolution A/RES/53/117 on FGM, the 1997 Regional WHO Plan for the Acceleration of the Elimination of FGM, the 1998 Joint Declaration of WHO/UNFPA/UNICEF for the Elimination of FGM, and the 2007 Inter Institution Declaration on FGM.

⁵¹ UN Sub-Commission on the Promotion and Protection of Human Rights, Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children, 22 July 1994, E/CN.4/Sub.2/1994/10/Add.1. Available from: <http://www.refworld.org/docid/3b00f19710.html> (accessed 7 April 2014).

⁵² Section 9(3). In all, there are 17 listed prohibited grounds of discrimination. This list is not a *numerus clausis*; it is open-ended in that a complaint of unfair discrimination can be brought to court if it is similar to any of the prohibited grounds.

⁵³ See: Geraldine van Bueren, "Health", in: MH Cheadle, DM Davis & NTL Hayson (eds), *South African Constitutional Law: Bill of Rights* (2002) 497.

has also been suggested that the reference to reproductive health care is significant, in that such services are essentially accessed by women who, historically, have constituted a vulnerable and disadvantaged class—not least in respect of access to abortion.”⁵⁴ Moreover, it is submitted that these women are usually the main victims of human rights violations resulting from harmful cultural practices, as they are typically rural, uneducated and marginalised.

Also relevant is section 28 of the Constitution, which provides for children’s rights. These include the right to basic health care services, the right to be protected from maltreatment, neglect, abuse or degradation, and the right to be protected from exploitive labour practices.⁵⁵ The right to education (under section 29) and the right of access to information (under section 32) also have some bearing—albeit indirect—on the sexual and reproductive rights of women.

It is important to note that the South African Constitution also protects cultural rights. Section 30 provides for an individual right to culture and language, whereas section 31 provides for the collective rights of cultural, religious and linguistic communities. These rights are given further impetus by section 185, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. They are also recognised by section 211(3), which provides for the application of customary law by South African courts. It may well be argued that a balance has to be struck between the enjoyment of cultural rights and the protection of sexual and reproductive rights that are seen to be violated by cultural practices. However, the balance has to be tipped in favour of the protection of sexual and reproductive rights, as there are certain limitations to cultural rights which include the requirement that they have to be exercised in a manner that is not inconsistent with any provision of the Bill of Rights.⁵⁶ Further limitations are imposed by the general limitation clause in section 36, which permits limitations that are “reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.”⁵⁷

As a country’s law of highest authority, a constitution provides a framework and establishes the norms to which all national laws and government actions should conform. However, it is legislation that “determines not only what is and is not legal, but outlines government responsibility in enforcing laws and protecting rights.”⁵⁸ It is in that context that the legislation relating to harmful cultural practices that violate sexual and reproductive rights of women in South Africa must be seen. The absence of such legislation—or the insufficiency of existing legislation—has a significant impact on whether and how the said rights are recognised and protected.

There is no single comprehensive statute aimed specifically at outlawing harmful cultural practices that violate sexual and reproductive rights of women in South Africa. However, there is an array of statutes that have a significant bearing on those rights. To begin with, the Domestic Violence Act⁵⁹ recognises in its preamble that domestic violence—which is a typical characteristic of harmful cultural practices—is a serious social evil that affects the most vulnerable members of South African society. The Act defines “domestic violence” broadly to include physical abuse; sexual abuse; emotional, verbal and psychological abuse; and economic

⁵⁴ See: Charles Ngwena & Rebecca Cook, “Rights Concerning Health”, in: Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa* (2005) 131.

⁵⁵ Section 28(1)(c), (d) and (e).

⁵⁶ See sections 30 and 31(2).

⁵⁷ Section 36(1).

⁵⁸ See: Centre for Productive Rights, *A Tool for Advancing Reproductive Rights Law Reform* (2006) 19.

⁵⁹ 116 of 1998. The Act mainly deals with the issuing of protection orders with regard to domestic violence.

abuse—among other things.⁶⁰ More importantly, the definition incorporates “any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.”⁶¹ This effectively provides recognition for the various manifestations of harmful cultural practices that violate sexual and reproductive rights.

The Domestic Violence Act has been criticised for a number of reasons—including the failure of the definition of domestic violence to recognise the continuing nature of such violence.⁶² The Act has also been criticised for not placing specific duties on the Departments of Health and Social Development (the latter being the Department under which the Act is supposed to be implemented and administered). In addition, the Act does not place any duties on health care workers who are, ideally, best placed to identify domestic violence. Due to these shortcomings, the Act is seen as being “insufficiently responsive to the needs of abused women and does not give effect to the broader constitutional rights of women”.⁶³

The National Health Act⁶⁴ is another pertinent and relevant statute. It recognises the protection and promotion of the rights of vulnerable groups, which include women and children.⁶⁵ These would inevitably include victims of sexual and reproductive rights violations resulting from harmful cultural practices. Under section 4(3), provision is made for free health-care services for pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aids, and, under section 4(3)(c), termination of pregnancy services are mandated for women subject to the Choice on Termination of Pregnancy Act⁶⁶—another statute which has significant impact on the sexual and reproductive rights of women in South Africa.

The Choice on Termination of Pregnancy Act permits termination of pregnancy—upon request of a woman—during the first 12 weeks of gestation, under certain defined circumstances from the 13th to the 20th week of gestation, and under limited circumstances after the 20th week of gestation.⁶⁷ This is a clear indication that South African law now recognises and acknowledges a woman’s right to reproductive autonomy. It is important to note that the preamble to the Act specifically states that the Act “promotes reproductive rights.” The use of this expression has been criticised as being ironical, as the Act in fact promotes “the right not to produce.”⁶⁸ The Act has also been criticised as being “hardly a model of legislative genius [as it] bristles with lacunae, contradictions, inconsistencies and incomprehensibilities, and demonstrate a stunning ignorance of the basic principles of criminal law.”⁶⁹ Despite these criticisms, a challenge to the constitutionality of the Act in *Christian Lawyers Association of South Africa and Others v Minister of Health*⁷⁰ was rejected by the court, on the grounds that a foetus was not a beneficiary of the right to life in section 11 of the Constitution. Despite the court challenges and the

⁶⁰ Section 1 of the Act.

⁶¹ Ibid.

⁶² B Meyersfield *Domestic Violence and International Law* (2010) 159.

⁶³ See Tarryn Bannister, “The Right to Have Access to Health Care Services”, Unpublished LLM dissertation, University of Stellenbosch at 68.

⁶⁴ 61 of 2003.

⁶⁵ Section 2(c)(iv).

⁶⁶ 92 of 1996.

⁶⁷ Section 2 of the Act.

⁶⁸ Ferdinand van Oosten “The Choice on Termination of Pregnancy Act: Some Comments” (1999) 116 *South African Law Journal* 62.

⁶⁹ Ibid. at 76.

⁷⁰ 1998 (4) SA 1113 (T).

criticisms, however, the Choice on Termination of Pregnancy Act has been hailed for having a marked impact on abortion-related mortality and for giving women in South Africa the right to reproductive autonomy. This must be seen in the context of unwanted and unplanned pregnancies that may arise from cultural practices like *ukuthwala* and forced child marriages.

The Promotion of Equality and Prevention of Unfair Discrimination Act⁷¹ is another statute that impacts on women's sexual and reproductive rights in the context of harmful cultural practices. The Equality Act (as it is sometimes referred to) prohibits unfair discrimination against women, and places specific prohibition on gender-based violence, female genital mutilation, and any system that prevents women from inheriting family property.⁷² Under section 8(g), limiting women's access to social services like health care is prohibited. Also prohibited are certain unfair practices listed in the Schedule to the Act, which include unfairly denying or refusing any person access to health-care services and refusing to provide emergency medical treatment to persons of particular groups.⁷³ It may also be argued that besides specific prohibitions such as FGM, other practices such as *ukuthwala* and virginity testing are regarded as unfair discrimination under the Equality Act. Accordingly, it may further be argued that such practices can be reported and prosecuted in the Equality Courts, which were created under the Equality Act.⁷⁴ Some of the relevant cases that have been brought before the Equality courts will be discussed further below.

In so far as the protection of sexual rights of women in South Africa is concerned, the most relevant statute is perhaps the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁷⁵ One of the objects of the Act is to afford "complainants of sexual offences the maximum and least traumatising protection that the law can provide" by, *inter alia*, "criminalising all forms of sexual abuse or exploitation..."⁷⁶ The Act defines "sexual offence", "sexual violation" and "rape" quite broadly—with consent being an important element. Accordingly, consent is explicitly excluded if obtained through the use of force or intimidation, under threat of harm, where there is an abuse of power or authority, where the sexual act is committed under false pretences, or where the victim is asleep, unconscious, mentally disabled, or below 12 years of age.⁷⁷ Chapter 3 of the Act deals with sexual offences against children, and specifically outlaws sexual acts with children and sexual exploitation of children.⁷⁸ Under section 1 of the Act, a child is defined as a person under the age of 18 years of age. It is submitted that the cultural practices of *ukuthwala*, and, to some extent, virginity testing, clearly fall foul of several provisions of the Act. It is surprising that not many cases have been brought to court under this Act—as will be seen further below.

Given that some cultural practices violate the rights of young girls, the Children's Act⁷⁹ is also of critical importance. Under section 12(i) "every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being." Section 12(2)(a) prohibits the giving out of a girl in marriage or engagement when she is below the minimum legal age. Even if she is above the minimum age, she may not be given out in marriage

⁷¹ 4 of 2000.

⁷² Section 8(a), (b) and (c).

⁷³ Section 3 of the Schedule to the Act.

⁷⁴ Chapter 4 of the Act.

⁷⁵ 32 of 2007.

⁷⁶ Section 2.

⁷⁷ Section 1 (3).

⁷⁸ Sections 15–17.

⁷⁹ 38 of 2005.

or engagement without her consent.⁸⁰ Female genital mutilation is specifically prohibited⁸¹—so too is virginity testing for girls under the age of 16 years.⁸² Strangely, virginity testing is allowed for children older than 16 years under certain circumstances.⁸³ It is submitted that this is rather problematic as it clearly ignores the rights to privacy, human dignity, and bodily and psychological integrity. It therefore perpetuates the violation of sexual and reproductive rights of young women who are subjected to virginity testing. It is for that reason that the United Nations Committee on the Elimination of Discrimination against Women has called upon the South African government to amend the Children's Act, and to completely prohibit virginity testing for all girls—irrespective of their age.⁸⁴

Another statute that has a significant bearing on sexual and reproductive rights of women in South Africa is the Recognition of Customary Marriages Act.⁸⁵ The Act regulates customary marriages and is seen as one of the vehicles through which the reform of customary law has taken place in South Africa since 1994.⁸⁶ Of particular importance is the Act's implied recognition of polygamy under sections 2 and 3. It is also important to note that the Act makes the payment of *lobola* one of the requirements of a valid customary marriage.⁸⁷ The Act also sets the minimum age of marriage at 18 years, but allows for marriage below that age with the permission of the Minister or authorised delegate.⁸⁸ Consent of the parties is one of the requirements of a customary marriage, and if one of the prospective spouses is a minor, consent of both his or her parents or legal guardian is required.⁸⁹ These provisions of the Recognition of Customary Marriages Act are particularly significant in the context of harmful cultural practices such as *ukuthwala*, early/child marriages, payment of *lobola*, and polygamy.

Litigation—Judicial Interventions

While legislation plays an important role in protecting sexual and reproductive rights of women in South Africa, litigation remains as one of the most important tools for challenging the cultural practices that violate those rights. The types of cases that have come before the South African courts dealing with these violations fall into two categories: those that have directly challenged specific harmful practices, and those that do not necessarily deal with a particular practice but make important and relevant pronouncements. Falling under the latter category are cases like *Bhe v Magistrate Khayelitsha*⁹⁰ which declared the African customary rule of male primogeniture to be unconstitutional as it discriminated unfairly against women and children. “The discrimination against women conveys a message that women are not of equal worth as

⁸⁰ Section 12 (2)(b).

⁸¹ Section 12 (3).

⁸² Section 12 (4).

⁸³ Section 12 (5).

⁸⁴ United Nations, CEDAW, “Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa”, Forty-eighth Session, 17 January-4 February 2011. Available from: http://advocacyaid.com/ecdnewsflash/CEDAW_C-ZAF-CO-4_closing_comments_2011.pdf.

⁸⁵ 120 of 1998.

⁸⁶ See: Chuma Himonga, “The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law of Marriage and Succession” 2005 *Acta Juridica* 84.

⁸⁷ Section 4 (4)(a).

⁸⁸ Sections 3(1) and 3(4)(a).

⁸⁹ Section 3 (3)(a).

⁹⁰ 2005 (1) BCLR 1 (CC).

men. Where women under indigenous law are already a vulnerable group, this offends their dignity,”⁹¹ the court said.

Also relevant is the case of *Christian Lawyers Association v National Minister of Health and Others*,⁹² in which the constitutionality of sections 5(2) and 5(3) of the Choice on Termination of Pregnancy Act⁹³ were challenged. These provisions allow pregnant women under the age of 18 years to give their informed consent to terminate their pregnancies during the first 12 weeks of pregnancy—without having to consult or obtain the consent of parents, undergo counselling, or wait for a prescribed period. The court found that these provisions were constitutional. In an earlier related case, the court had also found against the same plaintiffs, who were challenging the constitutionality of the whole Act on the basis that it violated section 11 of the Constitution, which protects the right to life. As mentioned earlier, the court rejected the challenge on the grounds that section 11 does not protect the life of a foetus.

In *MEC for Education, KwaZulu-Natala v Pillay*⁹⁴ the court considered, *inter alia*, the issue of discrimination on the basis of culture. The Court held that a school rule prohibiting a school girl from practicing her culture was unconstitutional. Although this case dealt with a harmless cultural practice (wearing a nose stud), it is instrumental and informative on how culture is protected under the South African Constitution.

Not many cases have reached the South African Constitutional Court that challenge the specific harmful cultural practices discussed in this paper, although a few have come before the lower courts. The only time, for example, that the Constitutional Court has had to pronounce on the issue of polygamy was in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyana and Another*,⁹⁵ in which it was held that if a man wishes to marry more than one wife under Xitsonga custom, he must get the consent of the existing wife. This clearly implies that polygamy is not unlawful or unconstitutional under Xitsonga custom—as long as the consent of the existing wife is obtained. The case is therefore seen as an acknowledgement and endorsement of polygamous marriages, a practice which, it is argued, is inconsistent with the sexual and reproductive rights of women.

In so far as the cultural practice of *ukuthwala* is concerned, a number of cases are known to have come before the local courts—particularly in the Transkei region of the Eastern Cape Province—long before the advent of the post-1994 constitutional order. In their support of the custom, Koyana and Bekker have made reference to cases like *Mkupeni v Nomungunya*,⁹⁶ *Mkokobane v Mngqumazi*,⁹⁷ and *Sakanka v Totsholo*.⁹⁸ In particular, Koyana and Bekker find praise in a post-1994 unreported case of *Feni v Mgadlwa*⁹⁹ which gave “unqualified support for *ukuthwala* custom as a basis for the formation of a valid customary marriage.”¹⁰⁰ More recently, however, the Wynberg Magistrate’s court in the Western Cape Province found a man guilty of *ukuthwala* and sentenced him to 20 years in jail. This judgement and conviction have been hailed by government and civil society as a victory for the human rights of young women and a turning

⁹¹ Para 187.

⁹² 2005 (1) SA 509 (T).

⁹³ 92 of 1996.

⁹⁴ 2008 (1) SA 474 (CC).

⁹⁵ [2013] ZACC 14.

⁹⁶ 1936 NAC (COC) 77.

⁹⁷ 1947 NA (COC) 41.

⁹⁸ 1945 NAC (C & O) 11.

⁹⁹ Transkei High Court Case No 24/2002 unreported.

¹⁰⁰ See: DS Koyana & JC Bekker, “The Indomitable Ukuthwala Custom” 2007 40(1) *De Jure* 143.

point in the fight against *ukuthwala*. According to one commentator, “...people have been hiding behind culture but we are grateful that the country is moving from this.”¹⁰¹

There are no known reported cases that have come to court challenging the traditional practice of virginity testing. The same applies to other less widespread cultural practices mentioned earlier—such as sororate and levirate marriages. In the general context of reproductive health rights the landmark case of *Minister of Health & Another v Treatment Action Campaign and Others*¹⁰² ought to be mentioned, as it is hailed as a victory for women’s reproductive health rights. The Constitutional Court held in that case that the state had violated the constitutional rights of expectant HIV-positive mothers, by not supplying them with medication that could reduce mother-to-child transmission of HIV. Also worth mentioning is the case of *Isaacs v Pandie*,¹⁰³ in which the court found that a forced sterilisation violated the rights to privacy, dignity and safety. Furthermore, in *Castell v de Greef*,¹⁰⁴ the Court outlined the elements of informed consent in a doctor-patient relationship. This is particularly significant in line with the rights to self-determination and individual autonomy—in the context of sexual and reproductive rights.

Conclusion

Despite the legislative and judicial attempts discussed above, harmful cultural practices are still prevalent in South Africa, and violation and abuse of women’s sexual and reproductive rights still abound. This is partly because many women in South Africa are unaware of their basic human rights. It is this lack of awareness—coupled with their socio-economic circumstances—that ensures women’s acceptance of the cultural and traditional practices concerned—thereby perpetuating violation of their rights. This is exacerbated by their powerlessness which is occasioned by centuries of subordination and discrimination. Thus it takes more than legislation and litigation to address this state of subjugation. There is a need for a more holistic approach that includes advocacy, human rights education, change of patriarchal mind-sets, and political will. In all these efforts, men have an important role to play. Most harmful cultural practices are perpetuated by and for men. But not all men are culprits. This suggestion is being made with extreme caution, as there are those who believe that women must not rely on men to liberate them—that they ought to do so themselves. Perhaps the safer and more workable solution is that it is everyone’s responsibility: the collective responsibility of women, men, civil society, the judiciary, and, of course—the state.

¹⁰¹ According to Desmond Lesejane, spokesperson of Sonke Gender Justice Group. See: “Sonke welcomes ukuthwala Conviction”, SAPA news, Friday 14 February 2014. Available from: <http://www.sabc.co.za/news/a/ab00e70042eca4eb9bed9f895990ad13/Sonke-welcomes-ukuthwala-conviction-20141402>.

¹⁰² 2002 (5) SA 703 (CC).

¹⁰³ [2012] ZAWCHC 47.

¹⁰⁴ 1994 (4) SA 408 (C).

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