
The HIV:AIDS problem and customary marriages among the Baganda in Uganda: A discussion of some aspects of customs, lived reality and HIV/AIDS

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Long essay submitted in partial fulfilment for the Masters Degree in Women's Law, Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe, 2003

The Baganda are the largest ethnic group in Uganda and are based in the southern part where Kampala City is located. This paper focuses on customary marriages, norms and vulnerability to HIV/AIDS infection within this group. It discusses the social and cultural determinants that can predispose married people to HIV infection through high-risk behaviour. It discusses briefly the ideological basis for customary law and adopts a social-legal perspective of legal pluralism. This paper aims to highlight some areas of customary law marriage that are risky and in need of reform due to the problem of HIV/AIDS and discusses the complexity of sexual behaviour and the vulnerability of wives. It is intended to contribute to the ongoing dialogue on the promotion of mutual and responsible behaviour in marriage and to generate debate on other aspects of behaviour that may not be covered by this brief. It is primarily based on qualitative research I conducted through in-depth interviews with married men and women and focus group discussions, for a post-graduate diploma in women's law.

Since HIV/AIDS was identified in Uganda in 1982, it has been demonstrated that women have a higher vulnerability to HIV/AIDS than men do and HIV is mainly spread heterosexually (Oleke, 1996). The higher vulnerability of women is attributed to their subordinate status in relation to men and the fact that women, especially married women, are unable to exert much control over their own sex lives, with the inevitable conclusion that they have less power than men to avoid infection in marriage (Reid and Hamblin, 1993). The powerlessness of women is due to social and cultural determinants. Women in sub-Saharan Africa cannot determine the basis upon which their conjugal experience with their husbands should take place and have to accept the risk of exposure through their husbands. HIV/AIDS prevention and mitigation strategies such as condom use do not realistically address the situation of married women and men who function under norms, rules and values generated by socialization, the dynamic social fields within which their lives are led and diverse factors which may induce risky behaviour. Some of these factors are socio-economic and cultural. Conducive social fields surrounding customary marriage create situations in which couples are at risk of infection.

Women find it difficult to control their sexuality. This social reality is affected by the fact that most husbands own property and are engaged in wage labour, whilst a significant proportion of married women depend on material support from husbands (UNDP, 1995). The socialization of women conditions them to be submissive to their husbands even without the corresponding reciprocity of love and respect from their husbands. This affects the ability of wives and husbands to live safer lives in order to deal with the risk of HIV/AIDS.

Customary marriage

Customary marriages are contracted according to the rites or customs of indigenous Ugandan African communities. The term *customary marriage* seems to be restricted to the customs of Ugandan Africans to the extent that it doesn't refer to Hindu customary marriages or religious marriages. The Customary Marriages Registration Decree¹ confines customs to those of indigenous Ugandan communities or ethnicity and the Domestic Relations Bill defines a customary marriage as a marriage celebrated according to the rites of an African community to which one or both parties belong.² The contractual terms of a customary marriage are not defined

¹ The Customary Marriages Registration Decree No. 16 of 1973.

² Section 3 of the Domestic Relations bill for an Act of Parliament.

or codified and depend on the customs and practices of the particular community, therefore often varying from community to community. This situation will not change when the Domestic Relations Bill is passed.

It is significant that certain common codes or customary norms among the various tribes have not been codified or interpreted as the customary common laws of Uganda and the persons given the mandate to apply customary law are not lawyers nor are they trained to do so. Baganda customary law systems determine and uphold certain norms regarding the subordinate status and place of women in the family. This subordination is also reflected in the whole process of marriage, in which a bride is given away to another family or clan.

The Domestic Relations Bill intends to recognize potentially polygamous marriages which are Islamic and customary marriages. Historically a person married under civil law is deemed to have adopted a European style or mode of life as opposed to an African or customary lifestyle. This lifestyle test included consumption habits and religion. Discussion of the family shows that the conception of marriage and of the family varies both in form and substance and depends on the society in question. The form or forms of marriage depend on the society's worldview of the functions of marriage. The context within which the marriage operates is also important in conceptualizing it. Marriage in the African context may provide a framework for attaining wider objectives, beyond the interests of the two parties getting married. These interests include the continuation of the lineage group, the establishment of alliances and the provision of domestic services by a wife. Individual interests were viewed within the wider interest of the community.³ This, as we have seen, includes the interests of the community in the procreation of children and the conformity of its members to social norms. The Domestic Relations Bill attempts to define the family restrictively as comprising a husband, his wife and their children, inclusive of adopted children. This proposed definition of the family is far removed from the functional African family form.

The conception and construction of customary law during colonialism and thereafter has promoted a rigid version of customary law enforceable by the state legal system that has not changed or evolved to suit new circumstances. Moreover, what was recorded as the correct version of African customary law may not have been correct or universal but rather the opinion of male court clerks and traditional leaders in collaboration with colonial officials. Interpretation of customary law shifted from the traditional adjudication and mediation processes to the state court systems. This process of construction and application of customary law removed it from its context and promoted a rigid version of customary law founded on precedence (Bentzon, 1998). The way customary law was applied further removed it from the socio-economic and cultural context in which Africans lived at the time.

In Uganda the Kalema Commission of 1965 studied laws and customs regulating marriage, divorce and the status of women with a view to reform. Its chairman, the Honourable Kalema, noted that customs evolved to suit the circumstances and conditions of life of the day. The commission was supposed to apply 'repugnancy' tests to bad customs with a view to reforming them in the context of Uganda's post-independent position as a sovereign nation. In carrying out repugnancy tests the commission followed the practice common in colonized Africa of applying

³ WLSA working paper No. 7 op cit

concepts of justice, equity and good conscience of the colonialists, or those trained as such, to customary marriages to ensure there was no conflict with written law. They found that the status of women is governed not only by legislation but also by 'social co-relation and taboos'. The observation that customary law suits different or changing social economic circumstances is important. We should note that the common law, which is the customary law of England, evolved out of the doctrine of precedence, constructive interpretation of the courts to suit changing circumstances and also the scholarship of learned authors. Customary norms are capable of evolving to deal with the problem of HIV/AIDS and of changing practices and norms 'to suit coping mechanisms of the day'. This depends on whether such practices and norms are enforced by people who understand the rationale behind them or by people who interpret them as rigid rules or codes. The Ugandan Domestic Relations Bill attempts in part to reform customary law marriages by ensuring that they shall be with the consent of the parties thereto; that the minimum age shall be eighteen and that certain uniform statutory laws apply to customary law marriages. If the bill is passed the impact of other normative orderings or patterns of high-risk sexual behaviour is unknown.

The social impact of customary norms and ideologies on sexual behaviour and thus the HIV problem can be found in a literature review of studies of cultural diversity and sexual behaviour by Olowo-Freers and Barton (1992). This compilation of data sheds some light on the significance of social norms and taboos in sexual behaviour. Some of the norms and taboos among the Baganda ethnic group, for instance, are founded on a belief in consequences controlled by an active spirit world in which disobedience is punished by sicknesses. These taboos, norms or social laws discourage or promote risky sexual behaviour. Pregnant mothers among the Baganda are required to abstain from sex; the consequences of disobedience are believed to include difficult childbirth and a mental illness called *amakiro* (form of madness) (Obbo, 1991). Such ideologies lead to social acceptance of a husband's additional marital affairs or polygamy with the excuse that he is required to abstain from sex during his wife's pregnancy. There is also a cultural taboo on sexual intercourse during the menstrual period of the wife. In qualitative interviews and focus group discussions with men in Kampala, men mentioned taboos to justify the practice of polygamy and or extra-marital affairs (Madrama, 1996). During the period of breast-feeding, parents are not supposed to have sex, as this was believed to lead to severe diarrhoea in the baby. During a period of mourning, a widow is not expected to indulge in sex. Certain forms of sex are also forbidden and used to attract different kinds of punishments or sanctions in the traditional society (Olowo-Freers and Barton, 1992). These norms have consequences on the patterns of sexual behaviour and are part of the ideology of a customary law system. The spiritual or ideological effect on behaviour fades when customary law is removed from its context as state recognized, interpreted and enforced. In Uganda, some of these philosophies were presented to the Law Reform Commission and included in final draft recommendations as grounds upon which a husband could justify before a court a right to marry an additional wife. These grounds included the sterility of a wife, permanent inability of a wife to carry out conjugal duties, the wife being an invalid and the wife having contagious or incurable ailments (Uganda Law Reform Commission, 1997). May one dare to include AIDS as a contagious and incurable disease to justify marriage to another wife?

We must note that sterility is used to justify marriage to an additional wife but this refers only to the sterility of the wife. Qualitative interviews in Kampala showed that more pressure is put on

wives to have children than on husbands and husbands are traditionally considered incapable of sterility but may be impotent. Sterility is almost invariably attributed to a wife except among those who seek conventional medical help (Madrama, 1996). In-depth interviews about sterility showed that it is always attributed to a woman and that, owing to the importance of motherhood, women sometimes try to get pregnant with other partners when they suspect the sterility of their husband. Child bearing gives esteem and worth to wives and they are sometimes called mother of a particular child. Several points emerge; barren women face ostracism and being chased away or divorced. Women are expected to produce male heirs for the husband's lineage, failing which relatives encourage a husband to get another wife and sometimes find one for him who will 'bear children'. In both scenarios the husband or wife who otherwise may have been faithful would be exposed to unprotected and often secret sexual intercourse with other partners for the sake of procreation (Madrama, 1996). In such cases, the prohibition of adultery would be a black letter law that would not deter the married couple from being what society expects of them. McFadden makes three points about female sexuality in relation to procreation. In most African societies, children born in the family belong to a man's lineage, male children are preferred to female children and women's fertility is acquired through the practice of bride wealth (McFadden, 1994). A woman who does not fulfil her expected role loses the right to remain in her husband's home where she was transferred on marriage through the customary marriage ceremony in which brides are given away in marriage to a man and acquire the husband's domicile.

Amongst the Baganda, most respondents I interviewed explained that when a couple gave birth to twins, this involved them in a ritual twin ceremony that required sex between the mother of the twins and one of her in-laws and sex between the father of the twins and one of his female in-laws. The prevalence or accuracy of these findings requires more experiential data. It is believed that if the ritual does not take place, something evil will befall the twins or the parents. However, some respondents thought that ritual sex was on the decline due to Christianity and the problem of AIDS (Madrama, 1996). This requires further research. Though in statistical terms the phenomenon of twins may be an insignificant percentage of the population, the possibility of married couples being coerced through belief and pressure from concerned relatives into having unprotected sex does exist. In terms of such a belief, the concept of adultery would not exist, thereby contradicting state-centred law.

In terms of women's control of their sexuality in marriage, customary norms weigh heavily against them asserting and controlling their own sexual life in marriage. The socialization of women by older women, especially a girl's paternal aunt, is that wives should always indulge their husbands whenever they desire sex and that failure to do so will push a husband into other women's arms (Obbo, 1991). Women do not initiate sex and so cannot normally insist on condom use in marriage as a strategy for the prevention of infection. Neither are they able to abstain for long periods, except when they are separated from their husbands. Sex is regarded as a hidden or private thing and discussion about it is taboo (Akello, 1994). When husbands migrate to town for work and come back after a long time, wives are still powerless to insist on protected sex.

In terms of state-recognized legal systems, the consequences of separation, divorce, custody, adultery, polygamy, and so on, depend on the form of marriage contracted, but the effect of social norms on any marriage system in terms of their impact on behavioural patterns cannot be over-emphasized. These extra-legal norms provide alternatives to the formal state-recognized legal system even though the influence of the Christian and Islamic religions and formal education and

written laws has decreased the significance of African social norms regarding sexuality and sex in the life of the society. The modern socio-economic system and the power of money introduced new norms coupled with new modes of production, forms of property ownership and usage, all of which have affected patterns of behaviour but prohibition of adultery remains largely a moral norm enforceable by society and the state.

Moral norms are matters of personal conduct for which individuals are responsible. The formal legal framework, on the other hand, normally applies deterrence in theory only to problem cases such as marital rape. The publication of such problem cases not only sensitizes the public to proper norms but may also deter prohibited behaviour. The law therefore represents an avenue of empowerment for women to negotiate a more equitable and equal relationship with their husbands for their mutual benefit in the fight against HIV/AIDS.

Early age of marriage

The early age of marriage has been the focus of campaigns to deal with the vulnerability of women due to customs promoting or allowing girls to get married before the age of majority. It is also a factor to be taken into account in promoting the equality of husbands and wives and gender equity in marriage. Under the customary marriage registration Decree 1973, a girl may get married at the age of sixteen while a man may get married at the age of eighteen. Yet by 1973 this statutory minimum was meant to deal with an earlier problem of girls getting 'married off' before the age of 16. The early age of marriage remains an issue in Uganda in view of the HIV/AIDS problem because among other things younger women in Uganda statistically have the highest rate of infection (Oleke, 1996). Moreover the early age of marriage has an adverse impact on the reproductive health of girl wives (Uganda National Family Planning Association, 1995). Under the Registration of Customary Marriages Decree, the consent of a parent or guardian is necessary before marriage. The prescribed age of 16 is, however, in conflict with section 123 of the Penal Code Act⁴ which provides that any man who has sex with a girl under the age of 18 years commits the offence of defilement and is liable to suffer death. In defilement cases, the girl's consent to sex is immaterial because of the legal presumption that such a girl has no capacity to consent to sex. Because marriage is consummated by sex, it follows that a girl cannot consent to customary marriage before the age of 18. Article 31 of the Constitution of the Republic of Uganda (1995) confers the right to marry to men and women of and above the age of 18 years. CEDAW further prohibits child marriages which shall be of 'no legal effect'.⁵ The 1995 constitution and the Children's Statute 1996 define a child as anybody under the age of 18 years.⁶ The constitution further provides that both parties intending to marry must give their free consent. The crux of this provision is that marriage shall be with the consent of the parties intending to marry. The right to marry is a constitutional right and consent may not be unreasonably withheld from a person who has attained the age of majority. The criminal law and the constitution have, therefore, implicitly outlawed customary marriage for girls below the age of 18.

⁴ Chapter 106 Laws of Uganda.

⁵ Article 16 (2) of CEDAW

⁶ Article 257 of the Constitution of the Republic of Uganda 1995

Under custom, a girl's capacity to marry is determined not by her age but by her apparent physical development; consequently young girls end up in risky unions with older men. Moreover the commercial or material worth of a young girl in terms of bride wealth makes it probable that she will be given away for materialistic reasons rather than for her own good, although among the Baganda bride wealth is meant as a token marriage gift to the parents of the bride. The Domestic Relations Bill provides that, in line with constitutional provisions, only men and women of or above the age of 18 years have the capacity to marry. Section 13 of the Bill further provides that men and women below the age of 18 have no capacity to marry. If properly enforced such a law will provide more time for the education of children and will enhance their physical, mental and psychological development, thus helping them make more informed marriage choices. The constitution now provides that all persons have a right to education⁷ and children are entitled to basic education, which is the responsibility of both the state and parents.⁸ Early age of marriage is among the factors identified as a socio-cultural determinant of the higher vulnerability of women to HIV/AIDS infection.

Bridewealth

Bride wealth confers a subordinate status on women and leaves them vulnerable to a legal system that does not recognize their status as wives when bride wealth has not been paid. The Constitution of the Republic of Uganda (1995)⁹ provides for equality in marriage, during marriage and at its dissolution. It has shifted the essential element of any marriage to an agreement between a consenting man and woman intending to marry and payment of bride wealth can no longer be the basis to determine the validity of a marriage. This is because the right to marry and found a family is a fundamental right and is based on the agreement of the intending parties. The exchange of bride wealth, however, helps partly explain the blatant regard of wives as chattels or property of their husbands or male brother's -in- law or relatives. In theory, bride wealth is regarded as the main social means by which a bride's productive and reproductive capacities are transferred from the bride's family to the groom's family (McFadden, 1994). Children for whom bride wealth has not been paid acquire the lineage of their maternal uncles. On the other hand a woman for whom bride wealth has been fully paid gives birth to children for the lineage of her husband. McFadden critiques the whole patriarchal system of culture as giving rise to conventions that treat women as the property of men, fathers as natural guardians of children and include cultural norms which advise women to bear pain for the sake of unity of the family in the face of oppression such as domestic violence, incest, and so on. Though bride wealth is not a strong factor among the Baganda, social norms that require women to submit to their husbands, widow inheritance and the conditioning of Baganda girls to unquestioningly serve their husbands strongly inculcates this cultural norm (Akello, 1994). Among the Baganda, bride wealth is a token and essentially marriage gifts. Under section 18 of the Domestic Relations Bill, marriage gifts shall not be an essential requirement for the validity of marriage; moreover it will be an offence to demand the return of marriage gifts. Marriage gifts include bride wealth. The Domestic Relations Bill further bans marriage of a widow through custom or practice without the widow's consent. In cases where she consents the marriage has to be celebrated in any of the

⁷ Article 30 Ibid

⁸ Article 34 (2) Ibid

⁹ Article 31(1) thereof

modes in the Domestic Relations Bill. These salutary provisions are yet to be debated and enacted by parliament.

Polygyny

Customary marriages are potentially polygynous. Polygyny has an adverse effect on the subordinate status of women and must be examined in the light of constitutional guarantees of equal rights and its intersection with the problem of HIV/AIDS. It would be correct to assert that if one partner in a polygynous union were infected, the male partner would distribute the disease to all the partners he sleeps with in the marriage. Men have argued that the practice of polygyny is necessary because there are more females than males and secondly, that it is a way of keeping a husband in the marriage as far as conjugal matters are concerned (Madrama, 1996). The practice of polygyny is possible because culturally it is acceptable for a man to have more than one wife. Economic factors also play a significant part in limiting the number of wives a husband marries or vice versa. The context within which polygyny is practised is mainly the social-cultural and religious acceptability of the practice. The practice of polygyny is possible because a man is expected to be a master, guardian and provider for his wives. The reasons for the practice of polygyny include the need to have children or children of a particular sex if not forthcoming from one wife, children as assets for labour, security in old age and prestige for the father in terms of his virility (Akello, 1994). Having more children was a way of 'spreading the risks' for survival and ensuring that some of the children would be genetically sound and socially successful. Due to economic dependence and cultural norms men can get away with polygyny despite the resistance of wives. Some women I interviewed in Kampala found the practice acceptable, especially where the different wives resided in separate homesteads; this was however a qualitative research and the women were housewives who relied on the husband's income. This acceptability reflects women's powerlessness to influence its censure. Some wives have to put the issue of being second wives in perspective and inevitably the question of social and economic security in marriage is central in joining such a union (Madrama, 1996). The socio-economic and cultural framework is that women access resources through husbands (Akello, 1994).

It has been said that men marry additional wives after amassing a certain level of wealth to demonstrate their virility. Second wives are also married so that there is always a wife available during periods of taboo when sex is not allowed (Olowo-Freers and Barton, 1992). As we have noted above, pregnancy of the wife and dissatisfaction with the relationship on the part of the husband are some of the factors or excuses for polygamy. The amassing of wealth is gender biased as a woman who has acquired wealth is not allowed to practice polyandry, neither is a wife who is dissatisfied with her husband formally allowed to marry another husband. Suffice it to observe that it is a more risk-prone marital relationship than monogamy and it enables risky behaviour. Polygyny demonstrates the unequal status of men and women and gender inequity. Polygyny is a risky social or cultural practice as far as vulnerability to HIV infection is concerned. It puts couples at risk of infection in that a woman may seek social and economic support from other men if it is not forthcoming from her husband in cases of economic hardship. There is however no evidence that suggests that it leads to a higher rate of infection than monogamy. Polygyny is only feasible in the context of the HIV/AIDS pandemic if all the partners in the marriage are faithful. It does, however, complicate HIV control strategies. In getting the serum-status of any spouse, should the other spouses give free and informed consent? In case one

partner tests HIV serum positive, should this information be relayed to the other partners in the marriage? Even when looking at stigmatization where any of the parties in a polygynous union is known to be HIV positive, the other parties are equally affected by the social impact of the HIV/AIDS infection. This is because all of them in effect are one because they share something central through the husband.

The international norm of equal rights and gender equity in marriage as one of the strategies to create responsible behaviour in fighting AIDS¹⁰ and the Ugandan constitutional provisions of equal rights in marriage¹¹ all indicate that polygamy should be outlawed. Polygyny confers upon a man a greater right than a woman because within marriage a man has a right to marry another wife while a wife does not. There is a further need for equality at the stage of contracting a marriage; a man may already be married while a woman has to be single at the time. Moreover, polygyny confers upon the wives unequal power relations and status compared with their husband. The wives have to compete for the husband's scarce resources and attention and a husband owes a duty of support to more than one wife while all wives owe chastity, loyalty and maintenance obligations to only one man (Matovu, 1995).

The equal rights provision in the constitution quoted above provides for equal treatment of men and women and the right of women to equal opportunities with men in political, economic and social activities.¹² The Domestic Relations Bill provides for equal obligations, monetary and non-monetary, between spouses. This would be difficult to play out in a polygynous union since polygyny is part of a legal framework, cultural norm and ideological outlook, which defines women as dependants of men. The Domestic Relations Bill, however, also includes restrictive conditions on the marriage of subsequent wives in Islamic and customary law marriages; the consent of the existing wife or wives has to be obtained in a court hearing and the husband has to prove his ability to maintain an additional family and treat his wives equally.

Socio-economic circumstances are such that men who earn small wages leave their wives in the rural areas to mind the farm. Men who move to urban centres for work end up seeking other women, thereby promoting a risky sexual culture, whilst the circumstances and environment of the wives who are left in the rural home may be comparably risk-prone.

Glaring socio-economic factors

It has been asserted that women are sometimes justified in having sex with a man other than a husband who provides money or material needs (Akello, 1994). Having multiple sexual partners has been identified as a common practice for married men (Reid and Hamblin, 1993). This phenomenon is bolstered by rural-urban migration when men go to earn wages or money and leave wives in the rural areas. In fewer cases research has shown that women sometimes have extra-marital affairs. The main reasons are economic dependence and hardship, revenge on husbands for their extra-marital relations, polygyny, age differentials between spouses and geographical separation. Extra-marital affairs were more prevalent among younger women in their twenties than older women above forty. This was linked to their sexual and economic needs.

¹⁰ UN DOC A/CONF.171/13, 18 OCTOBER 1994

¹¹ Article 31 (1)

¹² Article 33 (4)

Geographical separation, working conditions of women and the type of marriage influence these phenomena (Nabyonga, 1994). A specific study on the effects of polygamy showed that more women in polygynous unions were involved in extra-marital relations than those in monogamous unions. The practice was higher among younger wives below 40 years and 92.5 per cent of the women who indulged in extra marital affairs did it for economic reasons. The need for sexual satisfaction also accounted for 75 per cent of this category (Matovu, 1995).

The law and customary norms prohibit adultery or infidelity but this does not seem to directly affect sexual behaviour. This is because of the other factors that account for high-risk behaviour in spouses and other normative orderings outside of state-recognized law that impinge on the sexual behaviour of married couples. The law is part of the framework that influences marriage and sexual behaviour in customary unions and the extent and effectiveness of law is a factor to be taken into account in dealing with the HIV/AIDS problem in marriage. As part of social response, a supportive legal environment should provide a framework for goals and strategies of prevention and mitigation of the problems caused by HIV/AIDS.

Law is the foundation of social and state recognition of the family and enforcement of the rights and obligations therein. The family is the fundamental basic unit of society that enjoys protection by the state and society. This is expressly stated in numerous international conventions and declarations. The Universal Declaration of Human Rights (1948)¹³ declares that the family is the natural and fundamental unit of society and it is entitled to protection by society and the state. Men and women of marriageable age have the right to marry and found a family.¹⁴ This indicates a strong presumption that the family essentially flows from marriage. This international norm is repeated by the International Covenant on Civil and Political Rights (1976),¹⁵ the International Covenant on Economic, Social and Cultural Rights¹⁶ and the African Charter on Human and Peoples Rights¹⁷ specifically includes the protection of the family's physical and moral health.

Marriage laws in terms of their response to the HIV/AIDS problem must first be measured against the United Nations standard on the protection of the family and marriage in light of the HIV/AIDS problem, which standard gives the overarching framework for appropriate response to the problem in marriage. This standard is stated in the Programme of Action of the United Nations International Conference on Population and Development, chapter IV on reproductive rights and reproductive health.¹⁸ It provides, among other things, that programmes must reach men at their workplaces and recognizes that human sexuality and gender relations are closely interrelated and affect the ability of men and women to achieve and maintain sexual health and manage their reproductive lives. The action programme states that equality between men and women in matters of sexual relations and reproduction and full respect for physical integrity, require mutual respect and responsibility for sexual behaviour and equity in gender relations for a

¹³ Article 16 (3) of the Universal declaration of Human rights 1948

¹⁴ Article 16 (1) Ibid

¹⁵ Article 23 of the International Covenant of Civil and Political rights 1976

¹⁶ Article 10 (1)

¹⁷ Article 18 thereof.

¹⁸ UN DOC A/CONF.171/13, 18 OCTOBER 1994

proper response to the AIDS problem.¹⁹ The United Nations programme includes domestic violence and rape as high-risk behaviour²⁰ and recognizes the need to include men and women in efforts to combat the disease. These international norms challenge several norms in customary marriages.

Treating the problem of HIV/AIDS in marriage as primarily caused by husbands is unrealistic since infection involves both partners. A husband can only infect his wife when he has also been infected. Since the family is to be protected as a unit, husbands and wives must receive due attention in addressing the problem. A South African regional conference has noted that the treatment of the problem as male-driven marginalizes men in policy and responses to the problem (Sayagues, 2003). The conference discussed the need for a deeply spiritual transformation in the identity of men. Two decades of the HIV/AIDS problem and studies emphasized interventions that centred on women and girls. The social constructions of men in their interaction with women and girls as partners, husbands, fathers, teachers, and so on, is necessary for a more holistic approach. There is need to integrate culture and human rights and address different kinds of men and also re-negotiate gender power relations within the paradigm of equality (Sayagues, 2003). Having a dialogue with customary norms and practices is one of the ways of renegotiating gender and power relations for the safety of the family.

Cultural and religious norms are that sex is an activity that should take place only in marriage. Ideally husbands and wives are safer from infection from HIV because of norms of faithfulness. These norms are enforced by laws on adultery and restitution orders for resumption of conjugal rights in case one spouse withdraws from the company of another. The prevalent social norm is that women are expected to be faithful to their husbands and that marriage is a safer relationship for fulfilment of sexual needs.²¹ Socially and culturally determined gender roles bestow control in sexual matters upon men and ordinarily within the social-cultural context it is usually men who control or determine safer-sex methods such as condom use in marriage (Obbo, 1991). Culturally it is men who initiate sex and not women. Married women do not control when and how to have sex (Matovu, 1995). The lived reality of women and men is strongly influenced by social, cultural and economic factors. These factors are the subordinate status of women, rural-urban migration and mobility of men, patriarchal social relations where men dominate in most spheres of life, the fact that men are the majority wage earners in most families (UNDP, 1995), social norms and expectations that are permissive of men indulging in risky behaviour and requiring women to always submit to their husband's creature needs (Akello, 1994; Obbo, 1991). Women do not expect male fidelity and blame themselves for failure to satisfy his needs if a man seeks extra-marital affairs. This means that women cannot deny their husbands sexual intercourse however risky it may be after periods of separation. Some beliefs involve spouses' extra-marital sex. An example is the twin birth ritual ceremonies (Akello, 1994; Obbo, 1991). Pressure from peers and relatives due to childlessness or sterility gives rise to risky extra-marital intercourse for women or additional partners for men (Madrama, 1996). Moreover women cannot discuss condom use due to the social and personal imperatives for wives to have children (Reid and Hamblin, 1993).

¹⁹ Section 7.34 Ibid

²⁰ section 7.35 Ibid

²¹ Interviews I conducted in Kampala for a research Dissertation on the powerlessness of Married women and their subordinate status in 1996,

An understanding of the effectiveness of law, specifically customary law, depends on our conception of whether law is state centred and recognized or indeed as the tiered and interactive legal system that is operational and exists both within and without the state recognized system (Bentzon *et.al.*, 1998) This perspective is used to reveal issues and the dynamics or reality of women's lives that are concealed when the state-recognized customary law version is used to discuss this topic. State-recognized customary law has to apply within the limitations of legislation with which it must conform and not conflict, and application of repugnancy tests based on doctrines of equity, natural justice and good conscience.²²

Conclusion

A lot can be said about the enforceability of criminal laws and civil laws of marriage, adultery, marital rape, domestic violence, the husband's right to a wife's body, rural-urban migration, economic precariousness, the socialization of women as dependants, and so on. At the end of the discussions, however, the control of sexual behaviour requires change in attitudes, change in belief and concepts of personal responsibility for one's own acts. Gender equality and equity are essentially principles that call for a wide range of changes in culture and socio-economic status. These include the socialization and orientation of youth, equity in rights of inheritance, education, access to property to address economic precariousness, educational and sensitization strategies, a working environment for couples to live in the same home, and so on. The pressures that people under customary law face such as widow inheritance, twin ritual ceremonies, sterility and taboos on sexual behaviour require dialogue as to how to deal with the HIV/AIDS problem in marriage. The law has its limitations in dealing with social dynamics and must be expanded to include those other philosophies and ideologies which inform individual choices for a more holistic approach. As with other discussions on women's rights, dealing with the AIDS problem requires more education, changes in many spheres of life and a re-evaluation of social norms. Lastly, individual sexual behaviour is largely a moral matter.

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²² The Judicature State of Uganda 1996 section 16 thereof.

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