UNIVERSITY OF KWAZULU-NATAL
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BATTERED, DEJECTED, EJECTED AND REJECTED: THE RIGHTS OF HIV POSITIVE WOMEN TO BE PROTECTED FROM VIOLENCE IN ESWATINI.

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DEDICATION

In loving memory of Khetha Kethuk'thula Nothemba Mathenjwa and Sizakele Nhlabatsi

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It wasn't easy, but it was worth it. To God be all the glory. I would have given up if it wasn't for the Lord, who was by my side, who made it possible for me to finish what I started. I never knew that I was stubborn until circumstances, hardships and inadequate finances threatened to force me to pull out of the PhD programme. I stubbornly hung on to it, and I am so glad I did.

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- To Professor Ann Strode, my heartfelt gratitude to you for choosing to supervise this work and to guide me through it all. I will forever be grateful for your mentorship.
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Aluta continua

ABSTRACT

Eswatini has, as of 2018, the highest prevalence of HIV and AIDS in the world. The prevalence has continued to rise, climbing from 21 per cent of the population in 2016 to over 27 per cent in 2018. Violence against women (VAW) is also on the increase, attributed to the prevalence of gender inequality in the country. Research has shown a viable link between HIV and VAW. This is because women are most often powerless and have no voice, agency or control over their lives and bodies. Due to gender inequality, women may be unable to negotiate condom use with their husbands or partners. Women's refusal of males' sexual advances often leads to their violation, underscoring the link between VAW and HIV and AIDS. However, in Eswatini, the implications of this link have not been adequately investigated; hence, the need to investigate women's experiences of VAW to find out how well the legal and policy frameworks of Eswatini respond to VAW.

The study answers the following essential questions: What are the experiences of women living with HIV (WLH) regarding violence? Is the Eswatini legal and policy framework cognisant of the nexus between VAW and HIV? How does the legal framework protect HIV positive women from VAW and its consequences in light of international law?

This study found that violence against HIV positive women was multifaceted and involved a wide range of perpetrators. As such, WLH experienced many forms of violence, including stigma and discrimination. Perpetrators of violence against WLH originated from the home front – (private sphere) and then were found in the public sphere. Intimate partners, and family members, as well as community members and healthcare workers, were implicated in violating WLH in one way or another. The findings of this study confirmed that violence and HIV were inextricably interconnected at many levels and that legal remedies were inadequate, to the extent that women did not generally rely on them. Some of the inadequacies included the fact that the laws on marital and cohabiting relationships offered little protection in conflict with the provision in the Constitution provides that 'women have the right to equal treatment with men'.

This study argues that Eswatini's social context provides fertile ground for HIV and VAW and their interaction to thrive. It further contends that violence against WLH is a public health concern requiring a public health response. It concludes that violence against WLH is indeed a human rights violation, which requires a human rights response.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immunodeficiency Syndrome
ART	Antiretroviral Treatment
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Violence against Women
CSO	Central Statistics Office
FSWs	Female Sex Workers
GBV	Gender-Based Violence
HIV	Human Immunodeficiency Virus
IPV	Intimate Partner Violence
KI	Key Informant
MDGs	Millennium Development Goals
NGO	Non-Governmental Organisation
NSSV	National Surveillance System of Violence
UNOHCHRs	Office of the United Nations High Commissioner for Human Rights
PLH	People Living with HIV
PMCTC	Prevention of Mother-to-Child Transmission of HIV
SADC	Southern Africa Development Community
SDGs	Sustainable Development Goals
STIs	Sexually Transmitted Infections
SWANNEPHA	Swaziland National Network of People Living with HIV/AIDS
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNICEF	United Nations Children Fund
UNIFEM	United Nations Development Fund for Women
USAID	U.S. Agency for International Development
VAW	Violence against Women
WHO	World Health Organisation
WLH	Women Living with HIV
WLSA	Women and Law in Southern Africa

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CHAPTER ONE
INTRODUCTION

1. Background

According to the World Health Organisation (WHO), 30 to 60 per cent of women experience gender-based violence (GBV) worldwide which leads to them suffering physical, mental, and sexual health challenges.[1] Nevertheless, it is only in the last three to four decades that violence against women (VAW) have been recognised as an issue worthy of international attention or concern.[2] This is reflected in the adoption in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[3] The convention classifies VAW as discrimination against women. Before this, many victims of GBV suffered in silence as there was barely any public recognition of their plight as domestic violence was viewed largely as a private issue.[4] The adoption of CEDAW by the United Nations (UN), asserted VAW and its threat to women's well-being and health by recognising it as an international human rights issue.[5]

CEDAW's adoption was part of a broader movement in response to the failure of general human rights instruments to protect vulnerable categories of people. This response has led to the development of human rights instruments specific to vulnerable groups. Women are one such group, and at international, regional and sub-regional levels, there are instruments designed to protect women against violence, e.g., the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003.[6]

Now, it is accepted that acts of GBV against any person violate a variety of basic human rights protected by international laws, in particular, 'the right to life, liberty, autonomy and

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[1] N Sugg 'Intimate partner violence prevalence, health consequences and intervention' (2015) 99 *Med Clin N AM* 633. See also, Ellsberg, et al, 'WHO Multi-country study on Women's Health Domestic Violence against Women Study Team: Intimate partner violence and women's physical and mental health in the WHO multi-country study on women's health and domestic violence: an observational study' (2008) 371 *Lancet* 1165.

[2] USAID Bureau for Global Health: *Gender-Based Violence and Reproductive Health & HIV/AIDS* October (2011) 4.

[3] UN Convention on the Elimination of All Discrimination Against Women of 1979.

[4] Suaad Elabani *Attitudes to and Perceptions of Domestic Violence against Women in an Arab Community: A Case Study of Libyan Migrants in the UK* (unpublished PhD thesis Manchester Metropolitan University 2015) 59.

[5] Ibid.

[6] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003.

security; the right to be free from torture and cruel, inhuman, and degrading treatment; the right to equality and non-discrimination; and the right to the highest attainable standard of health'.[7]

The adoption of these instruments has also helped strengthen remedies for GBV by moving them from being the sole preserve of criminal law to attract both civil and criminal redress, as many states have promulgated specific laws to address domestic violence.[8] These laws are made up of mostly criminal laws which incorporate provisions for civil injunctions and protection orders.[9] For example, the stated purpose of the domestic violence legislation in South Africa[10] which neighbours Eswatini,[11] is to provide 'a speedy, inexpensive, easily accessible and effective remedy for persons who find themselves threatened by violence within their family circle'.[12]

It must be noted that GBV for the purposes of this study, is taken to mean acts and conduct perpetrated against women, men, girls and boys (even though it is more pronounced in the case of women, and its consequences often more profound for women) based on their sex or gender which causes or could cause them to suffer 'physical, sexual, psychological, emotional or economic harm', including threats to deprive people of basic freedoms in the private or public sphere of life in peacetime or in time conflict or war.[13] GBV disproportionately affects women; however, in this study, the phrase VAW is preferred over the GBV and is adopted for use. This is because the phrase VAW accurately focuses on the range of harmful practices and behaviours directed against girls and women just because they are female.

Gender refers to the societal roles, behaviours, activities, stereotypes and attributes that society makes appropriate for women and men.[14] Many societies use gender differences to justify 'unequal access to and control over resources, opportunities, and services' for men over

[7] J Chiu, K Blankenship, & S Burris *Gender Based Violence, Criminal Law Enforcement and HIV Overview of the Evidence and Case Studies of Positive Practices* Working paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law 7-9 (July 2011) 9.
[8] A Basu & R Menon, *Violence against Women, HIV/AIDS Vulnerability, and the Law* (2011) 12.
[8]Ibid.
[10] *E M Rutenberg v The Magistrate, Wynberg and R Rutenberg* Unreported: Case No 912/95: Cape Provincial Division as cited Discussion paper 70 by the South African Law Commission Discussion Paper 70 *Domestic Violence* May 1997.
[11] On 19 April 2018, the King of Swaziland or Eswatini unilaterally changed the name of the country from the Kingdom of Swaziland to Kingdom of Eswatini through Legal Notice 80 of 2018. The Notice stipulates in section 3 that 'reference in any written law or international agreement or legal document to Swaziland should be read and construed as reference to Eswatini'.
[12] The South African Law Commission Discussion Paper 70 *Domestic Violence* May 1997.
[13] The Swaziland National Gender Policy of 2010.
[14] Ibid.

women.[15] This has been achieved through socialisation whereby, from an early age, boys and girls are socialised in society and families into 'specific functional and emotional stereotypes'.[16] This learned behaviour from parents and influential people in society acts as a cue for boys and girls to understand themselves as 'cowboys who do not cry or as sensitive, serving girls'.[17] It is submitted that this socialisation is responsible for and sustains the continuation of gender inequality in society, which has made it difficult for individuals, in particular women, to make and influence important decisions that affect their existence, families, communities and societies.[18] GBV has everything to do with an individual subjected to 'any form of violence' because the perpetrator wishes to 'establish, enforce or perpetuate gender stereotypes or inequalities and keep in place a particular patriarchal order'.[19]

Several factors perpetuate VAW; however, in this study, VAW is attributed to both gender norms and women's low standing and legal status in society.[20] For example, there are prevailing gender norms which permit men to control women, in which domestic violence is considered a private family matter while a 'good' woman is rigidly defined as an obedient wife or woman.[21] Further, society bequeaths to women low status, which limits their access to productive resources as many have few skills that are valued outside the home, thus making them dependent on men.[22]

VAW is regarded as a global health phenomenon of rampant magnitude, which is often seen as both a root cause and a consequence of HIV.[23] Over the past few years, more consideration and focus has been directed at violence against women living with HIV as a new and emerging issue. Gender power inequities are perceived to have had, and continue to have, a dominant and crucial role in the HIV epidemic by neutralising women's power in sexual relationships.[24] This lack of power results in practices that condone, allow and even encourage

[15] UNAIDS & WHO, *Gender-responsive HIV and AIDS programming for women and girls: Technical Guidance Note for Round 11 Global Fund HIV Proposals* 2011. See also, A Cornwell 'Whose Voices? Whose Choices? Reflections on Gender and Participatory Development' (2003) 31 *World Development* 1325-1342.
[16] UNAIDS (note 15, above).
[17] P Naudé 'Women in the workplace: en route to fairness?' in A. Bosch (ed) *South African Board for People Practices Women's Report* (2017) 4.
[18] UNAIDS (note 15, above).
[19] The Swaziland Health Sector Response to Gender Based Violence Policy, March 2010.
[20] UNAIDS Inter-Agency Task Team on Gender and HIV/AIDS, *HIV/AIDS, Gender and Conflict Situations* (2006).
[21] Ibid.
[22] Ibid.
[23]A Mbabazi *Violence against women is both cause and consequence of HIV transmission* December 2015 available at: *https://www.avert.org/news/violence-against-women-both-cause-and-consequence-hiv-transmission* accessed 28.02.20.
[24] A E Pettifor, et al *Sexual power and HIV Risk, South Africa* (2004) 10 International Conference on Women and Infectious Diseases 1996.

men to have concurrent or multiple sexual partners when, at the same time, women are encouraged to be monogamous in accordance with tradition and to refrain from questioning their partner's lack of fidelity.[25] Accordingly women find themselves in detrimental situations in which intimate partners may wrongly interpret their sexual refusal or negotiation for safer sex as evidence of infidelity, which may result in violent outcomes.[26] The focus of this study is on the rights of WLH to be protected from VAW in Eswatini. The legal and policy framework is investigated to see how well equipped it is to offer women the needed protection from VAW.

The literature reviewed in this thesis covers research pointing at the causal link between VAW and HIV infection. It looks at gender inequality, GBV and VAW as pathways which increase women's vulnerability to and infection with HIV. It delves more particularly into the experiences of VAW by WLH, which is considered to be triggered by their HIV positive status. The study investigates the experiences of WLH who are or were involved in heterosexual relations. It covers perpetration of violence against WLH by numerous actors, such as an intimate partner, family (in-laws), health service providers and community members.

This study will not cover violence perpetrated against the high-risk population known as female sex workers (FSWs). This is not to downplay the increasing evidence which shows that FSWs often experience alarming levels of sexual and physical violence at the hands of clients, intimate partners, police, and other actors.[27] The exclusion of female sex workers from the study was decided to exclude them as they are a highly vulnerable group, and the researcher was concerned that involving them could place them at risk of research-related harm. Whilst FSWs suffer violence which is associated with HIV transmission and other sexually transmitted infections (STIs),[28] the reason they are not included in this study is because their experiences are quite specific and cannot be generalised.

The study is alive to the fact that VAW, gender inequality, and homophobia or heterosexism are serious forces at work that perpetuate HIV transmission, in particular, in high-risk situations which include substance use and sex work as alluded to above.[29] However, the purpose of this research is to first document the experiences of VAW by HIV positive women in Eswatini and to critically evaluate how the legal system in Eswatini protects or fails to protect WLH from VAW.

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[25] Ibid.
[26] Pettifor (note 24, above).
[27] K L Dunkle & M R Decker, 'Gender-based violence and HIV: reviewing the links and casual pathways in the general population and high-risk groups' (2013) 69(1) *American Journal of Reproductive Immunology* 20-26.
[28] Ibid.
[29] Dunkle & Decker (note 27, above; 23).

1.1 The sociocultural context and prevalence of VAW and HIV and AIDS in Eswatini

> 'Women in conservative Swazi society have a status inferior to that of men: all their lives they are minors; on marriage they become aliens in the patriarchal homesteads of their husbands, subjected to restrictions in behaviour and language, and humiliations and jealousies associated with a polygamous society; they are excluded from active participation in the ancestral cult, and their kin live in separate and often distant homesteads.'[30]

The above statement demonstrates gender disparities observed in Swaziland in 1947. While there has been some advancement in women's socioeconomic status, their legal status has remained largely unchanged particularly in the law of persons and family law through the practice of primogeniture and marital power. Eswatini remains a patriarchal society.[31] Due to this *status quo,* males control all spheres of life, in particular in the family set up where men are heads of households and ultimate decision-makers. These attributes allow men to have dominion over female members of the family.[32] In consequence women are put in a position that is analogous to minors, and they occupy a social status akin to that a child.[33] This has implications for women's autonomy, as decisions are made for them, even to the extent that they are often excluded from public life.[34] Males and boys, as effective heads of the family unit, take decisions on behalf of the family.[35]

Before the promulgation of the 2005 Constitution,[36] the laws of the country regarded sections of women as perpetual minors under both common law and customary law, subject to the guardianship of their fathers, husbands, brothers, uncles, and even sons.[37] Married women had no right to contract or sue or be sued in their own names.[38] The common law and Eswatini law and custom combined to deny a woman full legal capacity under given circumstance recognised by each of these legal systems.[39] In relationships, males had and still have the ultimate decision-making power regarding family planning.[40] This state of affairs is sanctioned culturally, meaning that women have no say over their reproduction choices – despite it not being a legal rule. Thus, women have limited autonomy over their bodies, and they do not have

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[30] H Kuper *The Uniform of Colour: a study of white-black relationships in Swaziland* (1947) 120. See also MD Aphane & others *Charting the Maze: Women in pursuit of Justice in Swaziland (*2000) 75.
[31] Aphane & others (note 30, above, 33).
[32] Ibid.
[33] Aphane & others (note 30, above).
[34] Aphane & others (note 30, above).
[35] Aphane & others (note 30, above).
[36] The Kingdom of Swaziland Constitution Act 001 of 2005.
[37] D Aphane, 'Vula Indzawo: The evolution of women's rights in Swaziland' (2007) 1 *Open Space* 47-51
[38] Ibid. See also, *Victor Tsela* v *Zeemans Bus Service (Pty) Ltd* and *Royal Swaziland Insurance Corporation* High Court Case No 779/88 in which Lomkhosi Tsela, a woman who lost the use of her lower limbs in a bus accident, could only sue for compensation under her husband's name.
[39] Aphane & others (note 30, above; 47).
[40] The Swaziland Demographic and Health Survey (DHS) 2006- 2007 (2008) 5.

the final say about their reproductive health, including deciding on how many children to have and how to space them.[41] The healthcare system of the country acquiesces in male domination women in Eswatini to the extent that family planning programmes targeted at women are impossible to implement as long as men control the reproductive health choices of their partners.[42]

According to studies conducted by a non-governmental organisation (NGO), Women and Law in Southern Africa-Eswatini (WLSA) in 2000[43] and 2001,[44] violence against females in Eswatini frequently occurred in both rural and urban areas. The studies reflect that VAW takes many forms, including sexual abuse, physical violence, emotional or psychological abuse and economic or financial abuse.[45]

A 2007 UNICEF study found that accurate figures on VAW in Eswatini could not be determined with certainty.[46] It maintains though that:

> Approximately 1 in 3 females experienced some form of sexual violence as a child; 1 in 4 females experienced physical violence as a child; and that nearly 2 in every 4 18- to 24-year-old females had experienced some form of sexual violence.[47]

The above numbers do not differ much from the finding of the 2016 National Surveillance System of Violence (NSSV) report carried out in Eswatini,[48] which paints a bleak picture of VAW statistics in the country. The report showed that 77 per cent of females experienced VAW in Eswatini and that 71 per cent of the reported cases took place in the home sphere.[49] It also reveals that 16 per cent of husbands and partners were responsible for perpetrating sexual and physical violence.[50] These statistics are only the tip of an iceberg as they only cover cases reported to the police. The general view is that the actual numbers are much higher because there are many barriers to reporting to the police – reinforced by traditional culture which expects women to be submissive in all things, even if mistreated.

Sexual violence has a significant impact on the victim, in particular, direct physical harm and emotional trauma which leaves a lifelong emotional scar coupled with the stigma of having

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[41] Ibid.
[42] DHS (note 40, above).
[43] Aphane & others (note 30, above).
[44] Women and Law in Southern Africa (WLSA)-Swaziland *Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland* (2001) 33-107.
[45] Ibid.
[46] 'The National Study on Violence against Children and Young Women in Swaziland' (October 2007); available at *http://www.unicef.org/swaziland/sz_publications_2007violenceagainstchildren.pdf*.
[47] Ibid.
[48] The Government of Eswatini, *The National Surveillance System of Violence (NSSV)* report of 2016 Central Statistics Office CSO (2016).
[49] Ibid.
[50] Ibid.

been raped and social marginalisation. Since sexual violence involves force to subdue the victim as a non-consensual sexual act, the chances of HIV transmission are increased as the likelihood of physical injury to girls and women's reproductive tracts makes HIV transmission more likely.[51]

1.1.1 The HIV and AIDS pandemic in Eswatini

Eswatini has the highest prevalence of HIV in the world. Statistics of the 2019 final report of the Eswatini government for adults aged 15 and older indicate an HIV prevalence of 27 per cent (20.4 per cent males, 32.5 per cent females).[52] The report revealed that HIV prevalence spiralled in males aged 45-49 to reach 48.8 per cent and in females aged 35-39 to be 54.2 per cent.[53]

Overall, HIV prevalence rates are higher in Eswatini than in neighbouring countries with HIV prevalence rates of 22.9 per cent in Lesotho, 21.9 per cent in Botswana, and 19.1 per cent in South Africa.[54] HIV remains a considerable health concern as women are more affected by the pandemic in Eswatini than their male counterparts.[55] UNAIDS reported that in 2016 220 000 people were living with HIV in Eswatini in comparison to 180 000 in 2010 and 170 000 in 2005.[56] The same report revealed that there were 8 800 new HIV infections in 2016 compared to 13 000 in 2010 and 13 000 in 2005.[57] In Eswatini, 170 000 people are receiving HIV and AIDS treatment, which is equivalent to 79 per cent of those living with HIV.[58]

Heterosexual relations are perceived to be the primary way in which HIV infection spreads in Eswatini.[59] Gender power imbalances, together with sociocultural factors, are perceived to have significantly influenced how heterosexual relations are being carried out.[60] In 1999, the HIV epidemic was declared a national disaster; however, HIV has continued to cause havoc in the country unabated. Ingrained traditions and customs are identified as one of the most significant challenges that the Eswatini leaders and the international health

[51] J L Daly 'AIDS in Swaziland: The Battle from Within' (2001) 44 *African Studies Review* 21-35.
[52] Government of the Kingdom of Eswatini. *Swaziland HIV Incidence Measurement Survey 2 (SHIMS2)* 2016-2017. Final Report. Mbabane: Government of the Kingdom of Eswatini; April 2019.
[53] Ibid.
[54] A B M Kharsany and QA Karim 'HIV Infection and AIDS in Sub-Saharan Africa: Current status, challenges and opportunities' (2016) 10 *Open AIDS Journal* 34-48. Available at *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4893541/* accessed on 09.01.2018.
[55] *SHIMS*2 (note 52, above).
[56] Joint United Nations Programme on HIV/AIDS (UNAIDS), Global and regional data 2017.
[57] Ibid.
[58] UNAIDS *Data* 2017 (note 56, above).
[59] The Swaziland Health Sector Response to Gender Based Violence Guidelines March 2010.
[60] Ibid.

community will face in attempting to curtail the rampant spread of HIV and AIDS.[61] For instance, Eswatini has a polygamous tradition within its culture.[62] Males are allowed to enter into as many marriages as they can economically sustain.[63] King Mswati III, the current king reflects this tradition with fifteen official wives.

1.2 Statement of the Problem

There were 36.7 million people in 2016 estimated to be living with HIV throughout the world and of the 64 per cent of new infections in sub-Saharan Africa, almost 43 per cent (excluding men and children) were among women.[64] Women's biological makeup coupled with gender norms, structural inequalities and low social status have rendered them two to four times more likely to be infected with HIV than men, resulting in the feminisation of HIV and AIDS in Africa.[65] The susceptibility of women and girls to HIV infection is exacerbated by discrimination and violence against them.[66] Research has shown a direct link between VAW and HIV infection in other countries; however, such a study has not been done in Eswatini.[67]

Whilst Eswatini has the world's highest prevalence of HIV infection, VAW is on the increase, placing women at the centre of both pandemics. However, in the case of Eswatini, the link between HIV and VAW as it affects HIV positive women has not been adequately investigated. It is therefore important to examine how the legal and policy frameworks of Eswatini respond to the pandemics. Research studies need to be carried out to establish whether the legal and policy frameworks of the country protect WLH from VAW, identify any gaps in the law and formulate recommendations for potential law and policy reforms. Using a qualitative research approach, this study documents the accounts of the affected people to explore their experiences of VAW and identify their perceptions on how best to address it.

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[61] Daly (note 51, above).
[62] Daly (note 51, above).
[63] Daly (note 51, above).
[64] UNAIDS data 2017 (note 56, above;12-13).
[65] Pan-American Health Organization *'Gender and HIV/AIDS' Women, Health and Development Programme, Fact Sheet* (June 2007) available at *http://new.paho.org/hq/dmdocuments/gdr-hiv-gender-sexuality-and-hiv-factsheet.pdf* accessed on 28.02.20.
[66] Avert 'Women and girls, HIV and AIDS.' Available at *https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/women* accessed on 27.02.2020.
[67] WHO, *Multi-country Study on Women's Health and Domestic Violence against Women* (2006).

1.3 Definition of terms

Violence against HIV positive women – refers to any act, conduct, structure or even a process in which power is used in a manner that causes physical, sexual, psychological, financial, or legal harm to women living with HIV.[68]

Structural violence refers to when violence is built into structures (such as in healthcare, justice system), appearing as unequal power relations and, consequently, unequal opportunities.

Gender-based violence, also known as GBV, is regarded as a serious violation of human rights which involves harmful acts directed at a person based on their gender, and it is a life-threatening health and protection issue.[69] It is rooted in gender inequality and the abuse of power through harmful norms and practices. GBV has everything to do with an individual subjected to 'any form of violence' because the perpetrator wishes to 'establish, enforce or perpetuate gender stereotypes or inequalities and keep in place a particular patriarchal order'.[70]

Gender refers to the societal roles, behaviours, activities, stereotypes and attributes that society makes appropriate for women and men.[71] Many societies use gender differences to justify 'unequal access to and control over resources, opportunities, and services' for men over women.[72]This has been achieved through socialisation, whereby, from an early age, boys and girls are socialised in society and families into 'specific functional and emotional stereotypes'.[73] This learned behaviour from parents and influential people in society acts as a cue for boys and girls to understand themselves as 'cowboys who do not cry or as sensitive, serving girls'.[74] It is submitted that this socialisation is responsible for and sustains gender inequality in society, making it difficult for individuals, particularly women, to make and influence important decisions that affect their existence, families, communities and societies.[75]

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[68] F Hale and MJ Vazquez 'Violence against women living with HIV: A background paper. *Development connections, UNIFFEM and the international community of women living with HIV/AIDS* 2010.

[69] G Krantz, C Garcia-Moreno "Violence against women" (2005)59 *Journal of Epidemiology & Community Health*818-82.1

[70] The Swaziland Health Sector Response to Gender Based Violence Policy, March 2010.

[71] The Swaziland National Gender Policy of 2010.

[72] UNAIDS & WHO, Gender-responsive HIV and AIDS programming for women and girls: Technical Guidance Note for Round 11 Global Fund HIV Proposals 2011. See also, A Cornwell 'Whose Voices? Whose Choices? Reflections on Gender and Participatory Development' (2003) 31 World Development 1325-1342.

[73] UNAIDS & WHO 2011 (note 15, above).

[74] P Naudé 'Women in the workplace: en route to fairness?' in A. Bosch (ed) South African Board for People Practices Women's Report (2017) 4.

[75] UNAIDS & WHO 2011 (note 15, above).

Patriarchy -mean that in society, men are regarded as superior and women inferior, Becker argues that "patriarchy justifies inequalities and injustices, even violence, in terms of women's choices and defects."[76]

Intimate partner violence is any behaviour within an intimate relationship that causes physical, psychological, or sexual harm to those in the relationship.[77] It a common form of VAW and includes physical, sexual, economic, and emotional abuse and controlling behaviours by an intimate partner.

Controlling behaviours – refers to acts that hinder a person's right of movement and free will or choice and it includes isolating a person from family members and friends as well as restricting their movements and monitoring it; and limiting their access to financial resources, including employment, education, or medical care.[78]

Emotional (psychological) violence – refers to emotional injury or wound; according to Iwaniec, emotional violence, also known as verbal and psychological abuse in its extreme forms, communicates the idea that someone is worthless, flawed, unloved, unwanted and endangered.[79] This form of violence includes spurning, terrorising, isolation, exploitation and denying emotional responsiveness, and entails verbal and non-verbal behaviours of belittling someone, shaming and degrading them, threatening them as well as imposing severe restrictions on them.

Medical violence – refers to violence directed to HIV positive women by healthcare professionals and includes sterilisation without informed consent and stigmatisation and discrimination.

Physical violence – refers to physical injuries or wounding or inflicting pain to a person. Physical abuse can include beating, slapping, shaking, tripping, punching, choking, pushing, burning, pulling hair, pinching, kicking, physical restraints, and any other type of contact that results in physical injury to the victim.[80] Physical abuse may also include restrictive behaviours, such as denying the victim medical care (such as ART) when needed.

Sexual violence - refers to any forced sexual encounter, any attempt to engage in sexual acts forcefully, or even any unwanted sexual comments directed against a person's sexuality or

[76] M Becker, "Patriarchy and inequality: Towards a substantive feminism" (1999) *University of Chicago Legal Forum* 21-88 29.
[77] WHO 'Understanding and addressing violence against women (2012) 1.
[78] Ibid.
[79] G Leburu, and N Phetlho-Thekisho 'Reviewing gender-based violence against women and HIV/AIDS as intersecting issues' (2015) 50 *Social Work Journal* 399-420 401
[80] Seilberger (2011) as cited in Leburu & Phetlho-Thekisho (note 79, above).

using coercion on a person irrespective of their relationship to the victim.[81] This means that sexual abuse occurs in any situation in which force or threat is used to obtain participation in unwanted sexual activity—for instance, coercing a person to engage in sexual activity against their will. The sexual offence of rape refers to 'sexual coercion' or 'sexual assault' taking place in the private and public sphere perpetrated by intimate partners, family, and community members.

Women living with HIV – refers to vulnerable women living with HIV capable of being physically or emotionally wounded or hurt due to their condition or status.

1.4 Literature review

This section of the thesis discusses the relevant literature on the link between violence against women and HIV and AIDS in the Eswatini context and its legal response. Where literature is not available, other research on research studies on the topic from the African continent and beyond is critically analysed to give a clear picture of what is currently understood regarding VAW and HIV. It highlights the knowledge advanced in VAW and HIV, such as the causes of VAW, and forms of violence perpetrated against HIV positive women. It concludes by highlighting gaps in the existing literature.

1.4.1 The link between VAW and HIV and AIDS in Eswatini

a) Violence against women

Gender-based violence (GBV), in particular, VAW is a global public health problem that affects women on every continent. According to the World Health Organisation Report of 2013, one in three women globally have experienced sexual assault or intimate partner violence.[82] Also, VAW amounts to a violation of women's human rights as women's rights are human rights.[83]

VAW in Eswatini is not a new phenomenon, apart from the unavailability of official, actual statistics on the extent of the violence problem in the country. Reliance is sought from police statistics on crimes that are gender-based violence in nature and civil society organisation's reports. For example, a 2007 study by UNICEF in Eswatini on violence against children stipulated that one in three females in the country experienced some form of sexual

[81] Chatora (2013: 12) as cited in Leburu & Phetlho-Thekisho (note 79, above).
[82] C Garcia-Moreno, C Palitto, K Devries, H Stockl, C Watts, & N Abrahams, *Global and regional estimates of violence against women* (2013) World Health Organisation Report.
[83] S Qureshi 'The recognition of violence against women as a violation of human rights in the United Nations system (2013) 28 *A Research Journal of South Asian Studies* 187-198.

gender-based violence as a child perpetrated by males they knew.[84] The study further surmised that one in four females experienced physical violence and that nearly two in every four females between the ages of eighteen and twenty-four years had experienced sexual violence.[85]

Similarly, the police surveillance on violence report of 2011statistics on crimes that gender-based, paints an even darker picture.[86] It revealed that 77% of females in Swaziland had been the victims of abuse and perpetrators were male and were known to the survivors.[87]

Also, VAW is termed domestic violence because it is prevalent in the domestic sphere. Clark & Goldblatt surmises that the prevalence of domestic violence in the domestic spheres connote the control men exercise that it is supported by violence.[88] The authors believe that domestic violence causes women physical and emotional pain whilst creating employment and health costs for women.[89] Other family members and children are affected by the aftermath of spousal abuse and suffer psychological, economic, and social harm.[90]

Literature has addressed the impact of violence on women in today's society. For instance, contemporary scholars argue that VAW negatively affects an individual's ability to negotiate safer sex behaviours and acts as a deterrent to seeking help, social support and healthcare services.[91] Fears of being battered or threats from intimate partners present a barrier to women who wish to access HIV prevention options, care, and support+ and treatment services.[92] Studies continue to establish that VAW and HIV both constitute major public health issues, and there is increasing evidence of their intersection as will be discussed below.[93]

b) Causes of VAW

Causes of VAW have been a subject of research over the years. Studies show that VAW is often caused by gender inequality.[94] WHO and UNAIDS are two international organisations

[84] UNICEF, 'The National Study on Violence against Children and Young Women in Swaziland' (October 2007); available at http://www.unicef.org/swaziland/sz_publications_2007violenceagainstchildren.pdf.
[85]Ibid.
[86]The National Surveillance System on Violence Report Swaziland: Central Statistics Office CSO (2011).
[87] Ibid.
[88] B Clark & B Goldblatt *Gender and Family law* in Gender, Law and Justice (eds) E Bonthuys & C Albertyn (2007) 195-243 199
[89] Ibid.
[90] Ibid.
[91] Chiu, Blankenship & Burris (note 7, above). See also, Y Li, et al, 'Intimate partner violence and HIV infection among women: a systematic review and meta-analysis' (2014) *Journal of the international AIDS Society* 1.
[92] Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, (August 2003) 2-40.
[93] Hale and Vazquez (note 68, above).
[94] F Kasiva, 'Robbed of Choice Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya' (2012) Available at: *https://profiles.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilization-experiences-of-women-living-with-hiv-in-kenya.pdf* accessed 27.02.2020.

that have researched VAW and HIV, and they have found that cause of violence was gender inequality, and that VAW was intricately linked to it. Hence, VAW has been seen as a crucial consequence of gender inequality.[95] The study pointed out that the aim of VAW at societal and relationship level reiterated and reproduced gender inequality.[96]

In 2019 Ruark and others conducted a study on navigating intimate sexual partnerships in an era of HIV in Eswatini gender inequality made women vulnerable to IPV.[97] They found that relationship problems in the Eswatini context included partners not helping with house chores, alcohol abuse, lack of progress towards marriage, household poverty, infidelity (known or suspected), lack of sexual satisfaction, and physical or sexual violence.[98] From the Ruark study, causes of VAW in Eswatini were addressed, while causes of violence against HIV positive women were not adequately addressed; hence WLH issues are at the periphery of the study.

Other causes of VAW identified by literature to make women vulnerable to HIV include harmful cultural practices.[99] For instance, VAW is often fuelled by ancient socio-cultural norms that underpin VAW's customary acceptability and persistence in society.[100] In Cape Town, a study found that attitudes based on tradition endorsed by few influential men and women reinforced women's subordinate social status, gender roles, and rape myths in that society.[101] In essences, gender inequality is at the root of VAW.

c) VAW and HIV interlink

While VAW, in general, is common in many spheres, violence against HIV positive women, has been researched by international organisations and academics. There is a dearth of literature. However, specific to the Eswatini context addressing the interlink between violence and HIV infection. In a study by Lang and others, VAW was widespread among WLH who were seeking health services for HIV.[102] The study found that WLH in violent relationships were less likely to practice safe sex through condom use and thus were likely to become

[95] WHO & UNAIDS, 'Addressing violence against women and HIV/AIDS – what works' 2010 9.
[96] Ibid.
[97] A Ruark et al., Navigating intimate sexual partnerships in an era of HIV: dimensions of couple relationship quality and satisfaction among adults in Eswatini and linkages to HIV risk (2019) 16(1) *SAHARA J: Journal of Social Aspects of HIV/AIDS* 10-24 17.
[98] Ibid.
[99] Kasiva (note 94, above).
[100] Ibid.
[101] S C Kalichman, 'Gender attitudes, sexual violence, and HIV/AIDS risks among men and women in Cape Town' *(*2005) *Journal of Sex Research* 299-305.
[102] D L Lang & L F Salazar, 'Associations between Recent Gender-Based Violence and Pregnancy, Sexually Transmitted Infections, Condom Use Practices, and Negotiation of Sexual Practices among HIV-Positive Women' (2007) 46 *Acquired Immune Deficiency Syndrome* 216-221.

pregnant.[103] The study also found that these women experience threats and actual physical violence when requesting the use of condoms,[104] revealing that efforts by public healthcare aimed at reducing HIV risks for women had to take into account the type of relationship the women was in, and in particular whether it was abusive or not.

Literature has also shown that VAW plays a role in creating a situation where women cannot negotiate for safe, thus becoming vulnerable to HIV, STIs and unwanted pregnancies.[105] In this regards, violence or threat has been linked to women and girls' heightened vulnerability to HIV by making it hard for them to negotiate for safer-sex or decide to abstain from sex and ensure that their sexual partners remain faithful.[106]

There are other risk factors that studies have found to increase the vulnerability of women to violence. The studies have been carried out to investigate how IPV hinders women's effort to decrease HIV risks behaviours decisively.[107] The risk factors that played a role in increasing WLH's vulnerability to HIV were educational background, alcohol use, marital status, previous experiences with IPV, and employment status.[108]

UNAIDS has been instrumental in raising awareness of violence against HIV positive women as an unacceptable violation of human rights of global proportions requiring a global health response.[109] Scholars and women's rights advocates agree that VAW and HIV and AIDS co-exist and have adverse health outcomes and development consequences for the victims.[110] Basu and Menon also add their voice to the link between VAW and HIV by stating that the linkage between HIV and vulnerability to VAW exemplifies the 'HIV paradox'; they advise that the rights of those vulnerable to infection must be promoted for a public health response to be successful.[111] After all, the rights of people living with HIV (PLH) must be promoted, protected, and their lives fulfilled.

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[103] Ibid.
[104] Lang & Salazar (note 102, above).
[105] B E Bloom, J A Wagman, K Dunkle & R Fielding-Miller 'Exploring intimate partner violence among pregnant Eswatini women seeking antenatal care: How agency and food security impact violence-related outcomes' (2020) *Global Public Health* 1-11.
[106] Ibid.
[107] M Teti, M Chilton, L Lloyd & S Rubinstein, Identifying the links between violence against women and HIV/AIDS: Eco social and Human Rights frameworks offer insight into US prevention policies (2006)9 *Health and Human Rights* 40-61.
[108] Ibid.
[109] UNAIDS 'Women living with HIV speak out against violence: A collection of essays and reflections of women living with and affected by HIV' 2014; available at https://www.unaids.org/en/resources/presscentre/featurestories/2014/november/20141126_womenspeakout accessed 03.02.2020.
[110] S K Wang 'Violence and HIV/AIDS: Violence against women and girls as a cause and consequence of HIV/AIDS' (2010) 17*Duke Journal of Gender Law & Policy* 314.
[111] Basu & Menon (note 8, above 17-9.

Furthermore, the relationship between VAW and HIV is best understood as a bidirectional and equally reinforcing relationship.[112] Violence against women and girls can both be a cause of HIV infections (for example, when a woman is infected through rape) and a consequence of HIV infections (for example, a woman may be beaten for disclosing her HIV status to her partner).[113]

Susan Fox[114] opined that the link between HIV and VAW shows how forced sex might increase the risk of HIV transmission directly due to physical trauma. Inadequacies in justice systems are reported to be a disincentive for women who may want to report VAW cases such as rape and seek post-exposure prophylaxis (PEP).[115] Dunkle and Decker further buttress this point as they posit that there are different pathways to HIV infection, including gender inequality and GBV.[116] The authors posit that sexual assault causes a direct first pathway from VAW to HIV transmission through genital or anal trauma resulting from forced sex.[117]

The second pathway from VAW to HIV results when the perpetrators are HIV positive and have repeated sexual contact with the victim, thus putting them at risk.[118] The third pathway is when victims of violence respond to the violence by taking sexual risks as revealed by various studies in developing and developed countries, which show that previous exposure to VAW and controlling behaviour from an intimate partner was linked to women's subsequent high-risk sexual behaviour.[119] This includes multiple and concurrent sexual partnerships, low use of HIV prevention measures such as condoms and increased participation in transactional sex and commercial sex work.[120] This establishes the link between VAW and HIV infection in a contest in which male perpetration of VAW is reinforced by 'dominant social and cultural norms about masculinity, femininity, and sexuality'.[121]

Basu and Menon also add their voice to the link between VAW and HIV by stating that the linkage between HIV and vulnerability to VAW exemplifies the 'HIV paradox'; they advise that the rights of those vulnerable to infection must be promoted for a public health response

[112] J L Daly (note 51, above). See also, Pettifor (note 24, above).
[113] Ibid.
[114] S Fox (UNICEF) *Gender-Based Violence and HIV/AIDS in South Africa Organisational Responses* (2003) 4.
[115] Ibid.
[116] Dunkle, & Decker (note 27, above).
[117] Ibid.
[118] Dunkle & Decker (note 27, above).
[119] Dunkle & Decker (note 27, above).
[120] Dunkle & Decker (note 27, above).
[121] Dunkle & Decker (note 27, above).

to be successful.[122] After all, the rights of people living with HIV (PLH) must be promoted, protected, and their lives fulfilled.

According to studies done in Rwanda and Tanzania, the HIV risk for VAW victims is up to one third higher than their counterparts who are not exposed to violent action or conduct.[123] Therefore, reducing VAW for those at risk of HIV infection is seen as a crucial step towards a comprehensive HIV prevention strategy.[124] In a 2017 study by Onu and others, HIV positive women's efforts to follow health care provider recommendations to use condoms to reduce the risk of superinfection and transmission (sexual and vertical) increased their risk of sexual victimisation.[125] In a study done by Rochat and others, the need for interventions for disclosure was interrogated.[126]

Also, there is a need to protect the human rights of PLH, given the current context of intense stigma and discrimination linked to the disclosure of HIV status.[127] Women are often susceptible to discrimination due to their HIV status; the fact that they, in any event, occupy an unequal position in society worsens their situation once they disclose their HIV status.[128] Fox reveals that the probability of men becoming more abusive to women after learning about the woman's HIV positive status is very high, as men often blame women for their HIV infection.[129]

Furthermore, studies reveal a great need for interventions that address the root causes of VAW, and as such, interventions can reduce VAW risks and greatly assist in preventing HIV transmission.[130] Underlying stigma and discrimination may easily be utilised to justify violence against HIV positive women if interventions are not crafted to tackle stigma.[131] Discrimination arises when a person is treated in a different manner which is 'unjust, unfair or [in a] prejudicial manner, often based on their belonging or being perceived to belong to a particular group',[132] whereas, stigma refers to acts or omissions directed towards a stigmatised individual,

[122] Basu & Menon, (note 8, above).
[123] UNAIDS, The Global Coalition on Women and AIDS, *Stop Violence against Women Fight AIDS* 2 (2007).
[124] Chiu, Blankenship & Burris (note 7, above).
[125] CC Onu, SL Dworkin and others "Brief report: Sexual violence against HIV positive women in the Nyanza Region of Kenya: Is condom negotiation an instigator? *J Acquir Immune Defic Syndr* 74(2017) 52-55.
[126] TJ Rochat & Others 'The Amagugu intervention for disclosure of maternal HIV to uninfected primary school – aged children in South Africa: a randomised controlled trial' (2017) *Lancet* 1-10.
[127] Wang (note 110, above; 324).
[128] Wang (note 110, above).
[129] Fox (note 114, above; 15).
[130] Fox (note 114, above).
[131] Ibid.
[132] Swaziland National Network of People Living with HIV/AIDS (SWANNEPHA), *The assessment of the stigma index among people living with HIV and AIDS in Swaziland report* (June 2011) 14.

characterised as a process of devaluation.[133] This entails that a person is stigmatised when he or she is discredited, seen as a disgrace and devalued in the estimation of others or his/her estimation.[134] For instance, a study carried out in Nepal on HIV positive women identified terrible forms of discrimination endured by WLH at the hands of family and community members – a process persisted in by healthcare workers.[135] As a result, these behaviours deterred WLH from seeking healthcare services and treatment.[136] The study found that HIV-related stigma and discrimination must be addressed as a matter of policy in all spheres, including healthcare settings.[137]

Other authors address the issue of medical violence against WLH head-on. For instance, a 2011 South African study revealed reports of WLH being involuntarily sterilised without their knowledge.[138] Essack and Strode highlight the plight of WLH who experienced coerced or forced sterilisation in South Africa.[139] The authors conclude that the sterilisation of WLH creates a vicious cycle that profoundly prolongs their marginalisation.[140] They argue that sterilisation of WLH that is forced or coerced is gender HIV-related discrimination because there are no reports of forced or coerced sterilisation of men, suggesting either a lack of opportunity to sterilise men or that WLH disproportionately bear the stigma and discrimination burden.[141]

d) Forms of violence

Hale and Vazquez indicate that violence against WLH was any act, structure or process in which power was exercised in a way that caused physical, emotional, sexual, financial or legal harm to HIV positive women.[142] The evidence also suggests that HIV positive women are highly vulnerable to the different forms of violence, predominantly physical, sexual and emotional violence.[143] HIV positive women may also be faced with emotional, psychological, and economic abuse from their community and family members. According to Iwaniec,

[133]SWANNEPHA (note 132, above).
[134] Ibid.
[135] N Aryal, PR Regmi & N R Mudwari 'Violence against women living with HIV: a cross sectional study in Nepal' (2012) 4 *Global Journal of Health Science* 117-125.
[136] Ibid
[137] Ibid
[138] A Strode, S Mthembu, & Z Essack, '"She made up a choice for me": 22 HIV-positive women's experiences of involuntary sterilization in two South African provinces' (2012) 20 *Reproductive Health Matters* 1-9.
[139] Z Essack & A Strode ' "I feel like half a woman all the time": The impacts of coerced and forced sterilisations on HIV-positive women in South Africa, *in Agenda: Empowering women for gender equity.*' (2012) 26 24-34.
[140] Ibid.
[141] Essack & Strode (note 139, above).
[142] Hale and Vazquez (note 68, above).
[143] Aryal, Regmi & Mudwari (Note 135, above; 117).

emotional violence, also known as verbal and psychological abuse in its life-threatening form, that communicates the idea that a person is unloved, worthless, flawed, unwanted plus endangered.[144] This form of violence includes spurning, terrorising, isolation, exploitation and denying emotional responsiveness, and entails verbal and non-verbal behaviours of belittling someone, shaming and degrading them, threatening them as well as imposing severe restrictions on them.[145] Psychological violence is similar to emotional violence. Researchers believe that violence does more than physically and emotionally injure women, but it is also substantially linked with HIV infection.[146]

According to Leburu and another provide that physical violence against women, particularly intimate partner violence (IPV), is a significant public health problem and constitutes the highest-level violation of women's human rights, based on its visibility and cruelty.[147] In studies done in South Africa, it was revealed that physical violence was a significant form of violence as it was the second leading cause of femicide in the country and as such a leading cause of disability, among women.[148]

In a study by Tenkorang and others found that the level of sexual violence against WLH was surprising.[149] According to WHO, sexual violence connotes any conduct that violates, abuses, humiliates, and degrades another person's sexual integrity, usually, the victim (and in this case the integrity of the WLH).[150] For instance, in a study done in Uganda, for example, it was found that the use of ART by HIV positive women led to increased risk of IPV such as physical, sexual, or psychological violence.[151]

Women also experienced HIV infection through consensual sex which is viewed as the second pathway from VAW to HIV results when the perpetrators are HIV positive and have repeated sexual contact with the victim, thus knowingly putting them at risk.[152] For example, this may be perpetuated by the myth that sex with a virgin cures HIV.[153] However, Epstein and

[144] Iwaniec (2006) 28 as cited in Leburu & Phetlho-Thekisho (note 79, above; 401).
[145] Ibid.
[146] Basu & Menon (note 8, above). See also, Chiu, Blankenship & Burris (note 7, above).
[147] Leburu & Phetlho-Thekisho (note 79, above).
[148] Ibid.
[149] EY Tenkorang, M Asamoah-Boaheng & AY Owusu, Intimate Partner Violence (IPV) Against HIV-Positive Women in Sub-Saharan Africa: A Mixed-Method Systematic Review and Meta-Analysis (2020) *SAGEl Journal*, 1-25.
[150] World Health Organisation (WHO) Sexual violence – world report on violence & health (2002).
[151] IN Ogbonnaya, et al, Prevalence of and Risk Factors for Intimate Partner Violence in the First 6 Months Following HIV Diagnosis Among a Population-Based Sample in Rural Uganda (2020) 24 *AIDS Behav* 1252–1265.
[152] Dunkle & Decker (note 27, above).
[153] S Leclerc-Madlala, On the virgin cleansing myth: gendered bodies, AIDS and ethnomedicine, (2002)1(2) *African Journal of AIDS Research* 87-95

Jewkes have found little evidence of the rape myth; instead, a host of factors contribute and affect the tragedy of sexual violence among young women and girls, chief of which are poverty, gender inequality, substance abuse and mental health issues.[154]

Some researchers have looked into the perpetrators of violence against HIV positive women. A 2015 study done by Paudel & Baral postulated that women living with HIV and AIDS experienced being rejected, shunned and treated differently by physicians, family and close friends, hence, WLH are at a particularly high risk of living a painful, shameful life of exclusion as many have been rejected from their family, friends and partners.[155] In other studies WLH shared accounts of being rejected and blamed, insulted, sworn and shouted at, called names, and gossiped about by family and community members alike.[156]

According to Chiu, the law could play a significant role in preventing VAW and helping its victims, arguing that the adoption of a legal system that vigorously 'promote[s], respect, protect[s] and fulfil[s] human rights' is ideal in ensuring that VAW is outlawed in all its forms, with vigorous enforcement.[157]

e) Recommendations

Studies have looked into the extent that violence against HIV positive women affects their lives. The need for interventions that address the root causes of VAW cannot be overemphasised, as such interventions can reduce VAW risk and greatly assist in preventing HIV transmission.[158] Many studies have recommended that there be the availability of disaggregated statistics on the prevalence of VAW and in particular, on violence against HIV positive women. Also, the call for reform of laws, policies and programmes on VAW to provide access to justice and safety nets to VAW victims has been made over the years, but still, VAW is prevalent.

The literature discussed in this section has shown that even though there is a growing body of knowledge on the interlink between VAW and HIV, such knowledge does not cover the Eswatini's context. Also, very little has been said about medical violence against HIV

[154] H Epstein & R Jewkes, The myth of the virgin rape myth (2009)374 *The Lancet* 1419.
[155] V Paudel & KP Baral 'Women living with HIV/AIDS (WLHA), battling stigma, discrimination and denial and the role of support groups as a coping strategy: a review of the literature' (2015) *Reproductive Health* 1-9 5.
[156] J Kehler, S Mthembu, T Ngubane-Zungu, & S Mtambo 'Gender and HVI violence: perceptions and experience of violence and other rights abuses against women living with HIV in the Eastern Cape, KwaZulu Natal and Western Cape, South Africa (2012).
[157] Chiu, Blankenship & Burris (note 7, above).
[158] Fox (note 114, above).

positive women. For this reason, a study on the experiences of HIV positive women in Eswatini is necessary and was undertaken in this thesis.

1.5 Principal theories upon which the research is constructed (research design)

The study adopts a human rights-based theoretical framework premised on the theory that all people including people living with HIV and AIDS (PLHA) have the right to life, liberty, and security (are born free and equal in dignity and rights). Furthermore, there are special obligations to protect vulnerable groups such as PLHA. The theoretical framework is also based on feminist theories such as that of the liberal feminists who see the purpose of the feminist movement in terms of 'women's social, legal, and political rights.[159]

1.5.1 Feminist theories

There are different feminist theories or views on the role of gender in society. The phrase, feminism theory refers to analytical frameworks that can be used to analyse women's subordination to understand challenges regarding women's subordination in society.[160] Three critical issues come up from the feminist theory. First of all, it emphasises women's experiences within a society; secondly, it recognises that women are subordinated and oppressed under the current circumstances, and lastly, there is a need to end women's unjust subordination in society.[161] There are three main forms of feminism: the liberal, socialist, and radical forms.

The liberal school of feminism thought is an individualistic theory. It accepts the values of individualism, freedom, and equality as benefits which must be extended to women like they are available to men.[162] It focuses on women's ability to maintain their equality through their own actions and choices.[163] It is based on the belief that women and men have the same rational capacities and capabilities and is that men and women should be treated equally.[164] Equality does not suggest "sameness".[165] The theory argues that women's exclusion from the public sphere may inhibit their full capacity to develop and exercise their rationality.[166] Liberal theory

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[159] M Camarasa & D Heim, 'Theoretical and methodological framework,' Gender violence effects indicators (GVEI) 2007 4. Available at *http://www.surt.org/gvei/docs/theoretical_and_methodological_framework.pdf* accessed on 17.03.2017.

[160] M W Osmond & B Thorne, 'Feminist theories: the social construction of gender in families and society' In: Boss P Doherty & others (Ed) *Family theories & methods emerging during the 1980s* (2009) 591 -625 592.

[161] Ibid.

[162] K van Marle & E Bonthuys 'Feminist theories and concepts' in Gender, Law and Justice (Ed) E Bonthuys & C Albertyn (2007) 15-49 31.

[163]Ibid, 32. See also Leburu, and Phetlho-Thekisho, (note 79, above).

[164] Leburu, and Phetlho-Thekisho, (note 79, above).

[165] Leburu, and Phetlho-Thekisho, (note 79, above).

[166] Leburu, and Phetlho-Thekisho, (note 79, above).

is premised on the fact that society embraces false beliefs about what women's capabilities are, and thus viewed as less intellectually and physically capable than men by nature.[167] The theory advocates for equality between women and men, in areas such as caring responsibilities, in the workplaces, especially those dominated by men until recently in most countries including in Eswatini.

According to this school of thought, the proposition is to promote equal opportunities through legislation and altering the socialisation processes so that children do not grow up accepting their gender inequalities as the norm.[168] Since liberal feminists' solution has to do with non-discrimination and eradicating gender bias from the law, their focus is to advocate for legal reform, resulting in gender-neutral laws that apply equally to women and men.[169]

In contextualising this liberal theory within the Eswatini situation, it is clear that after democracy in 1968 and after the adoption of the independence Constitution of 1968 which contained a Bill of Rights with its gender-neutral laws,[170] women remained on the periphery of society.[171] The state retained laws that were oppressive to women in marriage and cultural norms as evidenced by the common law principle of marital power which was codified into law through the Marriage Act of 1964, and the practice of the cultural principle of primogeniture. [172]

Even though the liberalist theory attained voting rights, right to pursue education and labour interest for women at the time, it failed to advance women's rights in situations where men and women were different from one another, particularly where their reproduction functions were concerned. [173]

The promulgation in Eswatini of a fully pledged Constitution in 2005 with a Bill of Rights, has recognised women as a vulnerable group, thus setting affirmative action provisions for them. It is yet to be seen whether affirmative provisions will be operationalised in full by the government in the future as the Constitution's adoption did not result in actual equality between women and men.[174] This is evidenced by the cases women continue to lodge in the High Court challenging laws that bar women from equality in the ownership of property and

[167] Ibid.
[168] Leburu, and Phetlho-Thekisho, (note 79, above).
[169] van Marle & Bonthuys (note 62, above; 32).
[170] Eswatini gained her independence from Great Britain in 1968.
[171] Kuper (note 30, above; 120).
[172] SD Mavundla, A Strode & DC Dlamini, Marital power finally obliterated: The history of the abolition of marital power in civil marriages in Eswatini (2020)23 *PER/PELJ* 1-19, 4-5.
[173] van Marle & Bonthuys (note 162, above; 31).
[174] Section 20 of the Constitution is the equality clause and discrimination in terms of gender is prohibited.

administering those properties,[175] challenging the right of married women to sue and to be sued unassisted by their husbands,[176] and challenging the marital power of the husband to rule over the person of the wife and her affairs.[177] These cases are discussed in detail in chapter three.

Whilst the liberal theory has been instrumental in getting countries to adopt laws that call for equality between men and women, for the women in Eswatini, the adoption of equality laws, and ratification of international instruments on the same did not translate to their total legal emancipation.[178] Women in Eswatini continue to fight for equality, in order to rid themselves of laws and practices that trump the equality provisions in Constitution and treaties, even though the Constitution has a supremacy clause.[179]

Socialist feminism, on the other hand, is associated with Marxist feminism as the theory posits that the subordination of women in societies is the outcome of the class system which is supported by the notion of private property.[180] It is a feminist theory that focuses on women's interactions with society in both the public and private spheres.[181] The socialist feminist is cognizant that capitalism thrives because it relies on women to offer free labour in homes front by caring and cleaning.[182] It argues that material and economic factors trigger women's subservientness to men in capitalist systems because patriarchy is rooted in private property ownership.[183] Therefore, feminists in this school of thought observe that women's liberation can only be realised by ensuring that both the economic and cultural sources of women's oppression (patriarchy) must cease to operate.[184] These feminists advance a two-pronged approach that seeks to broaden the Marxist's argument for the need of capitalism's fall.[185] This theory focuses on structural reform within the economy and society rather than the liberal approach of using law reform to obtain equality, as postulated in Jaggar & Rothenberg that

[175] *The Attorney General v Mary Joyce Doo Aphane*, [unreported] Civil Appeal case 12/2010.
[176] *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* [unreported] (470/2013A) [2013] SZHC 144 (18 July 2013) and Nombuyiselo Sihlongonyane vs Mhloli Joseph Sihlongonyane & Another [unreported] (470/2013) [SZHC207] (19th September 2013).
[177] Mavundla, Strode & Dlamini, (note 172 above). See also, *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law - Eswatini v Jukhi Justice Sacolo* [unreported] (1403/16) 2019 SZHC 166 (30 August 2019).
[178] Aphane & others (note 30, above; 30).
[179] Women and Law – Swaziland *Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland* (2001) 73.
[180] van Marle & Bonthuys (note 162, above; 33).
[181] Leburu, and Phetlho-Thekisho, (note 79, above).
[182] Leburu, & Phetlho-Thekisho, (note 79, above, 411).
[183] Ibid, 410.
[184] Ibid.
[185] Leburu, & Phetlho-Thekisho, (note 79, above, 410).

"common to socialist feminists is the understanding that gender oppression and class oppression both need to be addressed in order to alleviate the plight of women".[186]

In Eswatini, the socialist theory has been instrumental in ensuring that labour laws promote women's rights in the workplace. There is a need, however, for research to investigate whether women in the workplace are not discriminated against when it comes to remuneration and decision making. Cases of sexual harassment in the work environment are rampant as reported in the local newspapers, which shows that women are not spared in the workplace.[187] For instance, a 2018 study found that 19.6 per cent of females experienced sexual harassment in the workplace compared to 13.8 per cent males and that perpetrators were mostly members of the opposite sex.[188] It found that most of the victims of sexual harassment in the workplace did not report or lay a formal complainant, even though they knew their rights.[189]

It could be argued that the socialist theory of feminism is the most appropriate for Eswatini as, despite law reform, there has been a limited change at the level of patriarchal cultural norms. Structural changes to society and the economy are needed to enable women to compete equally.

Lastly, radical feminism "perceives women's subordination through the lenses of sex or gender and sexuality"[190] and thus is focused on patriarchy as one aspect of culture that needs to be reformed or eradicated.[191] It is a theory that calls for a radical reordering of society at the behest of women, thus ensuring that male supremacy is eliminated in all social and economic contexts.[192] The radical theory successfully highlights how patriarchy in society produced through socialisation beginning in the family structure, transcending to other spheres of society such as religious, educational, economic, and political structures leads to gender inequality.[193] Radical feminists endeavour to obliterate patriarchy in society through questioning and challenging societal norms and institutional systems that aid patriarchy.[194]

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[186] A M Jaggar & P S Rothenberg *Theories of women's subordination* in Feminist frameworks: Alternative theoretical accounts of the relations between women and men 3Ed (eds) A M Jaggar & P S Rothenberg (1993) 113-126 122.
[187] Sibongile Sukati & Mbongiseni Ndzimandze, 'Asians sex scandal: Whistle blower portrayed as culprit' *Times of Swaziland* 8 April 2019 available: http://www.times.co.sz/news/123130-asians-sex-scandal-whistleblower-portrayed-as-culprit.html accessed 18.01.2021.
[188] Swaziland Business Coalition on Health and HIV/AIDS (SWABCHA) *Sexual harassment in the workplace in Swaziland: a focus on the private sector & non-governmental organisation – baseline report* (2018) 20.
[189] Ibid, 22.
[190] Jaggar & Rothenberg (note 186, above). See also van Marle & Bonthuys (note 162, above; 34).
[191] Leburu, & Phetlho-Thekisho, (note 79, above, 410).
[192] Leburu, & Phetlho-Thekisho, (note 79, above).
[193] Leburu, & Phetlho-Thekisho, (note 79, above, 410).
[194] Ibid.

The radical feminists have pointed out that the fight for gender equality would mean challenging the idea of traditional gender roles, opposing the sexual objectification of women, and thereafter raised public awareness about issues pertinent to women.[195] The key issues include rape and violence against women. As such, this body of knowledge has successfully focused public and legal attention on domestic violence issues, which predominately affects women and has sexual harassment regarded as a gendered offence.[196]

In the context of Eswatini, radical feminism has had little impact. It can, however, be used to place a spotlight to the culture of polygamy and extramarital affairs that men are allowed to have culturally, whilst women that participate in extramarital affairs are frowned upon by society and when caught are fined cows on the chief's discretion and divorced by their partners.[197]

There is also the cultural practice of the reed dance which entails young women and adolescents partaking in a cultural dance before the King and the royal family wearing scanty beaded skirts and bare breast, which is perceived by some feminists as the objectification of the young women in the Kingdom.[198] The logic follows that young women who wear scanty skirts outside of the beaded skirts are harassed, raped or arrested by the police on charges of public decency, and called derogatory names in the country.[199] The culture of silence, where victims of intimate partner violence, are expected to keep mum about their ordeal and women are to hide incidences of incest under the umbrella of family secrets.[200] The environment is now conducive for women to at least report such incidences to non-governmental organisations and the police which has domestic violence and the sexual offences units.

1.6 Main Research Questions

The main research questions are:

To what extent Eswatini's legal and policy framework respond to violence against HIV positive women? What are the experiences of women living with HIV in Eswatini regarding VAW?

Is the legal and policy framework cognisant of the nexus between VAW and HIV in Eswatini?

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[195] Ibid.

[196] van Marle & Bonthuys (note 162, above; 35).

[197] E Hlanze & others *Customary practices, the laws, and risky behaviours – a concern for the increased prevalence and vulnerability to HIV and AIDS among women and the girl child: a rights-based approach* (2008) 75-141.

[198] Aphane & others (note 30, above, 73).

[199] Swazi police ban 'rape-provoking' miniskirts *Aljazeera* 24 December 2012 Available on https://www.aljazeera.com/news/2012/12/24/swazi-police-ban-rape-provoking-miniskirts accessed 02.02.2021.

[200] Aphane & others (note 30, above).

Sub-questions

- Who are the main perpetrators of VAW against WLH?
- Which are the main types of VAW that HIV positive women experience?
- How can the rights of HIV positive women be adequately protected through law and policy?

1.5 Objectives of the study

This dissertation aims to first document the experiences of VAW by HIV positive women; secondly, to critically evaluate how the Swazi legal system protects or fails to protect HIV positive women from VAW; and thirdly, make law and policy reform proposals for the development of a framework which addresses the intersection of VAW and HIV.

Specific objectives

This thesis has the following objectives:

- Document the VAW experiences of women living with HIV in Eswatini.
- Examine how governments should respond to the linkage between HIV and VAW in terms of the standards prescribed in international law.
- Describe how Eswatini has responded to the issue to date in terms of legislation and policies.
- Critically analyse the extent to which the Swazi framework meets the international standards and the needs as identified by women living with HIV.
- Make law and policy reform recommendations on HIV and VAW.

1.6 Methodology

The study is a combination of desk-based and empirical research. The study will adopt a qualitative methodology to underpin the research. This means that it is a qualitative research rather than a quantitative research. It must be noted that qualitative research is characterised by its aims, which relate to understanding some aspect of social life, and its methods which (in general) generate words, rather than numbers, as data for analysis.[201] Qualitative research is carried out when one wishes to understand meanings, look at, describe, and understand experiences, ideas, beliefs, and values. These can be addressed through qualitative methods such as desktop survey, interviews, and focus groups.

This study uses original datasets collected from field visits carried out in 2016 and is a perfect match with what the researcher designed the study to achieve. The data is still relevant as there have been no significant changes in the legal or social frameworks.

[201] N Brikci and J Green *A Guide to Using Qualitative Research Methodology* (February 2007)

1.6.1 Research Method

This study will use both a desktop review and interviews with women living with HIV as methods for collecting data and answering the research questions. Key informants' interviews will be carried out with policy makers, stakeholders and experts in the field of GBV and HIV.

1.7 Significance of the study

The study is essential in that it investigated the extent to which Eswatini's legal and policy framework responds to violence against HIV positive women. The study's significancy is also in researching the issue of VAW and HIV linkage, a subject that is under-researched in the context of Eswatini. As a result, the findings will be beneficial notably to:

Public healthcare policy makers. The findings of the study would be able to provide policy makers with knowledge on the types of violence HIV positive women experience and guide on how it could be ameliorated.

Civil society organisations. The findings would help non-governmental organisations with knowledge on issues they need to do advocacy on and lobby the government for and whilst gaining information on the areas where WLH need support.

Law and the justice system. The legislature, police and the justice system will be in a position to have information on the plight of WLH and then formulate prevention strategies to safeguard their rights against violence.

For the researcher, the study will help her uncover critical areas in violence against women that many researchers were not able to explore. For future research. The findings of the study would be crucial in taking the research forward on VAW.

1.8 Limitation/scope of the study

Central to this study is the in-depth exploration of the experiences of violence endured by HIV positive women in Eswatini as well as the social meanings women ascribe to these experiences. It further explores the link between infection with HIV and vulnerability to VAW and vice versa. It analyses the legal framework in Eswatini to gauge how it responds to the scourge of VAW and HIV.

The aims and objectives of this thesis limit its ability to address the nexus between VAW and HIV as observed by others such as people affected by HIV and men because it focused on the experiences of women who were HIV positive attached to an HIV support group centre. In-depth interviews were held with selected women and stakeholders in selected areas in Eswatini only, and excluded males found in the same HIV support group centres.

The study will not include sex workers as a vulnerable group that is prone to violence and HIV infection. The exclusion of female sex workers from the study was decided to exclude them as they are a highly vulnerable group, and the researcher was concerned that involving them could place them at risk of research-related harm.

This study is framed within socio-legal approaches, and as such, the outcome of this study is instrumental in informing the debate on the nexus between VAW and HIV. This study does not purport to generalise findings but points out perceptions of some of the HIV-positive women on the nexus between VAW and HIV.

1.9 Structure of the thesis

The thesis is structured as follows:

Chapter One comprises of the introduction to the thesis. It aims to provide an overall overview of the research describing the legal and socio-economic context under which HIV positive women exist under in Eswatini. Chapter Two offers an overview discussion of human rights norms dealing with violence against women and HIV at international, regional, and sub-regional levels.

Chapter Three gives an overview of Eswatini's legal framework on VAW and HIV and AIDS, whereas Chapter Four focuses on the normative/theoretical framework underpinning this research study.

Chapter Five focuses on the empirical aspect of the study, as it discusses the findings of the research study. Chapter Six comprises of the discussion of the research findings in relation to existing knowledge; and lastly, chapter Seven concludes this thesis by reiterating the findings of the study and drawing conclusions. It gives the recommendations to different stakeholders as well as for future research.

Each chapter of the thesis begins with a brief introduction that sets out what is discussed in the chapter. The introduction will be followed by sub-headings which delve into the heart of the chapters' arguments. This approach was adopted to ensure smooth flow and to communicate the bigger picture at the beginning of each chapter.

CHAPTER TWO
INTERNATIONAL, REGIONAL AND SUB-REGIONAL PROTECTION OF HIV POSITIVE WOMEN FROM VIOLENCE

2 Introduction

This chapter aims to delve into the international legal framework that promotes and protects women's freedom from violence. It assesses whether WLH's experience of violence can be addressed at international law level and to what extent. The chapter begins with a brief discussion of the historical background to the problem of VAW and then explores how international, regional, and sub-regional instruments and treaty bodies deal with the problem of VAW. The Maputo Protocol is the first legally binding treaty to acknowledge the link between women's rights and HIV and is thus adopted as the benchmark in this study.[202]

2.1 The historical context

Violence against women and girls is perceived as discrimination against them because it tends to render them far more exposed to HIV infection in comparison to boys and men.[203] Gender inequities are a key driver of the HIV epidemic among women, fuelled by gender norms relating to toxic masculinity which are linked to men's desire to have multiple concurrent sexual partners.[204] Ironically, when it comes to femininity, gender norms are so designed that women are prevented from knowing about sex and accessing HIV information and services.[205] Meanwhile, UNAIDS is of the view that women's protection from HIV demands their protection from violence as well as ensuring that women's economic independence is promoted.[206]

The international community, in general, has responded, albeit slowly, to VAW over the years despite VAW being a universal problem and one of the most prevalent abuses of

[202] African Charter on Human and Peoples' Rights Commission General Comments on art 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2012.
[203] Avert *Women and girls, HIV and AIDS.* Available at *https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/women* accessed on 27.02.2020.
[204] UNAIDS *World AIDS Day report: How to get to zero faster, smarter, better* 2011 available at: *https://www.unaids.org/en/resources/documents/2011/20111121_JC2216_WorldAIDSday_report_2011* accessed on 01.03.2020.
[205] Ibid.
[206] UNAIDS *Global Report on the global AIDS Epidemic* (2010) 10 available at: *http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/20101123_globalreport_en%5B1%5D.pdf* accessed on 01.03.2020.

human rights.[207] The hesitancy of international law to address violence against WLH has been attributed to the dichotomy between the private and public spheres;[208] it is said that from its inception, international law is primarily concerned with the public sphere while domestic law deals with the private sphere.[209] Events that happen behind closed doors within families are usually not subject to international law. International law has respected familial autonomy as articulated in the international conventions.[210] However, violence against WLH facilitated in the family under the guise of culture is now prohibited by international law.

2.2 The international legal framework

In this section discussed is the international legal framework dealing with VAW such as the hard law which is legally binding on states and soft law which is not legally binding on states but reflects political commitment of states. The hard law aspects are indicative of binding treaties, covenants, and conventions a country has acceded to or ratified and customary international law, whereas, the soft law aspect denotes declarations, concluding observations, and recommendations.

Eswatini is a party to international, regional, and sub-regional treaties responding to VAW and HIV. However, there are limited international law norms addressing the interlink between HIV and violence. Human rights law instruments promote and protect the rights of PLH and AIDS.

Human rights are legal, political, and moral guarantees aimed to protect and respect human values, reflecting the demand of the people that their human dignity, freedoms and equality be respected.[211] Human rights instruments are binding on states that ratify them, and human rights norms are entrenched in these instruments at international, regional, sub-regional level as well as at national level.

Human rights treaties obligate states parties to put in place an enabling environment by adopting laws and policies that advance human rights norms. The state has to ensure that fundamental rights of all people are promoted, protected, and respected and allowed to be

[207] UNIFEM *Ending violence against women & girls: evidence. Data and knowledge in the Pacific Island countries literature review and annotated bibliography August* 2010 available at *https://www.unicef.org/evaw.pdf* accessed on 01.03.2020.
[208] Ibid.
[209] L van den Berge 'Rethinking the public-private law divide in the age of governmentality and network governance: a comparative Analysis of French, English and Dutch Law' (2018) 5 *European Journal of Comparative Law and Governance* 128.
[210] Ibid.
[211] Human rights are internationally guaranteed; they are legally protected; they obligate states and state actors to practise and enforce them; they cannot be waived or taken away; and they are universal.

fulfilled, including the rights of women in general. Most human rights norms that protect VAW directly or indirectly are enumerated in the United Nations (UN) Universal Declaration of Human Rights of 1948 and many subsequent instruments, such as, 'covenants and conventions, declarations, guidelines' and treaty bodies' recommendations or comments adopted by the UN and regional organisations, including the African Union (AU) and sub-regional institutions.[212] Gordon provides that the UDHR has been "a beacon and a standard, its influence both wide and deep. It is a living document that demands renewed recognition and speaks urgently to the issues of today."[213]

The state of Eswatini has a duty to respect, protect and fulfil all human rights and fundamental freedoms of women, regardless of the existing political, economic, and cultural systems.[214] The protection of human rights in practice, however, is skewed towards the fulfilment of civil and political rights over economic, social, and cultural rights.[215]

2.2.1 International law norms on VAW and HIV and AIDS

The Universal Declaration of Human Rights (UDHR)[216] is centred on the notion that all human beings everywhere have the same fundamental human rights which no one can revoke or take away as the basis for justice, freedom, and peace in the world.[217] It must be noted that the UDHR does not explicitly address VAW and that it predates the advent of HIV and AIDS; hence there is no reference to it. This Declaration and its articles are recognised as part of customary international law.[218] The Declaration affirms the worth and dignity of all humans and equal rights of men and women. Therefore, the rights enumerated in the UDHR are common standards for all people everywhere. The Declaration has 30 articles, 12 of which address equality. For instance, in article 1 it declares that every person is *'born free and equal in dignity and with rights.*'[219] It prohibits discrimination for any reason at all in article 2 as rights belong to all people without any distinction.

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[212] G Brown, 'The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World: A report by the Global Citizenship Commission (2016) *NYU Global Institute for Advanced Study* 25.
[213] Ibid.
[214] The Vienna Declaration of 1993.
[215] General Assembly Resolution 32/130 of 1977 explicitly states that 'all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of both civil and political, and economic, social and cultural rights.
[216] UN Universal Declaration of Human Rights of 1948.
[217] Ibid.
[218] J Dugard *International Law: A South African Perspective* (2005). Customary international law comprises important international obligations originating from established international practice, and obligations originating from formal written treaties or conventions.
[219] Emphasis added.

Furthermore, everyone's right to life, liberty and security of person is set forth in article 3 of the UDHR; it provides that no one shall be held in slavery or servitude. Article 5 prohibits anyone being '*subjected to torture or cruel, inhuman or degrading treatment or punishment*'.[220] Article 6 emphases the right to be treated as a person in the eyes of the law, and that every person has the right to be treated by the law in the same way as everyone else. In terms of article 7 everyone has a right to be protected against violation of their human rights, whereas articles 8, 9 and 10 of the Declaration enumerate entitlements or redress available in case of a violation of one's human rights. These include the right to see justice being done through the use of a court of law or tribunal; prohibition of subjection to 'arbitrary arrest, detention or exile; and the *right to a fair and public hearing by an independent and impartial tribunal*'.[221]

It was in 1993, when the UN formally recognised VAW as a human rights abuse[222] through the adoption by the UN member states of the Declaration on the Elimination of Violence against Women.[223] The Declaration is not binding on states per se but a concreate political commitment to addressing VAW and GBV by states. The Preamble to the Declaration stated:

'Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women . . . violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.'

Article 1 of the Declaration defined VAW as an act of GBV entailing sexual, physical, or psychological abuse and causing suffering to women; and such acts include threats, coercion, including deprivation of liberty in an arbitrary manner, whether taking place in the public sphere or private life. Article 2 enumerates the instances which encompass violence against women as follows:

'Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at

[220] Emphasis added.
[221] Emphasis added.
[222] J Bond & R Phillips 'Violence against women as a human rights violation: international institutional responses' in *Sourcebook on violence against women* (Eds) CM Renzetti, JL Edleson & RK Bergen (2001) 481.
[223] United Nations Declaration on the Elimination of Violence against Women of 1993.

work, in educational institutions and elsewhere, trafficking in women and forced prostitution; Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.'

Article 3 emphasises that women have the right to equal protection and enjoyment of all fundamental human rights, be it in the 'civil, political, economic, social, cultural spheres'. Article 4 urges countries to outlaw VAW as well as bar the use custom, tradition, or religious considerations as an excuse to evade adopting measures to eliminate VAW in its entirety. The Declaration is significant as it defines VAW; however, it is silent on HIV despite being adopted after the advent of HIV.

Likewise, in 1995 the adoption of the Beijing Declaration and Platform for Action was a significate strides towards tackling VAW and HIV. [224] It is not a legally binding treaty, but a policy document that governments agreed and endorsed at the United Nations General Assembly made VAW an issue worthy of international attention. Eswatini has obligations under international and regional human rights instruments and commitments under the Beijing Declaration and Platform for Action to ensure women's freedom from violence. Women's rights advocates had argued that VAW was the most pervasive violation of human rights, experienced in families, workplaces, and communities across the globe.[225] Countries are expected to report on the steps undertaken to implement the provisions of the Platform for Action to the UN *Commission on the Status of Women.*[226]

One of the notable features of the Beijing Platform for Action are that women have, among other things 'the right to the enjoyment of the highest attainable standard of physical and mental health'.[227] The Declaration defines health as 'a complete state of physical, mental and social well-being, as opposed to the state of absence of disease or infirmity'. As a result, women's health encompasses 'emotional, social and physical well-being' which is determined by their socioeconomic and geopolitical context, and by biology.

According to the Declaration, women's enjoyment of the right to health is essential to their existence and includes their participation in all spheres of life, public or private. It points out that poverty, violence, and negative attitudes invariably affect women's health. It further alludes to the fact that HIV and AIDS, as well as other sexually transmitted infections, which

[224] United Nations Fourth World Conference on Women - Beijing Declaration of 1995.
[225] Bond & Phillips (note 224, above).
[226] Emphasis added.
[227] United Nations Fourth World Conference on Women - Beijing Declaration of 1995, para 89 on women and health.

are mostly transmitted through sexual abuse, negatively affect women's health.[228] The Declaration calls on states to adopt gender-sensitive measures to decisively tackle sexually transmitted infections, such as HIV and AIDS, and other sexually transmitted infections, including matters relating to reproductive health.[229]

In its actions to be taken, the Declaration implores states and civil society organisations to:

> [P]rovide more accessible, available and affordable primary health-care services of high quality, including sexual and reproductive health care, which includes family planning information and services, and giving particular attention to maternal and emergency obstetric care, as agreed to in the Programme of Action of the International Conference on Population and Development;
> Reinforce laws, reform institutions and promote norms and practices that eliminate discrimination against women and encourage both women and men to take responsibility for their sexual and reproductive behaviour;
> [E]nsure full respect for the integrity of the person, take action to ensure the conditions necessary for women to exercise their reproductive rights and eliminate coercive laws and practices;
> Ensure the involvement of women, especially those infected with HIV and AIDS or other sexually transmitted diseases or affected by the HIV and AIDS pandemic, in all decision-making relating to the development, implementation, monitoring and evaluation of policies and programmes on HIV and AIDS and other sexually transmitted diseases;
> Review and amend laws and combat practices, as appropriate, that may contribute to women's susceptibility to HIV infection and other sexually transmitted diseases, including enacting legislation against those socio-cultural practices that contribute to it, and implement legislation, policies, and practices to protect women, adolescents and young girls from discrimination related to HIV and AIDS; amongst other action steps to be undertaken.

The Declaration further notes that VAW is a stumbling block to the attainment of 'equality, development and peace'[230] and that that VAW violates and impedes the enjoyment of basic human rights by women. The Declaration goes on to define the term *violence against women*[231] (emphasis added) as acts of GBV that cause or are likely to result in, 'sexual, physical, or psychological harm' which include 'threats, coercion or arbitrary deprivation of liberty, occurring in public or private sphere' which cause untold suffering to women's well-being.[232]

Similarly, the Declaration implores governments to:

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[228] UN Fourth World Conference, (note 226 above para 117).
[229] UN Fourth World Conference (note 226, above).
[230] UN Fourth World Conference (note 226 above; para 112).
[231] Emphasis added.
[232] UN Fourth World Conference (note 226, above; para 113).

> Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women;
> Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons;
> Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
> Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;
> Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered and inform women of their rights in seeking redress through such mechanisms; and
> Formulate and implement, at all appropriate levels, plans of action to eliminate violence against women amongst other action steps to be undertaken.[233]

The Declaration emphasises the fact that women's fundamental human rights entail the right to have agency and voice to control their bodies and the right to decide on matters freely and responsibly about their sexuality, free from compulsion, discrimination, and abuse.[234] This is the first international document referred to in this study that sees a link between HIV and women's rights. Even though the Beijing Declaration links HIV to health, it does not directly link HIV and VAW.

In the context of VAW and HIV, the following binding human rights must be respected, promoted, protected, and fulfilled: the right to confidentiality and privacy, human dignity, bodily integrity, equality and non-discrimination, and the right to access healthcare.[235] These rights are provided for in both international and national legal frameworks acceded to and put into effect by Eswatini.

WLH are afforded protection by the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights of

[233] UN Fourth World Conference (note 226, above; para 124).
[234] UN Fourth World Conference (note 226, above).
[235] UN International Covenant on Civil and Political Rights of 1966 – see article 17 on privacy, article 10 on inherent dignity, article 26 on equality and non-discrimination and article 12 of International Covenant on Economic, Social and Cultural Rights of 1966.

1966 (ICESCR).[236] Eswatini ratified the ICCPR in 2004. It enumerates in detail the civil and political rights of the UDHR. The ICCPR[237] was adopted in response to egregious human rights violations that continued to occur around the world, although violence against women is not expressly mentioned.[238] In article 1, the ICCPR urges countries to always 'promote the right to self-determination and to respect that right'.[239] The Covenant recognises the 'rights of people to freely own, trade and dispose of their natural wealth and resources'.[240] Article 2 provides for the right to effective legal recourse where the rights are violated; it matters not whether the person who infringed the rights was acting in an official capacity or not. It is in article 3 of the Covenant where the right to equality between men and women in the enjoyment of their civil and political rights is provided for, whereas the right to life and survival is found in article 6. The right to freedom from 'inhuman or degrading treatment or punishment' is provided for in article 7, and article 8 provides for the freedom from slavery and servitude. Articles 9, 12 and 14 provide for the 'right to liberty, security of the person, freedom from arbitrary arrest or detention, freedom of movement, equality before the law, and the right to be presumed innocent until proven guilty'. Articles 23 and 26 enumerate the right to marry and found a family, and the 'right to equality before the law and equal protection respectively'. The ICCPR predates the advent of HIV and therefore does not address HIV and AIDS. It also does not explicitly contain provisions that address intimate partner violence.

However, the Human Rights Committee (HRC) as bodies that have added their voice in calling on states to tackle VAW, enumeration the provisions of the ICCPR. The Human Rights Committee (HRC) has remarked that the state parties should adopt necessary measures to combat VAW, in particular marital rape, while ensuring that VAW is regarded as an offence and punishable under criminal law.[241] The HRC has adopted General Comment No 28[242] where it addressed the issue of 'equality of rights between men and women' as stipulated in article 3 of the ICCPR.[243] The Committee urged countries to ensure that their reports contained detailed information on national laws and practice adopted that eradicated VAW, including domestic violence and rape. The Committee sought to know whether women were given access to legal

[236] Ibid.
[237] UN International Covenant on Civil and Political Rights of 1966 ratified in 2004.
[238] D Bogecho 'Putting it to good use: The International Covenant on Civil and Political Rights and women's right to reproductive health' (2004) 13 *Southern California Review of Law and Women's Studies* 229-272.
[239] Ibid.
[240] Art 1 of the ICCPR of 1966.
[241] Ibid.
[242] UN Human Rights Council General Comment 28 of 2000.
[243] UN Human Rights Council General Comment 28 of 2000.

and safe abortions where the pregnancy was a result of rape. Also, states were urged to report information on measures taken to prevent forced sterilisation and forced abortion. States were directed to report to the Committee on the practice of genital mutilation where it existed and provide information on the extent of the practice and on measures taken to eliminate it. Lastly, the Committee indicated to states that it required information on protective measures adopted, which included legal remedies, 'for women whose rights under article 7' of the ICCPR were violated.[244] On other occasions the HRC has pointed out that state parties should carry out awareness campaigns, ensuring that all forms of VAW are addressed, especially domestic violence, and that they fully comply with articles 3,[245] 6,[246] 7[247] and 26[248] of the Covenant.[249]

The HRC has also adopted Resolution 7/24 wherein the Council condemned strongly, all acts of VAW executed by state agents, non-state actors or private persons. The resolution obligates countries to adopt measures to ensure that GBV in all its forms is eradicated in the family, and community, in particular where GBV is perpetrated or condoned by a state as envisaged by the Declaration on the Elimination of Violence against Women. It further emphasises the need for countries to criminalise and punish all forms of VAW and that access to justice for women should include access to effective medical and psychological support and counselling.

Eswatini ratified the ICESCR in 2004.[250] The Covenant elaborates on the economic, social, and cultural rights enumerated in the UDHR.[251] Whilst the ICESCR does not expressly mention violence against women, the Committee on Economic, Social and Cultural Rights has noted that in some countries, women still 'occupy a subordinate role in society' and that discrimination and VAW are serious social problems affecting women's enjoyment of their social, economic, and cultural rights.[252]

The Economic and Social Council adopted Resolution 1988/27 to show it stance on the call to have VAW eradicated within families and society at large. The Resolution calls countries to

[244] Ibid para 11 & 22.
[245] Art 3 provides that state parties undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights.
[246] Art 6 provides that every human being has the inherent right to life; that this right shall be protected by law and that no one shall be arbitrarily deprived of his life.
[247] Art 7 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[248] Art 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law and prohibits discrimination.
[249] Bogecho (note 240, above).
[250] UN International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.
[251] Ibid.
[252] AR Chapman 'Violations Approach for monitoring the international Covenant on Economic, Social and Cultural' (1996) 18 Rights *Human Rights Quarterly* 23-66.

give effect to the recommendation on the eradication of VAW within the family and society. The resolution further recognises the crucial role played by organisations and institutions at grassroot level in dealing with VAW, namely criminal justice, social welfare, education, health, and shelter; and research is encouraged to establish networks at international level and local cooperation. Likewise, the binding Convention on the Elimination of All Forms of Racial Discrimination (CEARD) impliedly prohibits violence against women.[253] Eswatini ratified CEARD in 1969.

Another binding instrument that addresses VAW and HIV directly is the Convention on the Elimination of All Discrimination against Women (CEDAW). [254] Eswatini ratified CEDAW without any reservations in 2004. The Convention has 30 articles which give guidance on how states should promote women and girls' fundamental human rights in their territories, progress in life and overcome discriminatory barriers. It surrenders to states the powers to determine how laws and policies would be best to aligned to CEDAW to eradicate discrimination against women. In essence, article 1 of CEDAW defines discrimination against women so as to embrace all facets of human rights and fundamental freedoms[255] as follows:

> *Discrimination against women*[256] shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[257]

In line with the above, it is important to note that VAW is perceived as discrimination against women.[258] This is because violence disproportionately affects women; hence it is deemed as discrimination. Thus, women's call for freedom from violence is not an adaptation of a right built upon male experience.

Article 2 obligates the states the duty to review and repeal all discriminatory laws, policies, and practices in their legal framework that counter women's enjoyment of their rights. Article 3 is premised on the notion of equality of the sexes, stipulating that women are, in all spheres of life, equal with men and states must adopt measures to ensure that men and women's equality is found in all spheres, be it in civil, political, social, economic, and cultural life.

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[253] UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984 ratified in 2004.
[254] UN Convention on the Elimination of All Discrimination against Women (CEDAW) of 1979.
[255] Ibid.
[256] Emphasis added.
[257] Article 1 of CEDAW of 1979.
[258] The CEDAW Committee in 1992 adopted General Recommendation 19 dealing specifically with VAW.

Article 15 reiterates the assertion made in article 3, providing for the right to equality before the law in which women and men have equal legal rights to enter into 'commercial contracts, own property, and choose their place of residence'.

Articles 4 and 5 stipulate that states, where possible, may adopt temporary measures to accelerate women's equality; and that states agree to eradicate practices that promote the idea of inferiority or superiority of one sex over the other. Articles 9, 10, 11 and 12 refer to nationality, education, employment, and health respectively in which women have the same right as men to acquire, change, or retain a nationality without any discrimination. Also, women have equal rights to education, and employment regardless of marital status, as well as the right to affordable healthcare services. CEDAW further, requires states to take appropriate measures to eliminate discrimination within the family (article 16).[259] However, it makes no specific reference to violence.

The CEDAW Committee has further dealt with VAW through numerous general comments and recommendations. The first general comment to expressly deal with VAW from the CEDAW Committee is General Comment No. 12.[260] The Committee in this General Comment called upon countries to ensure that periodic reports submitted to it included information on legislative measures adopted by countries which protected women from 'all forms of violence in everyday life' (with reference to domestic violence, sexual abuse and workplace sexual harassment) as well as measures adopted to eradicate this violence and provide 'support services for women who are the victims of aggression or abuses'. Lastly, countries were directed to furnish statistical data on VAW incidents and on women who were survivors of violence. To make up for the omission, the CEDAW Committee in 1992 adopted General Recommendation 19 dealing specifically with VAW requiring countries to include in periodic reports to the Committee 'statistical data on the incidence of violence against women, information on the provision of services for victims and legislative and other measures taken to protect women against violence in their everyday lives, including against harassment at the workplace, abuse in the family and sexual violence'.[261] It must be noted that this Recommendation has been updated by General Recommendation No 35. This General Comment expressly provides that GBV is 'violence which is directed against a woman because

[259] Art 16 provides that states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.
[260] UN CEDAW Committee General Recommendation 12 of 1989.
[261] See *https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx* accessed 20.01.2020.

she is a woman or that affects women disproportionately'.[262] It further provides that states must investigate, prosecute, and punish VAW and failure to act can make a state liable because a state is responsible for its own acts and, under certain conditions for acts and omissions by private actors under the due diligence principle.[263]

The CEDAW Committee also adopted General Recommendation No. 19. [264] In this General Recommendation, the CEDAW Committee explained that despite GBV not being expressly mentioned in CEDAW, it fell within its scope. The Committee declared that GBV was an integral part of the discrimination definition as it consisted of violence that is disproportionately targeted at women. Such conduct included acts that inflict or threaten sexual, physical, or mental harm or suffering and other acts that deprive women of their liberties. The Committee alluded to the fact that GBV may violate specific provisions of CEDAW, 'regardless of whether those provisions expressly reference violence'.[265]

In paragraph 23, the CEDAW Committee addressed domestic violence 'as one of the most insidious forms of VAW and that it was prevalent in all societies'; in some family relationships women regardless of age were subjected to varied forms of violence, namely, battery, rape (including 'all forms of sexual assault), mental and other forms of violence.' The Committee explained that the different forms of VAW were perpetuated by backward traditional attitudes and that the situation was exacerbated by women's lack of economic independence − a factor which forced many of them to *'stay in violent relationships'*[266] (emphasis added). It noted that women's health was put at risk by violence and their capacity to contribute to the family and public life was weakened.

The Committee in the General Comment recommends the following measures to countries;

'States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention; States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the

[262] CEDAW Committee, General Recommendation No 35 on Gender-based violence against women, update General Recommendation No 19, 2017. C/GC/35
[263] (CEDAW, GR No 35, para 24).
[264] UN CEDAW Committee General Recommendation 19 of 1992 on Violence against women.
[265] UN CEDAW Committee General Recommendation 19 of 1992 on Violence against women.
[266] Emphasis added.

effectiveness of measures to prevent and deal with violence; Effective measures should be taken to ensure that the media respect and promote respect for women; States parties in their report should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result. They should report the measures that they have undertaken to overcome violence and the effect of those measures.'

In addition, the CEDAW Committee has over the years, actively engaged states on HIV/AIDS concerns, adopting and incorporating,[267] as a primary focus, a human rights framework for HIV prevention. Thus, the Committee has recommended that states accurately target the needs of affected populations through information and education strategies. Moreover, the Committee recommended that states adopt strategies to ensure care and support for PLH by adopting steps to ameliorate the disease's social and economic impact.[268]

The Convention on the Elimination of all Discrimination Against Women has been updated through the adoption of the Optional Protocol to the Convention on the Elimination of Discrimination against Women.[269] Eswatini is yet to accede to the Optional Protocol to CEDAW. In terms of this instrument, countries recognise the jurisdiction of the CEDAW Committee to 'receive communications submitted to it by or on behalf of individuals or groups of individuals, who are citizens of the state, alleging to be victims of a violation of the rights outlined in CEDAW by that State Party.'[270]

The optional Protocol rectification by Eswatini is something that needs to happen for a variety of reasons. However, the chief reason is that such a step will ensure that HIV positive women who suffer violence at the hands of government agents such as in the case of forced or coerced sterilization in public healthcare facilities would have the avenue to make a complaint directly to the CEDAW Committee after exhaustion of local remedies.

Another soft law instrument that was adopted at UN level and tackled the issue of VAW and HIV is the United Nations Millennium Declaration and Sustainable Development Goals. The Millennium Declaration of 2000 came with the world's millennium agenda called Millennium Development Goals (MDGs), which were to be attained in a period of 15 years from the year 2000 to 2015.[271] With the MDGs countries committed themselves to tackling

[267] World Health Organization, World Health Assembly, Resolution WHA 40.26, Global Strategy for the Prevention and Control of AIDS, Geneva, WHO, 5 May 1987. See also, S Gruskin and others, 'Human Rights and HIV/AIDS' 2002 available at: *http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07* accessed on 03.03.2020.
[268] Ibid.
[269] UN Optional Protocol to the Convention on the Elimination of Discrimination against Women of 1999.
[270] Arts 1 and 2 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women of 1999.
[271] UN Millennium Declaration Goals (MDGs) of 2000 available on *http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf* accessed 11.03.2020.

public concerns such as poverty, end hunger, disease, illiteracy, gender inequality and environmental degradation. As alluded to above, the MDGs came to an end in 2015, and the Sustainable Development Goals (SDGs) Agenda for 2030 was then ushered in. The SDGs consist of countries committing to five themes: people, planet, prosperity, peace, and partnership.

The SDGs' most relevant theme for this research is the people's theme − commitments to address 'poverty, hunger, good health and well-being, quality education, gender equality, water and sanitation'. As a result, countries undertook to adopt measures to eradicate violence against women in its entirety[272] and to deal distinctly with the transmission of the HIV and AIDS pandemic, among other diseases.[273]

Another political commitment treaty that was adopted at UN level to deal with HIV is the Declaration of Commitment on HIV/AIDS. [274] This UN Declaration highlights the intersection of VAW and HIV and AIDS,[275] stating that gender equality and women's emancipation are essential for the eradication of women and girls' vulnerability to HIV and AIDS. It further calls on states to ensure that women are empowered to have agency and voice and control over their bodies; are free to decide on matters touching on their sexuality and have the power to protect themselves from being infected with HIV.[276]

Countries are encouraged to pass laws that strengthen measures to eradicate women's discrimination in all spheres of life, thereby ensuring that they enjoy human rights regardless of their HIV status.[277] The rights referred to include the rights to education, healthcare, inheritance, employment, and the development of tactics to eliminate stigma and discrimination associated with being HIV positive, among other things.[278] Countries were expected to have done this by 2003.

States are expected to develop national strategies and fast-track the implementation of plans promoting the advancement and full enjoyment of all fundamental human rights by

[272] MDGs of 2000 − Goal 5 − Achieve gender equality and empower all women and girls para 5.2 available on *https://sustainabledevelopment.un.org/post2015/transformingourworld* accessed 11.03.2020.
[273] Ibid para 26.
[274] United Nations General Assembly Special Session on HIV/AIDS. Declaration of Commitment on HIV/AIDS (UNGASS) of 2001 available at *http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf* accessed on 11.03.2020.
[275] United Nations General Assembly Special Session on HIV/AIDS. Declaration of Commitment on HIV/AIDS (UNGASS) of 2001 available at *http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf* accessed on 11.03.2020.
[276] Ibid para 14.
[277] UNGASS of 2001 para 47.
[278] UNGASS of 2001 para 58.

women, in particular those rights that support 'shared responsibility of men and women' in decisions about safer sex.[279] The plans must also address the empowerment of women to have agency, voice, and control over their bodies to freely decide on their sexuality as well as ensuring their protection from HIV infection.[280] Countries were expected to have done this by 2005. This is the most important international document in that it is the first declaration to directly link HIV and VAW.

The UN also endorsed the International Guidelines on HIV and AIDS and human rights[281] a non-binding instrument with important political commitments for states. The UNAIDS and UNOHCHRs international guidelines on HIV and AIDS and human rights of 2006 consolidated the HIV and AIDS guidelines adopted in 1996,[282] with the aim of helping countries incorporate human rights standards to their strategies in practice in the era of HIV and AIDS.[283] There are 12 international guidelines, throughout which countries are encouraged to adopt national frameworks that are effective in their HIV and AIDS response. The navigation of the response should adhere to the respect, promotion, protection, and fulfilment of fundamental human rights. For instance, all government departments have shared responsibility in executing policies and programmes on HIV and AIDS.[284] Countries are to ensure that communities are consulted in the design of HIV and AIDS policy and programme implementation and through political and financial support.[285]

Countries are directed to address concerns raised by the HIV pandemic by reviewing and reforming public health laws[286] as well as their criminal laws and correctional systems to align them with international human rights law.[287] Countries are urged to enact and strengthen anti-discriminatory laws and pass laws to protect PLH and other vulnerable groups.[288] Guideline 8 obligates states, together with communities, to ensure that women and children live in an enabling environment by addressing inequality and prejudices through community

[279] UNGASS of 2001 para 59.
[280] Ibid.
[281] UNAIDS & UNOHCHR's International Guidelines on HIV/AIDS and Human Rights of 2006. Consolidated version available at *https://www.unaids.org/sites/default/files/media_asset/jc1252-internguidelines_en_0.pdf* accessed on 15.03.2020
[282] Published jointly by the Office of the United Nations High Commissioner for Human Rights (UNOHCHRs) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).
[283] Ibid.
[284] UNAIDS & UNOHCHR's International Guidelines on HIV/AIDS and Human Rights of 2006: Guideline 1.
[285] UNAIDS & UNOHCHRs International Guidelines on HIV/AIDS and Human Rights of 2006 Guidelines 2.
[286] UNAIDS & UNOHCHRs International Guidelines on HIV/AIDS and Human Rights of 2006 Guideline 3.
[287] UNAIDS & UNOHCHRs International Guidelines on HIV/AIDS and Human Rights of 2006 Guideline 4.
[288] UNAIDS & UNOHCHRs International Guidelines on HIV/AIDS and Human Rights of 2006 Guideline 5.

dialogues. The international guidelines are silent about violence against HIV positive women, and this is a gap that obscures the reality that this is a global problem.

Other soft law commitments that have been adopted at the UN level by treaty bodies that deal with VAW and HIV include the Security Council Resolution 1325. [289] The UN Security Council through Resolution 1325 aimed to 'promote and protect the rights of women and girls' in states enduring armed conflict. This resolution is profound in that its paragraph 11 it mandates the state to end all forms of VAW and impunity while safeguarding the protection of civilians during and after armed conflicts, in particular the protection of women and girls. Resolution 1325 obligates states to deal decisively with impunity by prosecuting all those who have committed crimes against humanity, genocide, including war crimes and crimes relating to sexual assault and VAW. It further emphasises the need to exclude such crimes, from amnesty programmes where feasible.

Furthermore, the UN Security Council adopted Resolution 1820. [290] Resolution1820 addresses the 'use of sexual violence, as a weapon of war' by which civilians are deliberately targeted during armed conflict for rape as 'part of a widespread or systematic attack' against them'.[291] Parties embroiled in armed conflict are obliged to adopt proper measures to ensure the protection of civilians, in particular women and girls, from violence, including sexual violence. The Resolution also records that some forms of sexual abuse, such as rape can under the circumstances be perceived as 'war crime, a crime against humanity, or a constitutive act concerning genocide'. The Resolution directs that offences touching on sexual violence *are included in the jurisdiction of the 'statutes of the ad hoc International Criminal Tribunals and the Rome Statute of the International Criminal Court (ICC)*' (emphasis added).[292] Resolution 1820 was repeated in Security Council Resolution 1888 (2009),[293] and there are other resolutions (Resolution 1889 (2009) and Resolution 1960 (2010)) adopted by the Security Council which emphasise and require the full implementation of the resolutions discussed above.[294]

Lastly, the UN Security Council adopted Resolution 2106, which is another profoundly significant Resolution by the Security Council in that it addresses the link between HIV infection and sexual violence carried out in 'armed conflict and post-conflict situations.[295] It

[289] UN Security Council Resolution 1325 of 2000 on women, peace, and security.
[290] UN Security Council Resolution 1820 of 2008.
[291] UN Security Council Resolution 1820 of 2008.
[292] Emphasis added.
[293] UN Security Council Resolutions Resolution 1888 of 2009.
[294] UN Security Council Resolution 1960 of 2010.
[295] Ibid.

states that women and girls disproportionately carry the burden of HIV and AIDS and that it should be viewed as a gender equality obstacle and challenge faced by them. The Resolution further addresses the need for national health systems to be supported by stakeholders (United Nations bodies, states parties and donors) by capacity development and strengthening.

It also calls for the involvement of civil society organisations to aid women and girls infected or affected by HIV and AIDS in situations of armed conflict and post-conflict by providing them with sustainable assistance. It alludes to the crucial role civil society networks play in community building and protection of women against sexual abuse during and after armed conflict and by also ensuring that survivors enjoy access to justice and reparations. Resolution 2122 (2013)[296] reiterates the importance of the full implementation and adherence by all parties concerned to the previous resolutions.

The Eswatini government has submitted states report to the CEDAW Committee on progress made in the implementation to the convention. There are a number of concluding observations the country has received from this treaty body. For instance, The CEDAW Committee's concluding observations on the periodic reports of Eswatini[297] touched on the 'definition of discrimination and legislative framework of Eswatini'. Whilst it noted that section 20 of the Constitution provided for the 'equality of all persons before the law' and prohibited discrimination on specific grounds, the Committee was concerned that this did not include sex and marital status.

The committee called upon Eswatini to align the 'legal definition of discrimination against women' with the definition of discrimination espoused in article 1 of the Convention, so as to include 'all prohibited grounds of discrimination, in particular, sex and marital status' by amending section 20 of the 2005 Constitution or 'adopting other appropriate national legislation.' Eswatini was urged to pass laws and policies such as Bills on marriage, administration of estates, transnational crime, employment, legal aid, and the land policy, and thus ensure the law was fully aligned with the Convention.[298]

The CEDAW Committee was further alarmed at the continuation of negative cultural practices, traditions and 'patriarchal attitudes, *including deep-rooted stereotypes regarding gender roles and responsibilities of women and men*'[299] in the family and society, which portrayed women as caregivers. The Committee also referred to harmful cultural practices

[296] UN Security Council Resolution 2122 of 2013.
[297] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014).
[298] Ibid para 9.
[299] Emphasis added.

perceived to be responsible for the increase in child and forced marriages, abduction of girls, and polygamy, practices which epitomised the 'unequal status of women in society'.[300] The Committee encouraged the country to adopt the following measures;

> Intensify media and other efforts to educate the public and raise awareness about existing sex-based stereotypes that persist at all levels of society, to eliminate them; expand public education programmes on the negative impact of such stereotypes on women's enjoyment of their rights, in particular in rural areas, targeting traditional leaders who are the custodians of customary values in the country; take effective legal measures to prohibit and eliminate child marriage and abolish polygamy.

The CEDAW Committee addressed the issue of VAW as a standalone issue,[301] noting with concern that the SODV Bill which was passed by Parliament and the Senate but was allowed to lapse because it did not receive royal assent. The committee further expressed concern at under-reporting of VAW due to the perceived culture of silence and impunity. It pointed out that the country needed to improve on ensuring the lack of data on the number of reported cases involving VAW ended, and that cases of VAW be investigated and prosecuted and sanctions imposed on the perpetrators. The CEDAW Committee urged the country *inter alia* to:

> [E]nact into law the bill on sexual offences and domestic violence without further delay and ensure that it is comprehensive, covering all forms of violence against women, especially marital rape and sexual harassment; encourage reporting of domestic violence and sexual violence against women and girls, to ensure that complaints are effectively investigated, and perpetrators punished with sanctions commensurate with the gravity of the offence and to address the culture of impunity.

The CEDAW Committee's concluding observations also touched upon health, noting concern over the high prevalence of HIV and AIDS, and called upon the country to adopt the following measures:

> [I]ntensify the implementation of HIV/AIDs response strategies, especially preventive strategies, and to continue to provide free antiretroviral treatment to all women and men living with HIV/AIDs, including pregnant women so as to prevent mother-to-child transmission.

The committee concluded that the implementation of these measures could assist in ensuring that WLH's rights were protected and promoted.

[300] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014) para 18.
[301] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014) para 20.

2.2 The regional human rights legal framework

Eswatini is a party to regional treaties responding to VAW and HIV. The African Union provides measures to be adopted by states in dealing with VAW under its system of human rights. At the regional level, the African Charter on Human and Peoples' Rights (AU Charter),[302] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) are the binding instruments which protect and promote the rights and freedoms of WLH to be protected from VAW and HIV and are binding on Eswatini.[303] There are numerous soft law treaties which countries have committed to in order to tackle VAW and HIV head on. These are discussed below.

2.2.1 Regional law norms on VAW and HIV

Eswatini ratified the AU Charter in 1995.[304] Whilst it contains fewer articles explicitly targeting women's advancement, article 18 obligates member states to abolish women's discrimination in their countries and to adopt measures that ensure the protection of all women's rights as envisaged in international Declarations and Conventions. It provides for the equality before the law principle in article 19, which makes provision for the equality of all people to enjoy the same rights and respect; and the domination of one group of people by another is strictly forbidden.

Another legally binding treaty on VAW and HIV at AU level is the adoption of the Maputo Protocol in 2003 by the General Assemble.[305] Eswatini ratified it in 2013. The Protocol enumerates the fundamental human rights for African women, and state parties to it are obliged to adopt legislative and other measures to promote and protect women's rights and their realisation.[306]

The Protocol makes the pursuit of women's rights a legitimate African cause as opposed to being an 'unAfrican' or western. The main aim of the Maputo Protocol is to tackle gender inequality in Africa, seen as driving the spread of HIV at an alarming rate on the continent.[307] It prohibits 'discrimination against women in all spheres of life' be it political, social,

[302] African Charter on Human and Peoples' Rights of 1981 ratified in 1995.
[303] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003, ratified in 2012.
[304] African [Banjul] Charter on Human and Peoples' Rights of 1981.
[305] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003.
[306] Ibid.
[307] K Stefiszyn 'Adolescent Girls, HIV, and State Obligations under the African Women's Protocol' - in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 155.

economic, or cultural. It defines discrimination against women to include differential treatment which is based on sex; and may include distinction, exclusion or restriction which inhibits the enjoyment of all fundamental human rights by women regardless of their civil status and spheres of life.[308]

The Maputo Protocol also prohibits harmful practices directed towards women, and it defines harmful practices in the broadest sense to include all practices and behaviours which negatively impede the fundamental rights such as 'the right to life, health, dignity, education and integrity' of women and girls.[309] It further defines VAW as any act that causes or threatens sexual, physical, economic, and psychological harm to women. It may include arbitrary imposition of restrictions on women or the denial of their fundamental liberties in private or public life in peacetime and during the time of armed conflicts or war.[310]

Article 2 of the Protocol gives guidance to countries on decisive measures to deal with all forms of discrimination against women in Africa. Countries are expected to include the equality principle in their national constitutions and other forms of domestic legislative frameworks in the process ensuring that equality between both sexes is attained as a matter of principle and implemented in practice.[311] Countries are obligated to pass laws and operationalise those laws with regulatory measures, which ensure that discrimination and harmful practices which put women's health and well-being in danger are prohibited and entirely curbed.[312] Article 2 further urges countries to change and amend through public education and other strategies such 'social and cultural norms or patterns of conduct of women and men' so that harmful cultural practices can be eliminated, especially the idea that males are superior to women.[313]

Articles 3 and 4 of the Protocol provide women with the right to 'inherent dignity,[314] life, integrity and security of the person' and that women are entitled in general to respect for their 'life and the integrity and security of her person' among other basic rights.[315] They prohibit women's exploitation in its entirety, as well as 'cruel, inhuman or degrading punishment and treatment' and call on countries to promulgate and enforce laws to proscribe VAW, in particular forced or unwanted sex whether taking place in the private or public

[308] Art 1(f) of Maputo Protocol of 2003.
[309] Art 1(g) of Maputo Protocol of 2003.
[310] Art 1(j) of Maputo Protocol of 2003.
[311] Art 2(1)(a) of Maputo Protocol of 2003.
[312] Art 2(1)(b) of Maputo Protocol of 2003.
[313] Art 2(2) of Maputo Protocol of 2003.
[314] Art 3(1) of Maputo Protocol of 2003.
[315] Art 4(1) of Maputo Protocol of 2003.

sphere.[316] Countries are obligated to enact and fast-track legislative and other measures that prohibit women's exploitation or degradation of any kind.[317] They are also urged to enact legislative, administrative, social and economic measures which are essential to prohibit, punish and eliminate VAW.[318]

Countries are further obliged to probe and conduct research to identify VAW's causes and its effects on women, upon which they are to adopt precise legislative and other measures that ensure that violence is prevented and eliminated.[319] Countries are called upon to vigorously promote studies on peace to ensure the eradication of harmful elements in 'traditional and cultural practices and stereotypes which fuel the acceptance and persistence tolerance of VAW'.[320] The Maputo Protocol compels countries to ensure that perpetrators of VAW are punished, and rehabilitation programmes for female victims are put in place, including reparation.[321]

Article 5 of the Protocol obliges countries to outlaw all facets of harmful practices that negatively affect the enjoyment of fundamental human rights by women and are contradictory to acceptable international standards.[322] Article 6 obligates countries to adopt measures to ensure that in marriage men and women are deemed equal partners with equal rights and entitlements. The Maputo Protocol calls upon countries adopt legislative measures to fix the marriageable age for girls at 18 years, and advocate monogamy.[323]

Article 8 emphasises that women have the rights to equality and to be protected by the law, which includes effective access to justice. Article 14 obligates countries to ensure the 'respect and promotion of women's right to health and sexual and reproductive health'. The Protocol provides in article 14(1)(d) and (e) as follows:

> [T]he right to self-protection and to be protected against sexually transmitted infections, including HIV and AIDS; and the right to be informed of one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV and AIDS, in accordance with internationally recognised standards and best practices.

The Protocol further protects women's sexual and reproductive rights by ensuring that in cases of rape, incest and sexual assault states authorise medical abortion for women, as well as in cases where the mental and physical well-being of the mother or that of the foetus is endangered

[316] Art 4(2)(a) of Maputo Protocol of 2003.
[317] Art 3(3) & (4) of Maputo Protocol of 2003.
[318] Art 4(2)(b) of Maputo Protocol of 2003.
[319] Art 4(2)(c) of Maputo Protocol of 2003.
[320] Art 4(2)(d) of Maputo Protocol of 2003.
[321] Art 4(2)(e) & (f) of Maputo Protocol of 2003.
[322] Art 5 of Maputo Protocol of 2003.
[323] Art 6(c) of Maputo Protocol of 2003.

by a continued pregnancy. Notably, this is the most significant binding human rights instrument which explicitly links HIV and VAW.

There are a number of political commitments which have been adopted by the African Commission on Human and People's Rights which calls on state parties to make policy changes to effectively deal with the scourge of VAW and HIV on the African continent. Chief of which is Resolution 260 on 'Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services'.[324] The Commission defined involuntary sterilisation as a procedure void of actual or informed consent or even against the wishes of the woman being sterilised. The African Commission asserted as follows:

> '[T]hat all forms of involuntary sterilisation violate in particular the right to equality and non-discrimination; dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health; as enshrined in the regional and international human rights instruments, particularly the African Charter and the Maputo Protocol.'

The above statement is significant in that it shines the light of equality on the practice of coerced sterilisation. The Resolution calls on states to ensure that their national legal and policy frameworks embody existing ethical and international medical principles on free and informed consent regarding all medical practices, in particular concerning sterilisation and access to healthcare services for WLH.[325] It obliges states to adopt measures that ensure that WLH are not unduly pressurised to be sterilised.[326]

The Commission calls on states to investigate all claims of coerced or forced sterilisation of WLH by healthcare workers, hospitals, and policymakers responsible for such deeds.[327] It also calls on states to adopt institutional structures that allow for individual complaints by WLH who were subjected to forced and coerced sterilisation, with access to legal assistance.[328]

The African Commission has given guidance on how states may interpret article 14(1)(d) and (e) of the Maputo Protocol through this General Comment.[329] The Commission warned states to look into addressing the many forms of discrimination which were perceived to be

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[324] African Commission, 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services Banjul, The Gambia: adopted during the 54th Ordinary Session of the African Commission held from 22 October to 5 November (2013) available at *https://www.achpr.org/sessions/resolutions?id=280 accessed 21.05.2020.*

[325] Para ii of African Commission, Resolution 260 of 2013.

[326] Para iii of African Commission, Resolution 260 of 2013.

[327] Para vii of African Commission, Resolution 260 of 2013.

[328] Para viii of African Commission, Resolution 260 of 2013.

[329] African Commission on Human and Peoples' *Right General Comments on Art 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2012.

responsible for preventing and hindering women from protecting themselves and being protected by others individually and as a collective. The grounds of discrimination alluded to were: 'race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and religion'. The Commission opined that African women had 'the right to the highest attainable standard of health, which includes sexual and reproductive health and rights.'

The Commission stated that women were unlikely to enjoy their rights in the era of 'high prevalence and significant risk of HIV exposure and transmission' due to the severe limitation of the rights women to sexual and reproductive health which increased their likelihood of HIV exposure and transmission. The situation was dire for women living with HIV whose access to the rights mentioned was severely limited or denied due to HIV-related stigma and discrimination, prejudices, and other negative, harmful customary practices.[330]

The Commission stated that 'the right to self-protection and to be protected from HIV' and other sexually transmitted diseases as stipulated in article 14(1)(d) meant that women had the right to access information about 'sexual and reproductive health services' and to be educated about it. The Commission pointed out that the rights stipulated in the article were indelibly linked to other women's rights, in particular, 'equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence'. The violation of rights enumerated adversely hinders 'women's ability to access, claim and realise their right to self-protection'.

The Commission expounded on the rights contained in article 14(1)(e), namely 'the right to be informed of one's health status and the health status of one's partner'; the provision was all-encompassing so as to include pre-testing and post-testing counselling to equip women to make informed decisions about prevention and treatment. The right was applicable for all women regardless of civil status, social status, economic status, political status or health status and any other status.[331]

The Commission, in paragraph 16, stated that 'the right to be informed on the health status of one's partner is vital' as it enabled women to make informed decisions about their health, in particular when they may have been at risk of harm or infection. The Commission alluded to the importance of knowing of a partner's health status and its value for women to avoid HIV infection or transmission (including any other sexually transmitted diseases). The

[330] Ibid para 5.
[331] African Commission on Human and Peoples' Right General Comments on Art 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2012 para 15.

Commission stressed that while information was power, it was important to obtain 'information on a partner's health status' through informed consent following international standards.

The Commission urged state parties not to interfere with 'the rights to self-protection, to be protected, and the right to be informed of one's health status and the health status of one's partner'.[332] It went on to affirm that states were 'required to take measures that stop third parties' from interfering with the rights mentioned above. It further stated that countries were obligated to adopt legal, social, and economic conditions that ensured that women indeed exercised their rights as canvassed in the General Comment. Another way to ensure that women realised their rights was through the adoption of community sensitisation drives, training of stakeholders such as 'healthcare workers, religious, traditional and political leaders on the importance of the rights [enunciated] in the General Comment'.[333]

Lastly, the African Commission affirmed that states were obliged to respect, promote, protect and fulfil all the rights of women as they related to article 14(1)(d) and (e) and all necessary measures were to be employed for women to claim and realise their rights.[334] Significantly the African Commission addressed the link between VAW and HIV through setting norms and standards on women's rights, HIV, including sterilisation.[335] Resolution 260, as discussed above, dealt with the issue of sterilisation of WLH by healthcare workers head-on by postulating that sterilisation should happen with WLHs full informed and free consent.[336]

In 2017 the African Commission adopted another soft law document called the Guidelines on Combating Sexual Violence and its Consequences.[337] The Guidelines are profound in that they give countries guidance and technical support on how to effectively implement their commitments and obligations to eradicate sexual violence and its consequences in the Africa region. The Guidelines direct states to ensure that when they fulfil their reporting mandate under article 62 of the African Charter and Article 26 of the Maputo Protocol, they also put

[332] African Commission on Human and Peoples' Rights General Comments on Art 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2012 para 21.
[333] African Commission on Human and Peoples' Rights General Comments on Art 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2012 para 23.
[334] African Commission on Human and Peoples' Rights General Comments on Art 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2012 para 24.
[335] E Durojaye 'The role of the African Commission on Human and Peoples' Rights in developing norms and standards on HIV/AIDS and human rights' (2017) *Global Jurist* 4. See also Chantal Jacqueline Badul *The coerced and forced sterilisation of women living with HIV in South Africa: A critical review of existing legal remedies* (unpublished PhD thesis, UKZN, 2018) 7.
[336] African Commission, Resolution 260 of 2013.
[337] African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and its Consequences in Africa 2017.

information on measures they have undertaken, and describe progress achieved in the implementing the Guidelines. Some of the notable features of the Guidelines are the general principles and obligations of state which countries must adhere to. The stipulated principles include the non-discrimination principle, the 'do no harm' principle, and due diligence principle.[338]

The non-discrimination principle calls on states to adopt necessary measures to ensure that victims of sexual violence's rights are guaranteed at all times and may not be discriminated against based on nationality, race, colour, ethnicity disability, health and HIV status, socio-economic status or political opinion, refugee, migrant, gender including sexual orientation.[339] The 'do no harm' principle provides that countries must adopt legislative measures and all other measures to guarantee the well-being and security of victims of sexual violence and witnesses.[340] Countries are to minimise the disadvantages that actions to combat sexual violence and consequences may bring to victims and witnesses.[341] The principle on due diligence makes states responsible for the acts of agents of states and that governments must ensure the agents refrain from committing acts of sexual violence.[342]

The Guidelines further makes it a state obligation to prevent sexual violence and its consequences.[343] This must be one done through the adoption of necessary measures that would guarantee that victims are protected from subsequent perpetration of acts of sexual violence and its consequences as well grant victims all types of needed assistance. The States have a further obligation to guarantee access to justice and to leave no stone unturned in investigating and prosecuting perpetrators of sexual violence.[344] This must be done by adopting measures that will ensure that victims of sexual violence have access to justice including those in rural areas. Furthermore, the Guidelines impose a duty on states to ensure that victims of sexual violence have access to an existing effective remedy and reparations. States are to adopt legislative and other measures that would ensure that such guarantees are accessible to victims in an effective, sufficient, and timeous manner and in a cost-effective manner.[345]

Lastly, another important soft law jurisprudence from the African Commission is a General Comment which was adopted in 2020 and it is on article 7(d) of the Protocol to the

[338] African Commission on Human and Peoples' Rights, Guidelines on combating sexual violence and its consequences in Africa (2017) 17-18
[339] Ibid.
[340] Ibid, 18.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Ibid.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The General Comment addresses the issue of equitable distribution of joint property in cases of separation, divorce, or annulment of marriage. This policy document does not expressly mention VAW or HIV, however, it is worth pointing out here that the General Comment is very crucial for women in relationships where domestic violence is present who may be forced to walk away from such relationships. The African Commission was cognisant of the fact that in some countries domestic laws failed to promote and protect equal marriage for women in marriages and some restrict their rights and responsibility with marriage. It for this reason that the Commission elaborated on the protection contained in article 7(d) of the Maputo Protocol which provides that "in case of separation, divorce or annulment of marriage, women and men have the right to equitable sharing of the joint property". The Commission recommends that the article be interpreted as follows:

> *to be interpreted as the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the nonmonetary contribution of the woman to the household and the family within the context of substantive equality*.

2.3 The legal framework at sub-regional instruments

The southern Africa Development Community (SADC) is also playing a role in the elimination of VAW, having put in place the SADC Protocol on Gender and Development, which contains provisions aimed at eliminating GBV and VAW. The SADC Gender Policy compliments the Protocol.

2.3.1 Sub-regional norms on VAW and HIV

The Kingdom of Eswatini ratified the SADC Protocol on Gender and Development in 2008. Article 6 of the Protocol urges countries to ensure that all laws that discriminate based solely on sex or gender be reviewed, amended, and repealed by 2015. Also, states are called upon to pass and enforce laws and other measures to

> [E]nsure equal access to justice and protection before the law; abolish the minority status of women by 2015; eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto, and eliminate gender based violence.[346]

[346] Art 6 (1) and (2)(a)-(d) of the SADC Protocol on Gender and Development of 2008.

In article 20, the SADC Protocol talks to the issue GBV, and calls upon countries to adopt the following measures:

> [B]y 2015, enact and enforce legislation prohibiting all forms of gender based violence; and ensure that perpetrators of gender based violence, including domestic violence, rape, femicide, sexual harassment, female genital mutilation and all other forms of gender based violence are tried by a court of competent jurisdiction. [347]

The Protocol addresses the issue of HIV transmission and other sexually transmitted infections and obligates countries to review and reform laws on GBV so that they comprehensively cover issues such as 'testing, treatment and care of survivors of sexual offences.' The laws on GBV should entail ensuring access to emergency contraception, as well as access to post-exposure prophylaxis in all health institutions in the process, ensuring that the risk of contraction of HIV and other sexually transmitted diseases is severely reduced.[348]

The SADC protocol calls on countries to expedite the review and reform of criminal and procedural laws dealing with sexual offences and GBV so that gender bias can be eliminated, and in its stead, survivors of GBV should be accorded access to justice and fairness and be assured dignity and respect.[349] Furthermore, countries are obligated to ensure that social and psychological rehabilitation programmes for victims of GBV are put in place;[350] and to deal with GBV cases in a gender-sensitive environment.[351] Countries are further urged to make special counselling services available for survivors of GBV, as well as put in place legal and police units to deal with sensitive issues in a dedicated manner.[352]

Article 27 of the SADC protocol addresses HIV and AIDS in detail, calling upon countries introduce policies and programmes directed at HIV prevention, treatment, care, and support. The policies and programmes adopted must ensure that they take into account gender inequality, harmful practices as well as biological factors that make women more vulnerable and make up the majority of those affected by and infected with HIV.[353]

2.5 Unmet international norms in protecting WLH against VAW

This study found that although a signatory to international instruments that aim to '*protect women from violence'*,[354] (emphasis added) the country's obligations on the rights of women

[347] Art 20(1)(a)-(b) SADC of the Protocol on Gender and Development of 2008.
[348] Art 20(2)(a)-(c) of SADC Protocol on Gender and Development of 2008.
[349] Art 20(3)(a)-(b) of SADC Protocol on Gender and Development of 2008.
[350] Art 20(4) of SADC Protocol on Gender and Development of 2008.
[351] Art 20(6) of SADC Protocol on Gender and Development of 2008.
[352] Art 20(7) of SADC Protocol on Gender and Development of 2008.
[353] Art 27(2) of SADC Protocol on Gender and Development of 2008.
[354] Emphasis added.

and freedoms in particular, and gender equality were yet to be met. This assertion is in stark contrast to the plethora of international and national laws adopted to protect women from violence, in particular, domestic violence. Motsepe opined that the fight against the HIV epidemic was a fight against fear, prejudice, ignorance, a fight against some of the most critical violations of human rights.[355]

While international norms set the yardstick for national law to follow by adopting legislative, judicial, administrative, and any other measures deemed necessary to tackle the two mutually reinforcing pandemics, implementation of such norms has not been carried out by the state party. While the country has ratified CEDAW, the Optional Protocol to CEDAW is yet to be ratified.[356] In fact, during the 2016 UPR discussions, it was recounted that in 2011 review, it was recommended to Eswatini that it must

> 'review all national policies and legislation that violated the principle of equality and non-discrimination; abrogate legislative and regulatory provisions that discriminated against women; adopt new laws following the principle of gender equality and non-discrimination as set out in CEDAW.'[357]

Unfortunately, the country representative reported back to the Universal Periodic Review (UPR) mechanism that:

> 'no systematic national legislative and policy reform process had been established to align all laws and policies with the principle of equality and non-discrimination as stated in the Constitution, and as espoused in CEDAW by the year 2016'.[358]

This means that international human rights remain paper rights which do not apply in practice to Eswatini women. For instance, the western form of marriage provided for by the Eswatini Marriage Act of 1964 was not aligned to the equality principle of CEDAW, other international legal norms and the Constitution. The Act entrenched marital power of the husband, a notion which made married women perpetual minors, devoid of the right to deal with real property, contract, sue and be sued without their husband's consent or permission.[359] In 2019 that the High Court of Eswatini in *Sacolo v Sacolo* progressively applied the equality clause found in

[355] A V Motsepe 'Constitutional legislative and policy framework on HIV in South Africa' in A V Motsepe *HIV and the law in South Africa: a practitioners Guide* LexisNexis 2016 1.
[356] UN Human Rights Council: Working group on the Universal Periodic Review 2-13 March 2016: 'It is reported that the Committee on the Elimination of Discrimination against Women encouraged Eswatini to ratify the Optional Protocol to CEDAW, and in 2016, the state party had not complied with the recommendation.
[357] Ibid para 26.
[358] UN Human Rights Council: Working group on the Universal Periodic Review 2-13 March 2016 para 28.
[359] This position was changed in the case of *Sacolo and another v Sacolo and others u*nreported (1403/16) 2019 SZHC 166 decision of 30 August 2019 which was handed down by the Eswatini High Court.

section 20 of the Constitution to strike out the principle of marital power of the husband as being discriminatory against women.[360]

2.6 Conclusion

At the international level, there are a plethora of international legal norms in conventions, declarations, concluding observations, general comments, and resolutions promoting and protecting WLH from GBV, some directly and others indirectly. The international framework has evolved over the years from first looking at VAW as a private domestic matter to a matter worthy of international recognition. Gender-based violence is prohibited in all international instruments.

International human rights instruments are profound in that they are offer blueprints for the adoption of legal and other measures by countries for the protection of women's rights, and in dealing with issues of concern such as VAW and HIV. The national legal framework must conform to international norms. Some of the international instruments that are binding on states predate the advent of HIV and are silent on VAW. The international documents that address VAW and HIV, however, form soft law as they are not binding on states.

The international norms that are binding on states have compelled countries to adopt legal and other measures that promote, protect, and fulfil women's rights. Eswatini's Constitution abounds with egalitarian norms on gender equality despite customary laws enjoying the same status as formal law (this aspect is discussed in the next chapter).

The caveat with international law is that it is based on voluntary acceptance and application by state parties. Where states accept international norms but fail to domesticate them, then international treaty bodies are forced to comment in concluding observations against defaulting states, a form of diplomatic engagement to coerce the state to comply. Meanwhile, the citizens are faced with having to challenge laws flying against international norms through courts − an expensive way of asserting rights. In recent years the international community has come to recognise the link between VAW and the vulnerability of women to HIV and AIDS. Altogether, international human rights instruments are profoundly significant in that they are blueprints which must at the end of the day be adopted and implemented at country levels to promote and protect women from GBV.

[360] Ibid.

CHAPTER THREE
LAWS AND POLICIES PROTECTING WOMEN FROM VIOLENCE IN ESWATINI

3 Introduction

The previous chapter discussed the legal framework protecting women living with HIV from violence at an international, regional, and sub-regional level. Eswatini has shown its commitment to protecting women from violence through acceding to and ratifying many international instruments. It is yet to be established whether Eswatini's international commitment is accompanied by implementation at the domestic level of the international conventions. This chapter deals with the national legal framework and policies promoting the rights of WLH and their protection from violence in Eswatini. Despite the absence of VAW statutes, provisions of the Constitution and provisions in statutes aimed at protecting women from violence, will be discussed below. A critical analysis of the national law is carried out in chapter six of this thesis.

There are two main branches of law, i.e., civil law and the criminal law, which protect women from violence. Protection is also provided for under common law (inherited from Britain through the General Law Proclamation of 1907), various statutory provisions, Swazi customary law and court practices which have been developed over the years.

Scholars refer to the legal system of Eswatini as being dualistic in character[361] as it comprises of both 'the Roman-Dutch common law as modified by statutes and the complex set of traditional rules and practices' to which the Swazi have owed allegiance to over the years, collectively known as Swazi/Siswati law and custom.[362]

At the apex of the national laws promoting the protection of women from GBV is the Eswatini Constitution.[363] The provisions on women's freedoms and rights in the Constitution draws from the human rights norms such as found in the Convention on the elimination of all discrimination against women (CEDAW) [364] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[365] The non-d-

[361] T Nhlapo *Marriage and Divorce in Swazi Law and custom* (1992) 6. See also JH Pain 'The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland' (1978) 11 *Comparative and International Law Journal of Southern Africa* 137-167 137.
[362] Ibid.
[363] The Kingdom of Eswatini Constitution 001 of 2005.
[364] UN Convention on the Elimination of All Discrimination against Women (CEDAW) of 1979.
[365] Protocol to the African ChartHer on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003.

discrimination principle and equality principle has been embedded in the Eswatini Constitution of 2005 followed by subsequent laws such as the Sexual Offences and Domestic violence Act of 2018 as discussed below.

3.1 Constitutional protection

Section 28 of the 2005 Constitution provides specifically for the 'rights and freedoms of women', providing as follows:

> '(1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
> (2) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
> (3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.'[366]

Furthermore, section 20 of the Constitution deals decisively with the issue of gender imbalances between males and females, providing for the equality of all people before and under the law. Discrimination based on 'gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability' is outlawed.

Section 28 provides for the protection of women's rights, which is a positive step and a break with the past given that Swazi law and custom discriminates against women at many levels. The Constitution provides the blueprint or principles which must be followed by individual Acts of Parliament to give effect to the intention of the Constitution.

Section 252(2) of the Constitution recognises that Swazi customary law (Swazi/Siswati law and custom) principles are an integral part of Eswatini law. The Constitution, however, cautions that customary law that is inconsistent with the supreme law will be rendered null and void to the 'extent that it is inconsistent with a provision of the Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity'.[367]

It must be noted that even though the Constitution of Eswatini refers to the supremacy clause, in practice norms that are found to be not on a par with the Constitution and detrimental to women's rights and freedoms as it pertains to equality and discrimination are allowed to co-exist with the constitution. This prompted the CEDAW Committee to issue a Concluding Observations to the Country to expand the definition of discrimination to include marital status and sex as well as expressed its dismay over the continued use of negative cultural practices,

[366] Section 28 of the Constitution 001 of 2005.
[367] Section 252(2) of the Constitution 001 of 2005.

traditions, and patriarchal attitudes, including deep-rooted stereotypes regarding gender roles and responsibilities of women and men. [368] The practices are contrary to the provisions of the Constitution and human rights norms are discussed in the sections below under the topic 'other aspects which heighten women's vulnerability to violence'.

3.2 Protection under Civil Law

There was no specific legislation on domestic violence in Eswatini before August 2018; hence provisions from other laws were invoked to address this gap. Civil Law is mainly concerned with the rights and duties of citizens *inter se*, and courts have *inter alia* the power to order compensation or to restrain another from undertaking certain conduct or action. Women experiencing domestic violence may approach the magistrate's court for one of the two following orders: a peace binding order and an interdict. Whilst this remedy is not specifically made with women victims of violence in mind, victims do benefit from this remedy which is in line with commitment placed on countries by the Beijing Platform of action to "take measures to ensure the protection of women subjected to violence, access to just and effective remedies." [369]

3.2.1. Peace Binding Order

A peace binding order has developed as a result of court practice in the magistrate's courts, and takes the form of a legal protection order available to anyone who is experiencing problems of abuse, including violence, with an individual, in the private sphere, (such as in a dating relationship or a neighbour) or public sphere (such as a stranger, or anyone else).[370] When a peace binding order is breached, the person in whose favour the peace binding order is made may report the breach to the police and the violator may be arrested for contempt. A peace binding order may be issued only by a magistrate.

3.2.2. Interdict/restraining order

An interdict is a court order in terms of which a person is ordered either to perform or not to perform a specific act. It is sometimes known as a restraining order. The Magistrate Court Act 66 of 1938 gives magistrates the jurisdiction to grant interdicts.[371] In a case of a VAW, an interdict may be sought to prevent a person from committing a legal wrong such as an assault.

[368] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014).
[369] United Nations Fourth World Conference on Women 1995, para 124.
[370] Magistrate Courts Act 66 of 1938.
[371] S 17 of the Magistrate Courts Act 66 of 1938.

Many different wrongs can be interdicted. The common wrongs found in family law cases include violent acts, threats of violence and anything else which could place someone in 'a state of fear or distress or alarm'.[372] When an interdict is breached, the person in whose favour the order is made may alert the police, and the violator may be apprehended and presented to court for contempt.

The High Court has jurisdiction to hear all matters in Eswatini and has issued interdicts to protect women's rights, as demonstrated by the case of Unreported (93/2018B) [2019] SZSC 40 (judgment 8 October 2019) below.

3.3 Criminal law protection

Criminal law is the branch of law aimed at proscribing certain human conduct as illegal and imposing state-sanctioned punishment for the breach of the proscribed conduct or action.[373] It is made up of both common law and statutory crimes.[374] In Eswatini matters of VAW and domestic violence are mostly considered as criminal offences and are addressed by way of criminal procedure.[375] The state, through its rules and regulations enforced by governing arms like the police, is responsible for maintaining law and order in a country. Any act which is likely to disrupt law and order is deemed as a 'criminal offence that is punishable by the state'. Criminal acts affect not only the individuals but the whole society, and therefore it is the duty of the state to protect society.[376] The primary goal of any criminal case is to punish the offender by giving him/her a fine or a set number of years in isolation away from society.[377]

While this remedy is necessary for women victims of violence to have a shot at justice, the country has an obligation to ensure that criminal laws and correctional systems are aligned to be at par with international human rights law.[378] The Human Rights Committee has urged countries to regarded VAW as an offence and punishable under criminal law.[379] Another treaty that calls on countries to expedite the review and reform of criminal law dealing with GBV and sexual violence is the SADC Protocol on Gender and Development. [380]

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[372] V Jaquier & T P Sullivan 'Fear of Post Abusive Partner(s) Impacts Current Posttraumatic Stress among Women Experiencing Partner Violence (2014) 20 *SAGE* 208-227. See also Fugate, J 'Who's Failing Whom? A Critical Look at Failure-to-Protect Laws' (2001) 76 *New York University Law Review* 272-308.
[373] J Burchell *Principles of Criminal Law* 4 ed (2013).
[374] Ibid.
[375] See C R Snyman *Criminal Law*, 4 ed (2008) 3.
[376] Ibid 30.
[377] Snyman (note 377, above).
[378] UNAIDS & UNOHCHRs International Guidelines on HIV/AIDS and Human Rights of 2006 Guideline 4.
[379] Human Rights Council Resolution 7/24.
[380] Art 20(3)(a)-(b) of SADC Protocol on Gender and Development of 2008.

3.3.1 Common law crimes

The common law of Eswatini comprises of the law that was incorporated through the 'General Law and Administration Proclamation' 4 of 1907, and it provided as follows:

> The Roman-Dutch common law saves in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland. Save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall *mutatis mutandis*, and as far as they may be applicable, be in force in Swaziland.[381]

Therefore, that common law of Eswatini is the law that developed under the influence of other legal systems. Roman-Dutch law which was first transported to South Africa and then to Eswatini comprised not only the Roman-Dutch law but also Roman law and English law which is now referred to as the common law.[382] It includes judicial decisions of superior courts, otherwise known as judicial precedents, based on the interpretation of existing law.[383] Judges must base their decisions on previous cases. Examples of common law crimes which are relevant to violence against women include murder, rape, and assault.[384]

a) Murder

VAW which leads to an intentional death is regarded as murder. Murder is defined as 'the unlawful and intentional killing of another person.'[385] The conscious and deliberate decision to take the life of a fellow human being (male or female) is regarded as the most reprehensible form of homicide.[386] In Eswatini, a distinction is made between killing in the heat of the moment and planned killing which is carried out with calculated deliberation. The latter form of the crime is usually severely punished, e.g., by capital punishment while the former may attract a jail term.[387]

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[381] S 3(1) & (2) of the General Law and Administration Proclamation 4 of 1907.
[382] See art 252. (1) of the Constitution 001 of 2005 which provides that 'Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute."
[383] B Garner *Black's Law Dictionary* 8 ed West/Thomson (2004) 293.
[384] Burchell (note 375, above; 575). The author addresses the issue of crimes against the person and he opines that after life, the most important interest of a human being is in the safety, health, and well-being of that person. He points out that the oldest of the criminal *iniuriae* is that of physical harm or injury to the body of the human being.
[385] J Burchell & J Milton *The Principles of Criminal Law* 2 ed (1997) 466.
[386] Ibid.
[387] Burchell & Milton (note 387, above).

Culpable homicide, however, is the 'unlawful, negligent causing of the death of another human being'.[388] Most common instances of culpable homicide are those arising from motor vehicle collisions and the careless handling of firearms.[389] Also, physical assaults may result in culpable homicide where the victim dies as a consequence of the assault, but the assaulter neither intended nor foresaw that death would result. It must, however, be established that the conduct of the accused was the factual and legal cause of the death of the deceased.[390]

b) Rape

VAW, which is sexual in nature, is criminalised if it is perceived as rape. Rape is defined by common law as 'unlawful sexual intercourse committed by a man with a woman, not his wife, through force and against her will'.[391] This crime requires that at least a 'slight penetration of the penis into the vagina' be proved to secure a conviction.[392] Other forms of sexual assault, e.g., offences that occur with penetration of a finger, bottle or stick can never amount to the offence of rape but are regarded as the lesser offence of indecent assault (discussed below).[393]

The crime of rape in Eswatini is committed only in respect of females.[394] A man cannot be raped, and women are incapable of committing the crime of rape. Also non-consensual penetration within the sphere of marriage is not considered rape.[395] The common law states that sexual intercourse 'without consent is not unlawful where it takes place between husband and wife'.[396] This is so because by marrying the women is said to have irrevocably consented to afford the husband the marital privileges in the future.[397]

Punishment is usually at the discretion of the presiding judicial officer, depending on whether the matter is pending before the High Court or the Magistrate's Court.

[388] C R Snyman (note 377, above; 403).
[389] Burchell & Milton (note 387, above; 474).
[390] Burchell & Milton (note 387, above).
[391] Garner (note 385, above; 1288). See also Burchell & Milton (note 290, above; 487).
[392] Burchell & Milton (note 387, above; 487).
[393] Burchell & Milton (note 387, above). See also, the Swaziland Criminal Procedure and Evidence Act 67 of 1938.
[394] Burchell & Milton (note 387, above; 597) – provides that under common law rape is confide to cases of forcible sexual intercourse with a woman without her consent and the essence of the crime was the employment of force to overcome the woman's resistance. The complainant was expected to cry out to indicate her lack of consent and to lay a complaint immediately.
[395] Burchell & Milton (note 387, above).
[396] Burchell & Milton (note 387, above; 491).
[397] Burchell & Milton (note 387, above).

c) Assault

Violence against women is penalised as a crime of assault. Assault consists of the infliction of violence upon the person of another. The law seeks to prevent this; hence the definition of assault is as follows:

> Assault consists of unlawfully and intentionally applying force to the person of another or inspiring a belief in another person that force is eminent to be applied to him/her.[398]

Burchell and Milton emphasis the fundamental provision that physical force, of whatever degree, should not be applied to the body of another person.[399] Recognising that the human body is made up not only of flesh and blood but also the mind (the '*mens*'), the crime of assault punishes not only applications of force to the corpus but also the application of force to the mind. This is done by punishing as assault the causing of apprehension of fear in the mind of a person by making them believe that they are about to suffer physical harm. The crime thus protects not only the human body from wounding but also the person from invasions of the mental tranquillity of the individual.[400] Species of assault are 'common assault, assault with intent to do grievous bodily harm and indecent assault'.

i) Common Assault

Common assault is either by actually applying force to the body of a person or by acting in such a way as to make that other person believe that such force was to be immediately applied to him or her.[401] Touching of a person's body without causing bodily harm, although it may be classified as assault, it is rarely prosecuted. Common assault results when there has been force administered to the body of another person directly or indirectly.[402] Force is applied directly where the offender attacks the victim with a weapon and is indirectly when the attacker for examples sets a dog on the victim.

Common assault may further be committed through inspiring fear in another.[403] The crime may be committed by any act, gesture or words causing a belief that the attack will occur.[404] The attacker must have had an intention to assault the victim, or where the assault

[398] Burchell & Milton (note 387, above; 478).
[399] Burchell & Milton (note 387, above).
[400] Burchell & Milton (note 387, above; 478).
[401] Burchell & Milton (note 387, above; 480).
[402] Burchell & Milton (note 387, above; 481).
[403] Burchell & Milton (note 387, above; 483).
[404] Ibid.

takes the form of inspiring an apprehension of an assault, an intention to arouse the apprehension of harm must be proved.[405]

ii) Assault with intent to do grievous bodily harm (assault GBH)

This kind of assault involves serious physical injury to the body of the victim. According to Burchell & Milton, the concept of 'grievous bodily harm' implies an assault by way of the application of actual force, to the person of another, whether directly or indirectly.[406] In order for the assault to constitute GBH, the prosecution must prove intent on the part of the accused to do more than inflicting a casual and insignificant, superficial harm or injuries.[407]

iii) Indecent assault

Sexual violence against women which is not penile in nature is penalised as indecent assault. Indecent assault is defined as an assault which by nature or design is indecent.[408] Hence, indecent assault is a generic crime that covers most of unlawful, unwanted sexual encounters which are not rape.[409] The following categories of acts are punishable as indecent assaults even though some may be seen to be as traumatic and severe as penile sexual violence if not worse:

- Failed rapes, for instance when x in seeking to rape y, may not succeed in inserting his penis in Y's vagina. He does not commit rape.[410] He may be charged with attempted rape if his actions amounted to the commencement of the offence of rape. However, the touching will only attract an offence of indecent assault.[411]
- Quasi-rapes, here reference is made to the various acts which have characteristics of rape but are not punished as such due to the definitional limitation of rape.[412] Quasi-rapes occur when something else other than the penis is inserted into the vagina or where the penis is inserted into any orifice of the body other than the vagina, and these cases are always treated as indecent assault.[413]
- Molestation, by the touching or fondling of persons in an indecent (which means sexual) manner may constitute the offence of indecent assault.[414]

[405] Burchell & Milton (note 387, above; 483).
[406] Burchell & Milton (note 387, above; 485).
[407] Burchell & Milton (note 387, above; 486).
[408] Burchell & Milton (note 387, above; 501).
[409] Ibid.
[410] Burchell & Milton (note 387, above).
[411] Burchell & Milton (note 387, above).
[412] Ibid, para 3.4.1 (b).
[413] Burchell & Milton (note 387, above).
[414] Burchell & Milton (note 387, above).

The crime of indecent assault is, thus, directed at those who seek by touching to engage another party in erotic activity without the consent of the other person.[415] It usually involves the touching of the private parts of the other person. It is also directed at those who may apply force or inspire fear by threats or conduct such that the victim has the apprehension that such force is imminent.[416] The offence of indecent assault generally attracts a lesser punishment than rape − usually a fine or imprisonment at the discretion of the judicial officer.

d) Crimen injuria

Crimen injuria is a common law offence which is recognised in Eswatini. It is defined as the 'intentional, unlawful impairment of the dignity or privacy of another'.[417] The offending conduct, includes emotional or psychological abuse. The essential elements of the crime include intentional and unlawful impairment of another's dignity. The impairment must be serious, as the law is not concerned with trivialities according to the maxim '*de minimis non curat lex.*'[418] Sentences for common law convictions are at the discretion of judicial officers; however, if the accused is a first offender, the sentence will probably be suspended.

It must be noted that since, many HIV positive women were concerned that other members of the community were emotionally abusing them by insulting using their HIV status, the offence of Crimen Injuria, deal with a conduct where one emotionally injures another. It can be used to address VAW in relation to emotional abuse.

3.3.2 Statutory law

Statutory law is a law passed by a legislative body. In Eswatini Parliament is the body which is entrusted with the duty to enact legislation and the legislation they enact is known as statutes.[419] The power to make laws in Eswatini 'vests in the King-in-Parliament'.[420] For a Bill to become law, it must be passed by both chambers of Parliament and assented to by the King under his own hand.[421] Therefore, a Bill passed by both chambers of Parliament will not become law 'unless the King has assented to it and signed it in token of that assent'.[422]

Discussed below are some of the legislation/statutes which protect women from gender-based violence and or violence against women. Some are specific, like the Girls and Women's

[415] Burchell & Milton (note 387, above; 502).
[416] Burchell & Milton (note 387, above; 503).
[417] Burchell (note 375, above; 632).
[418] Ibid.
[419] S 93 of Constitution 001 of 2005.
[420] S 106 of Constitution 001 of 2005.
[421] S 107 of Constitution 001 of 2005.
[422] S 108 of Constitution 001 of 2005.

Protection Act of 1920, Sexual Offences and Domestic Violence Act of 2018 and the Crimes Act of 1889 as discussed below.

a) The Girls and Women's Protection Act

This statute aims to protect women from sexual violence and criminalises certain aspects of VAW, which are sexual in nature. It serves to punish perpetrators and deter would-be offenders. Some of the conduct proscribed includes statutory rape and sexual relations with females with intellectual impairments.

i) Statutory rape

Statutory rape is defined in the above Act as 'unlawful sexual intercourse with a person under the age of consent' (16 as defined by the statute), regardless of whether it is against that person's consent.[423] It was promulgated to protect younger women below 16 years of age from sexual exploitation. The Act states that 'every male person who has an unlawful carnal connection with a girl under that age of sixteen years or who commits with a girl under that age immoral or indecent acts or who solicits or entices a girl under such age to the commission of such acts shall be guilty of an offence and liable on conviction to imprisonment not exceeding six years with or without whipping not exceeding twenty-four lashes and with or without a fine not exceeding one thousand emalangeni in addition to such imprisonment and lashes.'[424]

ii) Sexual exploitation of mentally impaired females

The Girls and Women's Protection Act further protects women with mental impairments from sexual exploitation by men. The Act makes it an offence for any person to have or attempt to have 'carnal connection' with a mentally challenged woman. The offence carries a sentence an imprisonment term of six years which may be accompanied by 24 strokes of whipping and a fine not exceeding one thousand emalangeni.[425] However, this Act has been repealed by the SODV Act of 2018.

b) Sexual Offences and Domestic Violence (SODV) Act of 2018

The SODV Act criminalises all forms of violence, such as domestic, IPV, and sexual violence. The notable feature of this Act is that it reviews, and reforms legislation passed before it, by

[423] Garner (note 385, above).
[424] S 3(1) of the Girls and Women's Protection Act 39 of 1920.
[425] Eswatini's currency's name which is equivalent to the South African rand in value.

providing a normative framework that is aimed at curbing domestic violence and sexual offences holistically. The Act came about as a response to public outcry over the prevalence of domestic and sexual violence offences against women and children which was viewed as a contributing factor into the high prevalence of HIV among adolescent girls and young women the kingdom.[426] The SODV Act expands the definition of violence in line with international norms as any act that physically, sexually, emotionally, economically, verbally or psychologically abuses another person, including acts of intimidation, harassment, unlawful stalking or damage to property and controlling abusive behaviour.[427] The Act is revolutionary in that it criminalises sexual harassment, stalking (acts which predominately lead to VAW) and by striking down the defence available to married men in a charge of marital rape. It is the first law to make provisions for protection orders in cases of domestic violence,[428] and the establishment of domestic violence courts at the magistrate's court level.[429] It remains to be seen whether there will be a holistic implementation of the Act, to afford appropriate protection to victims of violence. It has been shown in other countries, such as South Africa, that the coming into force of domestic violence legislation does not translate into action and fails offer women the intended protection.[430]

c) The Crimes Act

The Crimes Act 6 of 1889 prohibits the sexual exploitation of women by proscribing offences that have to do with immorality and offences that are carried out in public places such as a public resort.

3.4 Customary law

Customary law refers to siSwati (Swazi) Law and Custom whose origins lie in the habits or traditions of the Swazi nation. It is mostly uncodified and unwritten; customs are developed into law by repeated usage and observance.

International and regional human rights instruments protect the right to culture, tradition and custom for women amongst others, the Committee on Economic, Social and Cultural Rights notes that in some countries, women still 'occupy a subordinate role in society' and that

[426] Hlanze & others (note 197, above; 155).
[427] S 77(1) of the SODV Act of 2018.
[428] S 78-103 of the SODV Act of 2018.
[429] S 126 of the SODV Act of 2018.
[430] R S Mogale, K K Burns & S Richter 'Violence against women in South Africa: Policy position and recommendation' (2012) 18 *SAGE* 580-594. See also Gadinabokao Keaorata, *Shortcomings of the South African Domestic Violence Act 116 of 1998 in comparative perspective* (unreported LLM dissertation University of Pretoria 2016).

discrimination and VAW are serious social problems affecting women's enjoyment of their social, economic, and cultural rights.[431] The Maputo Protocol urges countries to change and amend through public education and other strategies such 'social and cultural norms or patterns of conduct of women and men' so that harmful cultural practices can be eliminated, especially the idea that males are superior to women.[432]

The Swazi Court Act of 1950 established the Swazi Courts (customary courts) which operate at regional level.[433] These courts have jurisdiction to hear matters concerning Eswatini nationals whose lives are guided by customary law.[434] In these courts, legal representation is barred, and the language used in proceedings is siSwati. The courts are mandated to hear matters relating to minor criminal matters; however, in practice, the police may refer domestic violence matters even though perceived in this study as serious, to these courts.[435] The Swazi Court Act directs presiding officials to issue sentences that fit the crimes. These courts are barred from hearing matters touching upon civil marriages or matters on witchcraft or divorce. In practice, however, the courts have presided over serious matters of domestic violence in which they have handed down derisory fines and sentences. In practice, some studies have found that the courts appear to favour men on whom they impose lenient punishment, especially in cases of domestic violence.[436]

3.5 Other aspects of the law which heighten women's vulnerability to violence

Often the law may unintentionally set norms of acceptable behaviour regarding VAW, particularly the laws which govern women in relationships, particularly aspects of family law which heighten women's vulnerability to GBV. However, this study reviews both common law and customary law aspects of family law to ascertain whether they play a part in increasing VAW.

Some issues include the age of marriage, minority status of women, polygamy, and inheritance. The international standard when it comes to marriage is found in article 6 of the Maputo Protocol where countries are obliged to adopt legal and other measures to ensure the equality of men and women in marriage, equal partnership with equal rights and entitlements.

[431] Chapman (note 254, above).
[432] Art 2(2) of Maputo Protocol of 2003.
[433] The application of Swazi Law and Custom is sanctioned by 252(2) of the 2005 Constitution, which provides that the principles of Swazi Law and Custom are recognised and adopted and shall be applied and enforced as part of the law of Swaziland.
[434] M Langwenya *Swaziland Justice Sector and the Rule of Law* (2013) 146.
[435] Ibid.
[436] Langwenya (note 436, above; 147).

Also, countries are to fix the age of marriage 18 years and monogamy should be preferred according to the Maputo Protocol. [437]

With regards to violence, the CEDAW Committee through a Concluding Observation advised Eswatini to deal with the problem of under-reporting of VAW due to the perceived culture of silence and impunity. [438]

3.5.1 Marriage

Marriage in Eswatini is an important rite of passage which is founded on family ties, which makes it a social process as much as it is a legal process, especially under Siswati custom.[439] According to Nhlapo, marriage in the country seeks to create a solid bond between two clans in negotiations which leads to the wedding ceremony of the two intending spouses.[440] There are two sets of laws that govern the conclusion of a marriage in the country, namely the Marriage Act 47 of 1964 or customary rules.[441] Both laws are recognised as valid, which may result in contradictions where spouses undergo both regimes of marriage.

a) Obedience laws – the husband's marital power

The common law confers a minority status on women upon marriage. This status is sanctioned by section 25 of the Marriage Act, which stipulates that the husband's marital power is an incident of a marriage in community of property.[442] Marital power is

> the right of the husband to rule over and defend the person of his wife, and this includes the right to administer her goods, dispose of them at his own will, and to prevent his wife from dealing with her own goods except with his knowledge and consent.[443]

In essence, it refers to the husband's administrative powers over the marital property as well as control over his wife's person.

A wife married in community of property cannot enter into a contract without her husband's consent − her husband has to approve such a contract. The husband acquires the decisive say in all matters concerning the common life of the spouses, and she is rendered a minor equivalent to those under the majority age, in consequence of which he represents her in court in all civil matters. The absolute power given to husbands is sometimes misused to the

[437] Art 6(c) of Maputo Protocol of 2003.
[438] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014) para 20.
[439] Hlanze & others (note 197, above; 76). See also Nhlapo (note 363 above; 44).
[440] Nhlapo (note 363, above; 44).
[441] Nhlapo (note 363, above; 28).
[442] Marriage Act 47 of 1964.
[443] J Wessels *History of the Roman-Dutch Law: Marriage and Divorce* (1908) 450-453.

extent that husbands chastise their wives or interfere with their freedom by prescribing where she may or may not go, what she may read, eat, do, or dress. This position persists in customary law, but for civil law marriages, the decision of *Sacolo v Sacolo*.[444] held that

> the doctrine of marital power is discriminatory against married women and offends against the constitutional right to equality before the law and the right to dignity, and therefore declared invalid.[445]

In this case, the parties were husband and wife and married in community of property in terms of the Marriage Act 67 of 1964.The facts were that Mrs Sacolo sought to terminate the entire concept of marital power which allowed husbands the sole discretion to administer matrimonial property. The suit emanated from Mrs Sacolo's frustration after she bought ten cows which were registered in her husband's name since she was married in terms of community of property and the husband was the administrator of the joint estate. He then sold certain of the animals without informing the wife and without sharing the proceeds. The husband had frequently refused her requests to sell part of the livestock she had bought to meet the children's academic needs as well as the family's needs. Mr Sacolo refused the requests despite having sold a number of the beasts even though he had moved out of the matrimonial home.
She sought the following orders:

- Declaring the common law doctrine of marital power to be unconstitutional in so far as it was inconsistent with Section 18, 20 and 28 of the Constitution of Eswatini Act No. 1 of 2005.
- Declaring that section 24 and 25 of the Marriage Act of 1964 are unconstitutional and invalid in that they were inconsistent with section 20 and 28 of the Constitution of Eswatini.
- Declaring that spouses married in terms of the Marriage Act of 1964 and in community of property have equal capacity to administer marital property.
- That the first applicant was authorised to administer the marital assets accruing to her marriage with the first respondent.

The court referred to two landmark cases (cited below) as providing the 'much-needed watershed'[446] regarding women's rights in Eswatini. The court observed that these cases dealt with specific instances and did not address the main challenge, which was marital power vested in men. The court further adverted to the prejudice endured by women which included not being able to deal with the marital property despite contributing to the common pool of assets.

[444] Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law − Eswatini v Jukhi Justice Sacolo (1403/16) 2019 SZHC 166 (30 August 2019) (hereafter the *Sacolo v Sacolo*).
[445] *Sacolo v Sacolo* para 2.
[446] *Sacolo v Sacolo* para 10.

The court acknowledged that this practice had been abused over the years and was a continuing source of tension in marital relations.

The Court decided that it 'was not fair that women must put in place certain measures in order to attain equality',[447] especially since husbands did not have to take this legal step to preserve their right to equality. The court ruled that such violated the right to dignity of women which embraced 'human value and the requirement to respect others.' Mlangeni J further asserted that:

> [L]ife without dignity is like a sound which cannot be heard. Dignity speaks . . . . It is a combination of thought and feeling . . .. It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.[448]

The court made the following orders:

1. Common law marital power is hereby declared unconstitutional on the basis of being discriminatory against married women.
2. Spouses married in terms of The Marriage Act 1964 and in community of property have equal capacity and authority to administer marital property.

Before the 2019 decision, two cases had been brought before the Eswatini High Court, challenging certain aspects of the principle of marital power.[449] The decisions in these cases had chipped away at the marital power of the husband in respect of standing before courts unassisted (*locus standi*) and women's rights to property registration, paving the way for the *Sacolo* decision. It must be noted that the marriage type in the case of *Sacolo* is the western type and the court nullified marital power under the western form of marriage, whereas marital power under customary law remains intact.

In 2010 in the case of *the Attorney General v Mary Joyce Doo Aphane,* Civil Appeal case 12/2010 Doo Aphane and her husband, Michael Zulu, bought a piece of land in the capital, Mbabane, and tried to register it in both their names. Aphane had continued to use her maiden name after their wedding and as they were married in community of property where all their property is combined in a joint estate regardless of whether it was acquired before or after the marriage and regardless of how much each one contributed she believed that she had the right to have her name and her husband's on the title deed. But she didn't or not according to the office of the Registrar of Deeds, which informed them that the property could only be registered

[447] *Sacolo v Sacolo* para 15.
[448] *Sacolo v Sacolo* para 16, the judge quoted Leburu J. in *Letseletsw Motshidiemang v Attorney General & others* (unreported case) MAHGB -000591-16, 11 June 2019.
[449] *See The Attorney General v Mary Joyce Doo Aphane*, unreported civil appeal case 12/2010 and *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* unreported High Court case No. 470/2013 A. available at https://swazilii.org/sz/judgment/high-court/10/29 accessed 04.10.2018

in the name of Michael Zulu in accordance with Section 16 (3) of the Deeds Registry Act, 1968.[450] This provision is based on Swaziland's common law, which still adheres to the view that a woman married in community of property is under the marital power of her husband.

She went to court claiming the right to be treated in the same way as her husband rather than being regarded as an appendage as a minor who cannot exercise adult rights.[451] The High Court of Swaziland ruled in favour of Aphane. However, on appeal, the Supreme Court upheld the appeal. It also upheld the spirit of the original decision by declaring Section 16 (3) of the Deeds Registry Act invalid because it is inconsistent with sections 20 and 28 of the Constitution. But it then suspended this declaration of invalidity for 12 months to give parliament time to pass a law to amend the unconstitutional section. The Supreme Court also authorised the Registrar of Deeds to register an immovable property in the joint names of husbands and wives married to each other in community of property while parliament was working on the new legislation.

The effect of this case on the status of married women was criticised by Langwenya,[452] who stated that the judgment did not deal with the legal position establishing the minority status of women nor did it address the common law position of marital power. Even after this case, it is still a legal requirement for women, unlike men, to disclose their marital status when they want to register property.

While in 2013 in the case of *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* challenged was the concept of marital power in so far as the discrimination of women to administer matrimonial property is concerned and the husband retaining the power to administer the matrimonial possessions.[453]

The facts were that the wife made an application to the court to have her husband removed as administrator of the joint property as a result of the husband's alleged mismanagement of the estate. The Constitutional question arose after the husband challenged his wife's capacity to institute legal proceedings without his assistance. The court looked at the concept of marital power in light of section 20 and 28 of the Swaziland Constitution of 2005 on equality before the law and rights and freedoms of women respectively.

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[450] Ibid.
[451] Ibid.
[452] M Langwenya, *Historic step towards equality for Swazi Women: An analysis of Mary Joyce Doo Aphane V Registrar of Deeds* (2012) 8.
[453] *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* (unreported) (470/2013A) [2013] SZHC 144 (18 July 2013) and *Nombuyiselo Sihlongonyane vs Mhloli Joseph Sihlongonyane & Another* (unreported) (470/2013) [SZHC207] (19th September 2013).

The court relying on the case of *the Attorney General v Mary Joyce Doo Aphane*, Civil Appeal case 12/2010 held that:

> marital power unlawfully and arbitrarily subordinates the wife to the power of her husband and was unfair discrimination based on sex or gender since it adversely affects women who have contracted a civil rites marriage in community of property with no ante-nuptial contract.[454]

The court further observed that, whilst it is accepted in common law that a married woman who is subject to the marital power may approach the court for leave to sue without the aid of her husband, such notion or concept is discriminatory of such women in so far as it applies to such class of women and not men. The court observed as follows:

> A married man does not, under any circumstances, have to apply for such leave and therefore this common law requirement constitutes unfair discrimination.

Notwithstanding this observation, the court did not entirely abolish the common law position of marital power. It confined itself to the issue of women's capacity to institute and defend legal proceedings without the assistance of their husbands. As things stood back then, husbands retained their common law status of being sole administrators of their matrimonial properties, until the Sacolo decision which changed all of this.

b) Marital rape

The human rights normative framework requires that marital rape must be criminalised. For instance, the Human Rights Committee (HRC) has remarked that the state parties should adopt necessary measures to combat VAW, in particular marital rape, while ensuring that VAW is regarded as an offence and punishable under criminal law.[455] Also, the Declaration the Elimination of All Discrimination Against Women provides in article 2 that VAW includes among other things marital rape.[456] In a Concluding Observation to Eswatini, the CEDAW Committee called on the government to enact a comprehensive legal framework that would specifically combat marital rape and sexual harassment among other things. [457]

[454] See paragraph 24 of the decision.
[455] Bogecho (note 240, above).
[456] UN Declaration on the Elimination of Violence against Women of 1993.
[457] UN CEDAW Committee Concluding Observations on the combined initial and second periodic reports of Eswatini fifty-eighth session (30 June-18 July 2014) para 20.

The Eswatini's common law views a husband's sexual intercourse with his wife without her consent as not unlawful, on the ground that by marrying the woman irrevocably consents to afford the husband marital privileges.[458] The law imposes a duty on the wife to stay with her husband, and any third party who interferes with that duty commits a wrong against the husband for which he can recover damages.[459] Married women are thus vulnerable as they cannot deny their husbands conjugal rights as the offence of marital rape is not yet recognised in Eswatini. This is an unfortunate and erroneous state of affairs as abusive husbands who force their wives into sexual intercourse enjoy legal immunity.

Under customary law, there is the payment of lobola upon marriage, loosely defined as the transfer of cattle as payment by the groom's family to the bride's family. According to Nhlapo, lobola should be given to the male members of the clan or fathers, and never to female members of the family or mothers of brides.[460] The author argues that lobola serves to 'compensate the wife's family for raising and educating her, and it also transfers her reproductive capacity to her husband's family'.[461] This is interpreted to mean that husbands own their wives' wombs as much as unlimited sexual privileges; and women are advised not to withhold sexual privileges of their husbands. However, the new SODV Act of 2018, despite not criminalising marital rape, removes the common law defence of irrevocable sexual consent by the wife to conjugal rights once married. The Act provides as follows:

> 'A marital or other relationship, previous or existing, shall not provide a defence to any offence under this Act.'[462]

The judicial interpretation of the Act will determine the extent to which VAW is tackled in Eswatini, thus providing access to justice to victims of violence. Other offences which the SODV Act makes provision for are rape, incest, sexual assault, prostitution, flashing, Stalking Sexual harassment, and domestic violence. It provides protection orders for those affected by domestic violence.

c) Grounds for divorce

The Roman-Dutch common law provides two grounds for divorce in civil marriages, adultery, and malicious desertion.[463] It does not address issues such as cruelty, neglect, or violence;

[458] Marriage Act of 47 of 1964 and the duties of wife under common law.
[459] See the case of *Dlamini v Dlamini* High Court civil case 34 of 1987 where Rooney J held the right of action should also be available to the wife.
[460] Nhlapo (note 363, above).
[461] T W Bennett *Customary Law in South Africa* (2004) 221, 224, & 226.
[462] S 151 of the SODV Act 2018.
[463] H. R. Hahlo *The South African Law of Husband and Wife* 4 ed (1975).

hence women who find themselves in violent relationships after marriage may be forced to remain married. Since domestic violence is not a ground for divorce, more often than not the death of women at the hand of their spouses gains only a mention in the print media.

Customary law does not provide for a formal divorce process on the view that 'there is no divorce in Eswatini law and custom'.[464] However, there are informal ways to put a customary marriage to an end by way of annulment – an extremely cumbersome way to accomplish dissolution of a marriage. Nhlapo cautions that 'Swazi tradition does not accept divorce in the Western sense'.[465] Women are most affected, as unhappy husbands can bypass the restriction by engaging in polygamy.[466] They can marry a second wife and pay no further attention to the first wife with whom they were unhappy. The prohibition of divorce under custom disproportionately affects women as they 'are the ones tied to unfulfilling and harmful relationships.[467]

d) Polygamy

Polygamy is a cultural practice that allows males to marry more than one wife.[468] Swazi/siSwati law and custom recognise polygamy as an acceptable form of marriage arrangement. Nhlapo posits that at times the marrying of an additional wife puts an end to the care and support of the first wife.[469] The act of marrying and moving on with somebody new could signify a substitute for divorce; thus, the first wife is rendered destitute and divested of her husband's affections.[470]

Under the Roman-Dutch common law, polygamy is penalised as the offence of bigamy. The 1964 Marriage Act prohibits people who are already married to marry. Section 7 of the Act renders civil marriages monogamous, stipulating that:

> No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy: provided that nothing contained in this section shall

[464] T Ezer, A Glasford, E Hollander, L Poole, G Rabenn, & A Tindall 'Divorce Reform: rights protections in the new Swaziland' (2007) 8 *The Georgetown Journal of Gender and The Law* 886.
[465] Nhlapo (note 363, above) 100.
[466] A K Armstrong & T R Nhlapo *Law and the other sex: the legal position of women in Swaziland* (1987) 46.
[467] Ibid.
[468] Hlanze & others (note 197, above; 76).
[469] R T Nhlapo 'The legal situation of women in Swaziland and some thoughts on research' in Julie Stewart & Alice Armstrong (eds) *The Legal Situation of Women in Southern Africa: Women and Law in Southern Africa* (1990) 11, 97 & 129.
[470] Ibid.

> prevent parties married in accordance with Swazi law and custom or other rites from re-marrying one another in terms of this Act.[471]

The law also provides for marriages by both civil law and customary rites, usually by way of a marriage in church followed few years later by the full customary ceremony.[472] This position juxtaposes the paradox of the duality of the legal systems as it is common for women who are adequately married under common law, to appropriate some of the rituals associated with customary marriage in order for them to overcome their 'incompleteness and illegitimacy' in terms of the sociocultural environment in which customary marriage carries more value. In some instances, the bride insists on customary rituals to seek greater acceptance from her in-laws.[473] In performing the customary marriage rituals (i.e. smearing herself with red ochre) after a civil marriage, a woman appropriates the obligations and vulnerabilities inherent in a customary union.[474] This means the male acquires the privileges and[475] values inherent in a customary marriage and also has a valid carte blanche to marital infidelity (or polygamy).[476] This contradictory status means bigamy is very difficult to prosecute.[477] A marriage cannot be both monogamous and polygamous at the same time.[478] In such instances, the husband's involvement with other women is often justified by the 'open-endedness' of the siSwati customary marriage, and the rule requiring monogamy in a civil marriage is often forgotten.[479]

Nhlapo advances Poulter's (1979:40) argument to resolve this conflict,[480] suggesting that a dual marriage would be monogamous 'not because of any inherent superiority of monogamous marriage over polygamy or of the received law over customary law' but because the rules under each system are not of equal effect.[481] The common law forbids polygamy: SiSwati/Sesotho law allows it but does not positively require it. 'It can, therefore, be argued that the weaker permissive rule has to give way in the face of the mandatory prohibition'[482] The HIV/AIDS pandemic demands responsive laws end men's carte blanche privilege to marital infidelity which put women at a higher risk of infection with HIV/AIDS.

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[471] S 7 (1) of the Marriage Act 47 of 1964.
[472] R T Nhlapo (note 363, above).
[473] Hlanze & others (note 197, above; 90).
[474] Ibid.
[475] Hlanze & others (note 197, above)
[476] Hlanze & others (note 197, above).
[477] Nhlapo (note 363, above; 30-34).
[478] Nhlapo (note 363, above; 30).
[479] Hlanze & others (note 197, above).
[480] Nhlapo (note 363, above; 36).
[481] Ibid.
[482] Nhlapo (note 363, above).

e) Proprietary consequences of marriage

The human rights standard as stipulated by the African Commission on Human and Peoples' Rights through 2020 General Comment on article 7(d) of the Maputo Protocol is that in case of separation, divorce or annulment of marriage, women and men must have the right to equitable sharing of the property. Countries are to adopt measures that will ensure that an excess of half of the marital property is apportioned to a woman in recognition of unequal enjoyment of property rights and nonmonetary contribution she makes to the household.

Eswatini entrenched the common law marital power of the husband in 1964 through the promulgation of the Marriage Act.[483] As a consequence, where a couple were married by civil rites and in community of property including profit and loss, the wife would automatically fall under the husband's marital power which meant she was under the guardianship of her husband, creating an imbalance of power and *de jure* dependency.[484] Her lack of capacity implied that she could not, without her husband's consent, alienate or encumber property, whether her own or belonging to the joint estate; enter into contracts or other legal transactions or hold an office such as trustee or director of a company.[485] The wife also had no *locus standi in judicio* to sue and be sued in her own name. The husband had to represent her, otherwise the proceedings would be null and void.

Also, the registration of landed or immovable property (such as title deed houses of the matrimonial home) could only be registered in terms of the Deeds Registry Act of 1968 in the husband's name. A civil marriage is presumed to be in community of property until the contrary is proved. Sections 24 and 25 of the 1964 Marriage Act purport to import certain aspects of traditional /customary culture into a civil marriage, providing as follows:

> The consequences following from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, unless both parties to the marriage are Africans in which case subject to the terms of section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi Law and Custom.

Section 25 (1) provides:

> If both parties to a marriage are Africans the consequences following from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnisation of the

[483] S 24 of the Marriage Act 47 of 1964 provides that 'The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of Section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom.'
[484] Nhlapo (note 363, above; 40-4).
[485] Hahlo (note 465, above).

> marriage the parties agreed that the consequences following from the marriage shall be governed by the common law.

Section 25(2) stipulates that 'if the parties agree that the consequences following from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register the fact of the agreement; and the production of a marriage certificate, original or duplicate marriage register so endorsed shall be prima facie evidence of the fact unless the contrary is proved'.

A marriage out of community of property entails that the signing of an antenuptial contract (ANC) by the spouses before the solemnisation of the marriage. An ANC enables the spouses to opt-out of the normal consequences of civil marriage, such as the regulation of the marriage by customary law and marital power.[486] The ANC varies the proprietary consequences of the marriage, excluding community of property, in which case each spouse retains the property which he/she had before entering into the marriage.

Proprietary consequences of a civil marriage are, according to section 25, regulated in terms of traditional/customary law if the parties are African. A customary law marriage recognises neither community of property nor antenuptial contract,[487] but is based on male ownership and patrilineal succession.[488] Women, in particular, married women, can own and pass on only small items of property, and generally, all property in a household is held in the name of the head of the family. It is also argued that the earnings of a wife and any property acquired by her through her own industry falls into the estate, as there is no law which, with certainty, gives this right to women.

3.5.2 Succession and inheritance

Death is an unavoidable rite of passage which signals the end of life on earth, but it is viewed differently in Swazi traditions as a continuation of life away from the earth, in the world of ancestors.[489] In terms of Eswatini law and custom, death does not necessarily dissolve a marriage.[490] A death of one spouse 'simply ushers in a new phase of the relationship' between the families of the spouses who, after all, were the parties to the marriage contract.[491] Once a Swazi woman is married and smeared with red ochre, she must perform certain functions for

[486] See section 25 of the Marriage Act 47 of 1964.
[487] Nhlapo (note 363, above).
[488] Nhlapo (note 363, above).
[489] Hlanze & others (note 197, above; 81).
[490] Ibid.
[491] Ibid.

her husband for the rest of her life, including customary mourning as his widow.[492] There are rituals which by Swazi law and customs must be undertaken by women to mark the passing on of their husbands, and it includes *Kuzila*-wearing of black mourning gowns; *Kugenwa*- levirate, and *indlalifa*-heir.

a) Kuzila (mourning)

According to Hlanze, widowhood rites associated with wearing black and observing periods of mourning are difficult to override because, in most instances, the extended family and in-laws have roles to play in determining issues of property inheritance as well as cleansing rites.[493] Hence, widowhood not only reflects a condition of loss, but it thrusts a woman into a new maze of relationships that are critical to her future well-being as well as social status.[494]

Kuzila is a cultural practice where 'a woman is expected to mourn the death of her husband for a period of 2 to 3 years'.[495] A widow is associated with a bad omen (*sinyama*) as a consequence of the death of her husband irrespective whether she was complicit in his death.[496] During the mourning period, a widow is removed from economic activities and in most instances without any provision of alternatives for making a living. They are not allowed to cultivate their fields when they are still in black, and they are dependent on relatives to do that.[497] A widow is therefore expected to keep a low public profile and should be visibly dressed in black. Widows cannot be seen in public gatherings and cannot go to royal residences as well as the chiefs' kraal because of *sinyama* − a bad omen. This creates loneliness, and they tend to have forbidden relationships with men who will comfort them in many ways, including sexually. In this way, the widow may be infected with the virus if she is HIV negative or spread the virus if she is already infected.[498]

Once the mourning period is over, widows are expected to take part in a ceremony where the in-laws officially remove the mourning gowns from the widow's body, and she is expected to consider marrying one of the husband's brothers under *Kungenwa*.[499]

b) Kungenwa (Levirate)

[492] Nhlapo (note 363, above; 117).
[493] Hlanze & Others (note 416, above) 85.
[494] Ibid.
[495] Hlanze & Others (note 197, above).
[496] Hlanze & Others (note 197, above).
[497] Hlanze & Others (note 197, above).
[498] Hlanze & Others (note 197, above).
[499] Nhlapo (note 363, above).

Under civil marriage, the death of one spouse terminates a marriage and releases the surviving spouse to remarry whoever he or she likes. SiSwati law and custom permits levirate marriage, a process by which one of the late husband's male relatives inherits the widow i.e., marries her. The family council settles the issue of whether the custom of the levirate should be invoked, whereby the relative of the deceased, usually a brother or half-brother is chosen to cohabit with the widow.[500] Nhlapo opines that upon the widow's consent[501] she accepts the levirate, staying on as part of the household, and if there are any children born, they belong to the deceased, not the levirate partner.[502] The custom serves as a means of providing for the widow and her children − social and material support after the death of her husband and 'father', who may have been a breadwinner in the home. Widows who refuse to participate in this custom are deprived of support.[503]

McFadden observed that the levirate or wife inheritance practice is the most extreme expression of the absence of the concept of respect for the personhood of the female in the society in which they live. Other related practices like arranged marriages buttress this practice; the practice of bringing a younger sister to the marriage home in case the bride is infertile is among other practices, all of which speak loudly to the issue of gender inequality and the absence of the recognition of women's rights in general. This concept is intimately related to the concept of bodily integrity, and the absence of this lies at the heart of the struggle for gender equality in all societies.[504]

The levirate – wife inheritance practice –violates the widow's rights as argued above by McFadden, and it increases vulnerability to HIV as they she be infected in the process or be re-infected.

c) Inkhosana/heir

The law regulating succession and inheritance under common law in Eswatini is governed by the Intestate Succession Act 3 of 1953, the Administration of Estates Act 28 of 1902, the Wills Act of 1955 and Eswatini law and custom. Here discussed are the consequences of inheritance under Swazi law and custom. An Eswatini woman normally moves to her husband's parental home upon marriage – as would be expected in a patriarchal society.[505] Nhlapo records that

[500] Nhlapo (note 363,, above; 76).
[501] Nhlapo (note 363,, above).
[502] Nhlapo (note 351, above).
[503] Hlanze & Others (note 197, above).
[504] P McFadden 'Sex, sexuality and the problems of AIDS in Africa' In: Meena R, (ed) *Gender in Southern Africa: Conceptual and theoretical issues* 1992.
[505] Women and Law – Swaziland (note 179, above; 71).

when the husband dies, the family council (*lusendvo*) will call a meeting to select an heir to the estate.[506] In essence, custodianship of the deceased's estate passes to the eldest son or a similarly designated male person who assumes the role of executor or family trustee (*Inkhosana*).[507] Men are the heads of the family and the household, with the power to make all decisions and control all assets and property.[508] Through this principle of primogeniture, the subservient social position of women is cemented in rural communities, where it is estimated that about 70 per cent of women live.[509] Female siblings are barred from inheriting from their fathers based on their gender, and married women, though they migrate to the husband's home, are considered outsiders in their matrimonial homes, deprived of the inheritance that is due to them once their spouses die.[510]

WLSA has over the years reported cases of property grabbing from widows by in-laws as a problem needing attention.[511] Selfish trustees − *Inkhosana* are recorded as having squandered the deceased's estate for their own benefit at the expense of the widow and her 'orphans'.[512] The case of *Zodwa Kunene and WLSA-Swaziland v Chief Prince Jabhane and others, Minister of Constitutional Affairs & Attorney General* underlines the impact of the practice of primogeniture on women.[513] The facts were that Kunene's parents died together with her five siblings.[514] She was living in her parental home with her children. One of the male siblings of Kunene was survived by a male child, Kunene's nephew, and they were staying in Kunene's late parents' home. Kunene stated in court papers that the Chief's Council informed her that her parents' home belonged to her nephew; he was the heir, and she must vacate the homestead with immediate effect. As she had nowhere to go she challenged in court the customary practice of male primogeniture's as being inconsistent with the Constitution in light of the right to dignity,[515] equality, freedom[516] and rights of women.[517] However, this case was

[506] Nhlapo (note 363 above; 75).
[507] Hlanze & Others (note 197, above; 85).
[508] Nhlapo (note 363 above; 75). Nhlapo surmises that when the head of a household (husband) dies, the family council (*lusendvo)* meet to choose an heir to the estate.
[509] Central Statistical Office, population, and housing census 2007.
[510] Women and Law in Southern Africa– Swaziland (note 179, above).
[511] Ibid. See also, Women and Law in Southern Africa – Swaziland *Family in Transition: The Experience of women in Swaziland* (1998). See too Women and Law – Swaziland Charting the Maze: *Women in pursuit of Justice in Swaziland* (2000).
[512] Ibid.
[513] *Zodwa Kunene and WLSA-Swaziland v Chief Prince Jabhane and others, Minister of Constitutional Affairs & Attorney General* [Unreported] Case No, 1592/17.
[514] See *http://wwwsouthernafricalitigationcentre.org/2019/04/25/swaziland-a-challenge-to-customary-principle-of-male-primogeniture/* accessed 03.04.2019.
[515] S 18 of the Constitution 001 of 2005.
[516] S 20 of the Constitution 001 of 2005.
[517] S 28 of the Constitution 001 of 2005.

later withdrawn. Even in the absence of a decision on this issue, the facts illustrate the similar plight of other women.

The recent case of *Ethel Dlamini v Chief GasawaNgwane* shows how badly some widows are treated under the practice of primogeniture.[518] It is encouraging that the Supreme Court applied the doctrine of human rights to protect the rights of Mrs Dlamini. The Eswatini High Court refused to grant the appellant (Mrs Dlamini) an interim interdict against the respondent (Chief Gasa). Mrs Dlamini was married to Chief Gasa's brother, Prince Lomahasha (late) in terms of Siswati customary law in 1977. After her marriage to the Prince, Mrs Dlamini resided at Qomintaba Umphakatsi (chief's residence and community gathering place) and had five children. Mrs Dlamini's father-in-law and senior Prince, Chief Tsekwane gave her a field where she grew crops and enjoyed peaceful and undisturbed possession of the said field until 2015. The *Umphakatsi* was then fenced, and access was through a gate, which was opened every morning to allow community members to enter.

When the senior Prince died in 2000, Chief Gasa took over the responsibility in 2001 and was later installed as Chief of Lavumisa.[519] He then constructed his homestead away from the old *Umphakats*i, setting up the new *Umphakatsi* where community meetings were held. After the completion of the residence, Chief Gasa removed the cattle kraal and the roof of the main hut and then ploughed Mrs Dlamini's field without informing or seeking her consent. Mrs Dlamini was living alone at the old Umphakatsi, save for occasional visits by her children and grandchildren. In 2016 Mrs Dlamini began constructing a new pit latrine (toilet) on the old *Umphakatsi* as the old pit latrine had filled up, becoming a health hazard. However, Chief Gasa, without notice to Mrs Dlamini, sent men to fill the new toilet. These events made Dlamini feel like Chief Gasa's intention was to drive her out of her homestead. Mrs Dlamini took legal action, and the facts justified an interdict in her favour − a *prima facie* right, apprehension of irreparable injury and the absence of any other satisfactory remedy.

The court found that Mrs Dlamini had been arbitrarily deprived of the field given to her by her father-in-law and that she was being forced to live in unsanitary and degrading conditions while the decision of the Regional Administrator was pending. It ruled that her right to dignity was being violated, demonstrating that the Supreme Court progressively interpreted

[518] *Ethel Dlamini (Born Gule) v Prince Chief GasawaNgwane* Unreported (93/2018B) [2019] SZSC 40 (judgment 8 October 2019).
[519] Eugene Dube 'Emakhosikati report Chief GasawaNgwane to RA' *Times of Swaziland* 27.02.2016 available at *http://www.times.co.sz/news/106873-emakhosikati-report-chief-gasa-wangwane-to-ra.html* accessed on 01.04.2020.

the provisions of the Constitution on human rights to arrive at a decision that halted the respondent from violating Mrs Dlamini's rights.

3.6 Conclusion

In conclusion, Eswatini has 'a dual legal system' which comprises of Roman-Dutch common law as modified by statutes on one hand and Eswatini law and custom on the other. The Eswatini Constitution of 2005 provides the basis for the protection of women from GBV in civil and criminal law. Peace binding orders and interdicts are the only protective orders targeting VAW.

In the criminal law, there are common law, statutory and customary law protections for VAW. For example, murder, rape, and assault are examples of common law offences which protect women from violence. Also, statutes protect women in a domestic violence situation; the SODV Act of 2018 provides the normative framework for curbing domestic violence and sexual offences in Eswatini. It expands the definition of domestic violence and rape in line with international norms. The Act provides a victim-centred approach for survivors of sexual and gender-based violence and repeals the outdated laws which dealt with the violation of women, such as the 1889 Crimes Act and 1920 Women and Girls' Protection Act. SiSwati law and custom is used by traditional courts known as Swazi Courts to adjudicate minor cases of VAW between Eswatini nationals.

There are other aspects of family law which disproportionately magnify the vulnerability of women to violence, both under common law and Eswatini law and custom. It cannot be said that Eswatini has a well-developed and accessible criminal and civil law framework which serves women suffering domestic violence in relationships.

CHAPTER FOUR
RESEARCH METHODOLOGY

4 INTRODUCTION

The two preceding chapters comprised a literature review on the laws and policies promoting and protecting the rights of WLH from GBV at national and international levels. This chapter focuses on the research methodology and the methods used for both the desk review and empirical components of this research. It begins by describing the research questions and aims of the study, followed by a description of the research design, methodology and methods used for data collection. It gives an overview of how sampling and data analysis were carried out. Issues of data quality and ethics are also discussed.

4.1 Research questions and aims

The following main questions guided this research study:

> What are the experiences of women living with HIV in Eswatini regarding VAW? Is the legal and policy framework cognisant of the nexus between VAW and HIV in Eswatini? How does the legal framework protect HIV positive women from VAW and its consequences in the light of international norms?

The sub-questions were as follows:

- Who are the main perpetrators of VAW against WLH?
- Which are the main types of VAW that HIV-positive women experience?
- How can the rights of HIV-positive women be adequately protected through law and policy?

The research study was premised on the following main research aims:

> To document the experiences of VAW by HIV positive women; critically evaluate how the Swazi legal system protects or fails to protect HIV positive women from VAW and make law and policy reform proposals for the development of a framework which addresses the intersection of VAW and HIV.

The sub-aims were:

- Document the VAW experiences of women living with HIV in Eswatini.
- Examine how governments should respond to the linkage between HIV and VAW in terms of international law.
- Describe how Eswatini has responded to the issue to date in terms of legislation and policies.
- Critically analyse the extent to which the Swazi framework meets the international standards and the needs as identified by women living with HIV.
- Make law and policy reform recommendations on HIV and VAW.

***Table no. 1**: Research methodology and processes overview*

Theoretical approach **Research design**	Human rights-based approach Descriptive and exploratory
Methodology approach	Qualitative methodology
Research methods adopted	Desktop review Semi-structured interviews
Sampling strategy	Purposive sampling
Data sources & data processing	Semi-structured interviews with 30 WLH Key informants (KI) interviews with 15 stakeholders
Data analysis	Thematic analysis (Braun & Clarke, 2006)
Data quality	Credibility, transferability, dependability, and conformability
Ethical considerations	Independent ethics review, UKZN; Gatekeeper's approval, Eswatini; collaboration with NGOs, Eswatini; and compliance with risks and benefit, informed consent, and confidentiality

4.2 The theoretical framework

This study adopts a human rights-based theoretical framework premised on the theory that all people, including PLH, have 'the right to life, liberty and security − are born free and equal in dignity and rights. Furthermore, there are special obligations on state parties under human rights law to protect vulnerable groups such as PLH. The theoretical framework is also based on feminist theories such as that of the liberal feminists who see the purpose of the feminist movement in terms of 'women's social, legal, and political rights.[520] Feminist epistemologies have posited that 'knowledge is dynamic, relative and variable and that knowledge cannot be considered an aim itself but a process'.[521] (An in-depth discussion of the feminist theories is found in chapter one, under sub-heading 1.4.1 titled feminist theories). Taking into consideration the two theoretical frameworks above, the methodological/conceptual framework of this research study is based on the following principles:

- VAW 'constitutes a violation of the rights and fundamental freedoms of women and prejudices or nullifies their enjoyment of those rights and freedoms';[522]
- VAW has multiple and multidimensional effects, with the common denominator, being gender-based;[523]

[520] Camarasa & Heim (note 159, above; 4).
[521] Ibid.
[522] UN Declaration on the Elimination of Violence against Women of 1993. Available at: *http://www.un.org/documents/ga/res/48/a48r104.htm* accessed on 17.03.2018.
[523] Camarasa & Heim (note 159, above; 9).

- From a feminist standpoint, the best way to learn and understand issues of VAW and its devastating effects is by listening and hearing the voices of the women who are victims or have experienced and observed this phenomenon.[524]

4.3 Methodological approach

There is a dearth of literature from Eswatini addressing the methodological approaches in the area of VAW and HIV, hence reliance is sought from literature originating from other countries in the Africa region and beyond. This study adopted a qualitative methodology. According to Ritchie and others, there is no single, accepted way of carrying out qualitative research.[525] Flick asserts that at a general level, qualitative research is frequently described as a naturalistic, interpretative approach, aimed at exploring phenomena from the interior and capturing the perspectives and accounts of study participants as a starting point.[526] It must be noted that a qualitative research methodology is categorised by its objectives, which mainly relate to understanding facets of social life; its methods mostly generate words, as opposed to statistics, as data for analysis.[527] Authors such as Creswell say that qualitative inquiry represents a legitimate mode of social and human science exploration, without apology or comparisons to quantitative research.[528]

In contrast, quantitative research is the investigation of human or social problems solely based on testing of a hypothesis based on a specific theory which is composed of variables that are measured with numbers, which are then analysed with statistical procedures to evaluate whether the prognostic generalisations of the theory hold false or true.[529]

The following featured areas set out the methodological and theoretical assumptions and features of a qualitative research methodology as articulated by Merriam[530] and Creswell[531] and how they relate to this study:

- Researchers who adopt a qualitative research methodology are concerned mostly with the process as opposed to outcomes.[532]
- Qualitative research has an interest in meanings − more particularly, how people make sense of and deal with life experiences; hence this is one area that requires the

[524] Camarasa & Heim (note 159, above).
[525] See R Ormston, L Spencer, M Barnard & D Snape, 'The foundations of qualitative research' in Ritchie J et al 2ed Qualitative *Research Practice* (2013) 1-23.
[526] U Flick *An introduction to qualitative research* 4 ed *SAGE* (2014).
[527] Brikci and Green (note 201, above).
[528] J W Creswell & C N Poth *Qualitative inquiry & research design-choosing among five approaches* 4 ed *SAGE (*2018) 36 -39.
[529] Ibid 68.
[530] S B Merriam *Qualitative research − a guide to design and implementation: Revised and expanded from qualitative research and case study applications in education* (2009) 16.
[531] Creswell & Poth (note 530, above; 76).
[532] Ibid.

investigator to interview the subjects involved in the experience.[533] This research study focused on how WLH experience and make meaning of their experiences as related to VAW.

- The researcher is the agent who collects and analyses data in qualitative research; hence the data collection for this study was carried out by the investigator through semi-structured interviews and in-depth interviews and analyses using thematic analysis. [534]
- 'Qualitative research normally involves fieldwork.' In this study, field visits were conducted in four sites.
- 'Qualitative research is concerned with the nature of reality. Reality, in most cases, is constructed by the individuals involved, including the investigator, with those subjects being investigated, as well as the reader or audience interpreting the study. 'The researcher needs to report these realities, rely on voices and interpretations of informants through extensive quotes, present themes that reflect words used by informants, and advance evidence of different perspectives on each theme.' [535]

The rationale for selecting qualitative methods for this study was necessitated by the purposes of this research and the fact that it centred on exploring, in-depth, HIV-positive women's experiences of GBV, as well as the social meanings women, ascribed to these experiences.

Qualitative research is carried out when one wishes to know meanings, look at, describe and understand experiences, ideas, beliefs and values.[536] Usually, qualitative methods that are adopted in such a scenario include desktop survey, interviews and focus group discussions.[537] This can be achieved through the adoption of qualitative research methods which are carried out when one wishes to understand social meanings, look at, describe and understand experiences, ideas, beliefs and values of a particular group or subset of a group. [538]

4.4 Research methods

The qualitative methods used in this study included an extensive desk review of the relevant legal and policy framework both at international and national levels, research reports and refereed journals and texts. It also involved the use of empirical data collection, namely, semi-structured interviews with selected key informants' and interviews with individual women participants to capture their personal experiences of violence while living with HIV in Eswatini.

[533] Creswell & Poth (note 530, above; 76).
[534] Creswell & Poth (note 530, above; 76).
[535] Creswell & Poth (note 530, above; 76).
[536] Brikci & Green (note 201, above).
[537] Brikci & Green (note 201, above).
[538] Brikci & Green (note 201, above).

4.4.1 Desktop review

For the literature review, primary sources were consulted such as: international law, national laws, national constitutions, law reform commissions' reports, resolutions, declarations, general comments, case law, state reports submitted to treaty bodies and concluding observations. This research study also reviewed available secondary sources which comprised books, background papers, and academic articles. Various internet websites were also relied upon to gain needed relevant data and information.

4.4.2 Interviews: Semi-structured and in-depth

Face-to-face interviews were used to collect data from key informants and WLH. Interviews are 'best suited for understanding people's perceptions and experiences.'[539] Interviews are similar to everyday conversations, even though interviews are focused on the investigator's requests for specific data and to explore the lived experiences of a participant on a specific subject. Interviews, however, are different from the everyday discussion because they are conducted in a rigorous manner that produces reliability and validity, otherwise known as 'trustworthiness'.[540] This brings about confidence in the findings when reviewed by the investigator or third parties that the findings reflect what the research set out to answer, and not the bias of the researcher.[541]

There are varied kinds of interviews to choose from in qualitative methods. The feature that distinguishes interviews is the degree of standardisation imposed on the exchange between interviewer and respondent.[542] These range from semi-structured where one adopts a topic-guide, to less structured interviews and very detailed interviews such as life histories.[543] This research predominately utilised semi-structured as well as in-depth interviews as they were in line with the purpose of the study. In-depth interviews are commonly used and are less structured in nature as opposed to semi-structured interviews and may cover only one or two issues. This type of interview is adopted whenever one wishes to explore in depth the subjects' own perceptions and accounts.[544] This research predominately utilised semi-structured interviews as they were in line with the purpose of the study – they allowed the researcher to ask questions and probe issues of relevance to the overall research questions.

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[539] P Sankar and N L Jones, 'Semi-structured interviews in bioethics research' *In Empirical Methods for Bioethics* (2015) 117.
[540] Brikci & Green (note 201above; 11).
[541] Brikci & Green (note 201, above).
[542] Sankar & Jones (note 541, above).
[543] Brikci & Green (note 201, above).
[544] Brikci & Green (note 201, above).

Before data collection, the researcher piloted the interview questions with two participants, one representing WLH and one representing key informants (KIs). These two interviews were recorded, transcribed verbatim and analysed to see how the respondents viewed and answered the questions. Interview questions which did not appear to be straightforward were reworked as to capture the essence of what they were intended to cover.

Two semi-structured interview guides (Annexure 1 & 2) (one designed for WLH's interviews, and the other for KIs) were used during the interviews. The interview guide for WLH covered demographic characteristics, VAW, HIV, and law-related questions. Interviews were conducted face-to-face, at places convenient for participants – none were interviewed in their homesteads to ensure confidentiality, given the sensitive nature of the research topic. The participants spoke in the language of their preference (siSwati), and some used a combination of siSwati and English. All interviews were audio-recorded, and notes taken with the participants' consent.

4.5 Sampling strategy and sample size

Participants were selected through purposive sampling. According to Terre Blanche and others, purposive sampling is a sampling method that is based on careful selection of cases that are typical of the population being studied, often utilised to create small, but relevant samples in qualitative research or case studies.[545] In this research study, the aim was to document the experience of violence by HIV positive women and to get their perceptions of how the law protected them from violence. The population targeted were, therefore, WLH over 18 years of age.

Sample sizes are typically small in qualitative work.[546] One way of identifying how many people one needs is to keep interviewing until, in the analysis, nothing new comes from the data – a point called 'saturation'. For this study, this point was estimated to be about 25 to 30 people since interviews were conducted with a fairly homogeneous group of women.

4.5.1 The recruitment of individual participants

The 30 WLH participants were recruited from organisations of people living with HIV support groups. Recruiting from HIV support groups was considered the most appropriate way to respect rights to privacy and confidentiality, considering that HIV is a private issue. The research was formulated with the idea that there were 'problem owners' which needed to be

[545] M Terre Blanche, K Durrheim, & D Painter Ed *Research in Practice: Applied Methods for the Social Sciences* 2 ed (2014) 563.
[546] Ibid.

consulted as per Randell and others.[547] It was necessary that a gatekeeper's permission in Eswatini be obtained. Since the study was to be carried out among women living with HIV, gatekeeper's approval was obtained from the National Emergency Response Council on HIV/AIDS (NERCHA) of Eswatini, a leading HIV/AIDS support group (see Annexure 2). NGOs also permitted interviews to be conducted in support groups established by them.

The gatekeeper's letter authorising the research was presented to organisations of people living with HIV with a request that the researcher be linked with support groups of people living with HIV. The interviews were carried out in Eswatini during February and March 2016. This study was carried out in four areas in Eswatini: in two rural communities (Mantabeni in the Hhohho region and Manzana-Dvokolwako in the Manzini region), one in a peri-urban area (Ludzeludze-Matsapha), and in one in an informal settlement (Mangwaneni in the Manzini region). According to the Eswatini Housing Census of 2007, more than 70 per cent of the population live in rural areas, and more than 20 per cent reside in urban areas.[548] Mbabane and Manzini are the two most populated regions in Eswatini.[549] However, HIV prevalence is higher in urban than in rural areas (31 per cent and 24 per cent, respectively, for women and men age 15-49).[550]

Table no: 2 *HIV support group location and number of participants interviewed*

Name of Support group	**No. of participants**
Manzini, Mangwaneni	9
Matsapha, Ludzeludze	7
Manzini, Manzana	5
Hhohho, Mantabeni	9

The table below presents the demographic details of the 30 WLH participants' age range, civil status, education, and employment status. The demographic data established that the WLH participants are a marginalised group, with many of the women not having finished school. A high proportion of the women who were interviewed were unemployed. According to Brixiová

[547] R Randell, et al, 'Virtual reality microscope versus conventional microscope regarding time to diagnosis: an experimental study' (2013) 62 *Histopathology* 351. See also, A Blandford 'Semi-structured qualitative studies' in: Soegaard, Mads and Dam, Rikke Friis eds. *The Encyclopedia of Human-Computer Interaction,* 2 ed (2013) 11.
[548] Central Statistical Office (CSO), Population and housing census 3 (2007) 13.
[549] Ibid 14.
[550] Central Statistics Office *The Swaziland Demographic and Health Survey (SDHS)* 2006-07 (2008) 224.

and Kangoye, unemployment in Eswatini is especially widespread among: (i) women, (ii) the less educated, and (iii) youth.[551]

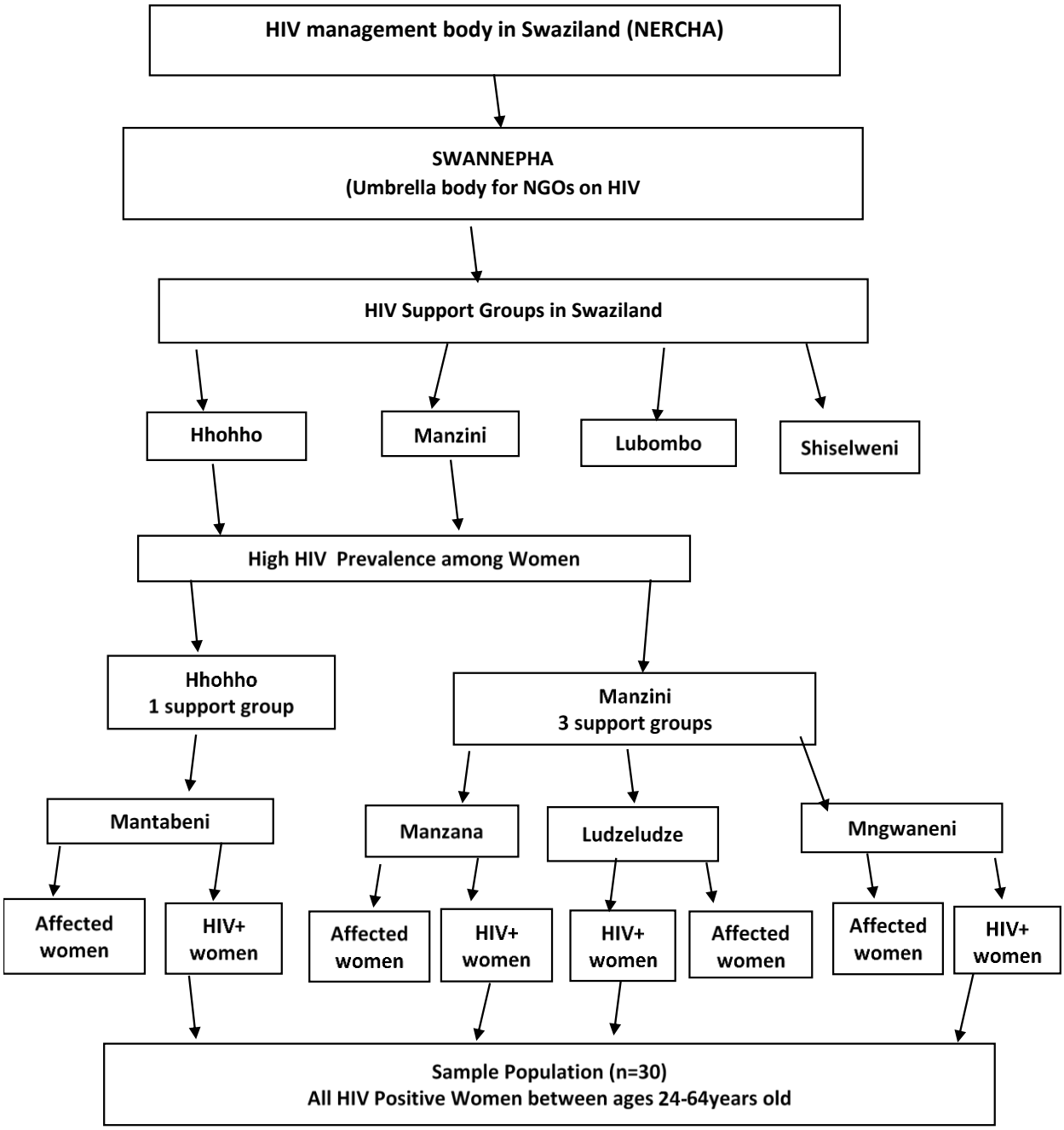
Table no 3*: Participants' demographic information*

Age range	No. of participants	Civil Status	Education	Employment
24 – 29	2	1 married & 1 single	2 primary education	2 unemployed
30-34	5	1 widow, 2 married& 2 dating	2 high, 2 secondary,[552] 1 never been to school	1 employed & 4 unemployed
35-39	5	2 married, 2 dating & 1 single	2 tertiary, 2 secondary & 1 primary school education	2 employed, 1 domestic, 2 unemployed
40-44	2	Both married	1 primary & 1 never been to school	2 unemployed
45-49	7	2 widows, 1 married, 2 dating & 2 single	2 high, 4 primary &1 never been to school	1 employed & 6 unemployed
50-54	6	3 widows, 1 married, 1 dating & 1 single	4 secondary, 2 primary education	All 6 unemployed
55-59	2	1 widow & 1 single	2 primary education	2 unemployed
60-64	1	1 widow	1 Primary education.	1 unemployed
All	30	8 widows, 9 married, 6 single &7 dating.	13 primary, 4 high, 8 secondary, 2 tertiary, 3 never attended school.	25 unemployed, 4 employed & 1 domestic worker.

WLH participants were recruited from support groups of PLH, and the demographic profile of the participants was impacted by the profile of participants in the support groups as well as their willingness to participate in the research.

[551] Z Brixiová, & T *Kangoye Youth Employment in Africa: New Evidence and Policies from Swaziland*. Tunis: Working Paper Series No 175 African Development Bank' (2013).
[552] Secondary level of schooling entitles the learner to a junior certificate which is necessary for progression to high school. It resembles grade 8-10 the South African education system.

Figure 1: *Sampling frame for the study*



4.5.2 Selection of key informants (KIs)

A key informant is a respondent who understands the culture of the subject matter, can reflect on it and articulate for the researcher what is going on – often key informants have particular expertise in the phenomenon of interest.[553] Since KIs, under the appropriate circumstances, can help advance the researcher's analysis, 15 KIs were purposively selected based on their position and nature of their work in relation to the study's aims i.e., women's rights and HIV and AIDS. They included representatives of NGOs working on HIV and AIDS and women's rights issues who were mainly engaged in advocacy and the promotion of women's rights and the rights of PLH at national and grassroots levels.

Fifteen KI interviews were conducted, and the interview guide is attached as Annexure 1b. The researcher conducted these interviews in siSwati and English, and the interview responses were all recorded, and notes taken with the consent of KIs. The recorded data were translated verbatim and analysed using thematic analysis.[554]

4.6 Data Analysis

After the field research − carrying-out interviews to collect data − it was necessary to analyse the gathered data. To do this, the researcher chose to use Atlas.ti, a software program for data organisation and to facilitate data analysis. The program was invoked after reading and re-reading transcripts for familiarisation with the data.[555] Texts were then assigned codes. This method of data analysis is referred to as thematic analysis of data which is detailed below. It must be noted that there are different approaches to coding and iteratively analysing data. Thematic analysis is the most common method used for descriptive qualitative projects and is adopted in this study.

4.6.1 Thematic analysis of data

Braun and Clarke have elucidated one of the approaches to thematic data analysis, arguing that 'what is important is that the theoretical framework and methods match what the researcher wants to know and that they acknowledge these decisions'.[556] A thematic method of analysis is one that surveys all the data to identify the common issues that recur and identifies the main themes that summarise all the views collected in the field.[557] The thematic analysis completed

[553] Merriam (note 532, above; 107).
[554]Merriam (note 532, above).
[555] V Braun & V Clarke 'Using thematic analysis in Psychology' (2006) *Qualitative research in Psychology* 16.
[556] Ibid, 80.
[557] Braun & Clarke (note 557, above).

in this research followed the following phases of thematic analysis postulated by Braun and Clarke.[558]

1. **Familiarising with the data:** The researcher transcribed the recordings into written data and simply read and reread the data while making notes of ideas that sprang to mind.[559] The researcher was quite familiar with the data, especially as she facilitated all interviews.
2. **Generating initial codes:** After reading and making sense of the data, the researcher proceeded to code the entire dataset systematically and collated data that was relevant to each code.[560] Coding is about labelling specific passages of the data that the researcher thinks are relevant for further discussion. It is about highlighting interesting/important features of the data and assigning that data a code.
3. **Patterns were identified and noted with coded data:** As Braun and Clark recommend that the researcher should use visual aids to help organise codes into sub-themes.[561] The patterns were logically organised and grouped together and then themes assigned to them.
4. **Reviewing themes**: Once the researcher completed searching for themes, the next step was to check whether the themes tied in with the data and thereafter develop a thematic map of the analysis. Each theme captured an aspect of the data that essentially responded to one or more of the research questions.[562]
5. **Defining and naming themes**: The researcher moved on to refine the themes and the overall narrative iteratively. A representative thematic map was developed, which served as the basis of the review, and additional refinement and consolidation of selected themes were carried out.
6. **Producing the report**: Lastly, after the refinements, the findings per theme were carefully selected by the researcher through reflecting further on the themes; then the researcher gave narratives and used example quotes from the datasets to illustrate themes.

The above-stipulated phases were adopted to ensure that the datasets were approached with deepening engagement through layers of analysis. The report produced is included in the next chapter on research findings.

4.7 Ethical Considerations

Ethical considerations require that research be conducted in a moralists and values-based manner.[563] This research study adhered to ethical considerations necessary when the research touched upon experiences of people which may be considered painful and sensitive, including

[558] Braun & Clarke (note 557above; 87-88).
[559] Braun & Clarke (note 557, above; 16).
[560] Braun & Clarke (note 557, above; 18-19).
[561] Ibid.
[562] Braun & Clarke (note 557, above; 82).
[563] Ormston et al (note 527, above).

the gatekeeper engagement, independent ethics review, informed consent, anonymity and confidentiality, and risks and benefits (protection of participants from harm).

4.7.1 Gatekeeper engagement

As this study targeted a vulnerable population − women living with HIV – the research was approached with high sensitivity in respect of gaining access to study participants through the consent and permission of the gatekeepers[564] in the field of HIV and AIDS in Eswatini. The research study was conducted after the Eswatini National Emergency Response Council on HIV and AIDS permitted the researcher to gain entry and conduct the field study with WLH, provided ethical considerations were followed. The letter of approval from the gatekeeper is attached as Annexure 2.

4.7.2 Collaboration with non-governmental organisations (NGOs)

The research study, as mentioned above under the topic 'recruitment of individual participants', relied on NGOs' collaboration. NGOs, whose mandate is to promote the rights and well-being of people/women living with HIV/AIDS, were asked for permission to conduct the study in support groups of PLH in which the NGOs were working at grassroots level. The NGOs were given a copy of the gatekeeper's approval letter.[565]

4.7.3 Independent Ethics Review

Ethical clearance to carry out the study was obtained from the Humanities and Social Sciences Research Ethics Committee (HSSRC) of the University of KwaZulu-Natal in South Africa. All participants who took part in the study were made aware of the ethics review process. Participants were further alerted that the HSSRC of UKZN could be contacted should there be any questions about ethical issues. The Research Ethics Committee's ethical clearance letter titled 'Protocol reference number: HSS/0087/015D' is attached as Annexure 3.

4.7.4 Risks and Benefits

Ethical considerations demand that study participants be protected from harm. In this study, care was taken to minimise risks of harm when interviewing the participants (HIV positive women) about their experiences of violence. The researcher ensured that when a sensitive topic arose, a direct question was asked so that the participants were not confused about what was

[564] R S Broadhead & R C Rist, 'Gatekeepers & the social control of social research.' (1976) 23*Social Problems* 325.
[565] See **Figure 1** above on the sampling frame for the study.

meant by the question.[566] Participants who showed signs of distress during and at the end of the interview were given on-the-spot counselling by the researcher (a trained counsellor) and further referred to organisations which specialised in counselling victims of violence if the wished to get further assistance.

The participants were provided with clear information about the objectives and purpose of the study. Participants were made aware that no financial benefit would accrue as a result of the data collected from them. Participants were given E20[567] as transport reimbursement. The participants were thanked for taking their time to participate in the research study.

4.7.5 Informed consent

Informed consent is one of the most critical concepts in research ethics. Mainly, it involves ensuring that potential participants have a clear understanding of the purpose of the research study they are being recruited to participate in, how the data/information received from the interview will be used, and what being a participant means to them.[568] At the beginning of the interview participants were asked to give their free and voluntary consent to participate in the research; participants gave their consent in writing to participate and gave separate consent for the audio recording of their interviews. The consent forms are attached as Annexure 4.

4.7.6 Confidentiality and privacy

Participants were given the assurance that in taking part in the study they would be accorded anonymity and confidentiality. Anonymity means that the identity of the participants would not be made known outside the research team.[569] A guarantee of anonymity was given particularly to participants living with HIV/AIDS.

Confidentiality entails avoiding attributing comments in reports or presentations that render participants identifiable.[570] In this research study, confidentiality was maintained throughout the data collection, analysis and report writing processes. Pseudonyms were used to identify the responses of women living with HIV. Also, care was taken with data storage, in that audio records and transcripts were stored in password-protected files in the computer of the investigator. Also, the computer where the datasets were archived was only accessed by the researcher, ensuring that the risk of breaching anonymity and confidentiality was minimised.

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[566] Ormston et al (note 527, above).
[567] This amount is in the Swazi currency Lilangeni and is equivalent to USD$=+/- 1,70.
[568] Ormston et al (note 527, above).
[569] Ormston et al (note 527, above).
[570] Ormston et al (note 527, above).

4.7.7 Reliability and validity

Validity and reliability are key aspects of all research. However, in qualitative studies, authors such as Guba propose that validity and reliability can be attained by qualitative researchers using four criteria in pursuit of a trustworthy study:[571] credibility, transferability, dependability, and confirmability.[572]

a) *Credibility*

Credibility entails that the researcher must be trustworthy in carrying out the study in an ethical manner, as far as is possible.[573] In pursuit of credibility, the researcher in this study interviewed participants to the point of saturation, where data became repetitive. The point of saturation came when interviews with 15 KIs and 30 WLH had been conducted. Also, the researcher listened to recorded audios of the interviews repeatedly to ensure that what was captured was indeed the verbatim descriptions of the participants.

a) Transferability

In qualitative research studies, transferability refers to the extent to which the findings can be applied in other contexts or with other respondents.[574] To ensure transferability, the researcher adopted the use of the full description of the phenomenon under scrutiny. The researcher presented actual data from participant interviews rather than the researcher's own inferences when presenting the final analysis/findings; hence extracts from interviews are used to support interpretations of the data.[575] This was done with sufficient detail and precision to allow others to make judgments about the transferability of the data. Also, since this research was carried out through purposive sampling, the researcher ensured transferability through selecting samples in different locations; for example, in urban, peri-urban, and rural areas.

b) Dependability

Lincoln and Guba stress the close ties between credibility and dependability, arguing that, in practice, a demonstration of the former goes some distance in ensuring the latter.[576] In this research study, the use of individual participant and KI interviews, and the literature survey

[571] E G. Guba 'Criteria for assessing the trustworthiness of naturalistic inquiries' 29(1981), *Educational Communication and Technology Journal* 75–91.
[572] A.K. Shenton 'Strategies for ensuring trustworthiness in qualitative research projects' 22(2004) *Education for Information* 63–75.
[573] Merriam (note 532, above; 234).
[574] Ibid 223.
[575] Shenton (note 574, above; 67).
[576] Y S Lincoln & EG Guba, 'Naturalistic inquiry' (1985) *SAGE.*

including the coding system that was adopted which led to sub-themes and major themes, all ensured the dependability in the study. According to Fossey and others, the aim here is to make sure that the researcher gets information from different sources and in different ways in order to crystallise an issue.[577]

d) Confirmability

The concept of confirmability refers to the degree to which the findings are the product of the focus of the inquiry/research and not of the biases of the researcher.[578] According to Giacomini and Cook, qualitative researchers are encouraged to become 'self-conscious' about the research and to self-disclose a range of possible influences, known as reflexivity. Accordingly, they should disclose their training, occupation, previous personal and professional experiences, and relationships with the participants.[579] Researchers should declare their assumptions and beliefs so that readers can ascertain and assess for themselves their impact on the interpretations of the findings.[580]

This can be done by examining of the researcher's admitted beliefs and assumptions (reflexivity). In this study, the researcher did not approach the data analysis with preconceived conclusions; however, she had previously worked with different NGOs calling for the enactment of adequate legislation to deal with GBV in Eswatini. The researcher has been aware of the GBV predicament of women in Eswatini from her previous work position. The researcher had little or no contact or connection with organisations of people living with HIV before carrying out the study. The researcher believed there was a need for laws and other extra-legal mechanisms to curb violence against women.

4.8 Limitations of the study

The study focused exclusively on women living with HIV and AIDS and who were members of an HIV support group, thereby missing the opportunity to interact with women who were not members of support groups, and therefore potentially more vulnerable. The researcher believes that such women would have been hard to recruit due to the stigma and discrimination which made them elect not to be members of HIV support groups in the first place. This led to the use of purposive sampling which accordingly limited the respondents to only those who

[577] Fossey et al, 2002 as cited in Catherine Slack, *Exploring the ancillary-care experiences of stakeholders in South African HIV vaccine trial*s (unpublished PhD thesis University of KwaZulu-Natal 2015) 106.
[578] E Babbie & J Mouton *The Practice of Social Research*, 14 ed (2012) 278.
[579] See Malterud 2001 as cited in Slack (note 579 above; 94).
[580] Ibid

had disclosed their status or those openly living with HIV, excluding those women who have not disclosed or are secretly living with HIV.

Given the purposive sampling approach, this study has limited generalisability. Nevertheless, these findings may be relevant to other WLH living in similar contexts.

4.9 Conclusion

This chapter describes the research methodology used in this study. The study is posited on a human rights theoretical framework which suggests that all people have a right to life, liberty, and security of person. The study is qualitative by design and adopted research methods such as desktop review and semi-structured interviews as these were the most suited for the research questions which aimed to explore lived experiences of WLH concerning violence and perceptions on the extent to which the legal framework is protective. Purposive sampling was used to select participants, and there were 30 individual interviews with WLH and 15 conducted with KIs. The chapter concluded with ethical considerations relevant to the study and reflected on issues of the quality of the data.

CHAPTER FIVE
FINDINGS

5. INTRODUCTION

The previous chapter discussed the research methodology and processes undertaken in carrying out the empirical research study with KIs and WLH on the experiences of VAW in Eswatini. The theoretical framework and research design, research methods, sampling strategy, data sources and data processes, data analysis and coding of emerging themes were discussed. Strategies were adopted and discussed together with data quality and ethical considerations.

This chapter presents the study findings as they emerged from the empirical data, delving into four broad themes and sub-themes as they related to the research questions posed in this study − the broad themes outlined in this chapter.

1. **The multifaceted nature of violence**: Violence was seen to be multifaceted involving a wide range of perpetrators and impacting on all aspects of victims' lives.
2. **Disclosure as a vector of violence**: Disclosure of HIV status was perceived as a key factor which increased vulnerability of HIV positive women to violence.
3. **Violence and HIV as dual epidemics**: Violence and HIV were perceived as inextricably interconnected in participants' narrative at many levels; this impacted on their ability to protect themselves against HIV infection and to access treatment.
4. **Inadequate legal remedies**: The women did not generally rely on legal remedies to enforce their rights.

5.1 The multifaceted nature of violence

This study found that participants described violence against WLH as multifaceted, that is, having many different aspects or features and involving a wide range of perpetrators. In the context of this study, the violence reported by WLH included all forms of violence. The perpetrators were identified as the family (intimate partners, in-laws, family members), community members and healthcare workers. Discussed below are the types of violence that WLH faced, and the perpetrators responsible for violating the rights of HIV positive women.

5.1.1 Experiences of emotional violence by WLH

Participants experienced emotional violence which encompassed blame and deep humiliation. The emotional violence came from the private sphere and moved to the public sphere, that is,

the violence came from intimate partners, moved to the family, the community and eventually to health facilities.

Intimate partners (IP) were viewed by the study participants to be involved in conduct that perpetuated emotional violence against WLH, for example:

> My late husband, I was once married, and my husband is late. *He would subject me to constant insults, humiliation at home or in public, ridicule, rejection, manipulation, threats, isolation from friends and family member*;[581] I mean all sorts of things. It started once I told him that I was HIV positive. That is when he started to tell me that it was *I who came with the virus to the relationship*.[582] He prohibited me from going to the hospital; he would ridicule me, for instance, if he found me bathing, he would be like why bath coz you are HIV positive, you are wasting my water. He was really abusive towards me. I stayed depressed all the time, wondering why this was happening to me: **Participant 2, WLH.** (Participant's emphasis)

> Also, it includes a male partner, who when he discovers that the woman partner is HIV positive, *he gets furious and accuses you of sleeping around with other men*,[583] without first testing himself for HIV. He will boast that he doesn't have the virus, forgetting that women frequent the hospital, so it is easy for them to get tested. That is the actual abuse of women as some women must conceal their status because if you are found out, you will be hurt: **Participant 16, WLH.** (Participant's emphasis)

The quotations from the participants suggest that WLH experienced violence from their IPs as a form of blame for acquiring HIV, and as a result, they were subjected to humiliation and other human rights abuses. In this intimate sphere, the focus of emotional violence was on how the virus had entered the relationship. Anger and blame were projected on to WLH. The excerpts further suggest that since WLH were suffering from a sexually transmitted disease, they were considered to have loose sexual morals and to be promiscuous and unclean. As such, anticipated stigma and violence prevented WLH from disclosing their HIV statuses to their partners

The participants described encountering emotional violence from the broader family members, another layer of perpetrators coming from the private sphere. The participants described that the family was involved in creating stigma and discrimination, which WLH viewed as emotional abuse, in particular, by their in-laws, for example:

> . . . in addition, if you are married and have the HI virus, your in-laws stigmatise and discriminate against you and some of the people will tell you that food prepared by you, they will not eat it as you are positive: **Participant 24, WLH**.

[581] Emphasis added.
[582] Emphasis added.

> . . . family members from in-laws have it in their minds that the bride (makoti) is here to make their son sick or that she is the one who came with the virus to the family even though they are not aware of their son's HIV status: **Participant 1, WLH**.
>
> Women, whenever they test first and bring the result that they are HIV positive they are automatically blamed that they are the ones who are positive and are responsible for bringing the HIV to the family, so they get discriminated by the husband and the in-laws for that, and they are stigmatised: **Participant 37, KI.**

The extracts emphasise two things: the relationship between in-laws and bride/wife is not based on trust, and in-laws are portrayed as perpetrators of violence with the bride at the receiving end. Also, the quotations suggest that in-law family members are responsible for perpetuating the narrative that the bride brought the virus to their homestead. This is a narrative of an outsider bringing harm into a cohesive unit, thus further emphasising the feeling of exclusion of WLH.

The blaming of women is nothing new in Eswatini, and it is often linked to traditional beliefs or practices by which the woman is culturally disempowered to do anything about her situation.[584] Women are blamed despite the fact that most acts of VAW occur in the family context; when women do fall victim to violence, they will be blamed for their own victimisation.[585] For instance, when the husband dies of a long or short illness, women are accused of performing witchcraft or when the children misbehave women are blamed; yet when the children excel in life and school, the culture dictates that the children take after their fathers. In this study, women were accused of being vectors of the HIV disease by families, for example:

> '. . . the accusation that she is responsible for bringing the HI virus to the home is because the blame is always placed on the woman even if it is well known in the community that the man was promiscuous – since men would normally admit during drinking sprees that they know that their wives are not cheating but when they return home they accuse the wives of bringing the virus to the home': **Participant 35, KI.**
>
> 'Many women in relationships are blamed for bringing the HIV just because they tested first': **Participant 37, KI.**

WLH face humiliation based on their HIV status in the public sphere when they interact with community members. Most participants described experiencing stigma and acts of discrimination from community members directly linked to their HIV status. Participants viewed stigma and discrimination collectively as a pervasive standalone form of violence that rendered women helpless. For instance, most participants noted that in some communities,

[584] WLSA- Swaziland (note 44, above; 86).
[585] Aphane & others (note 30, above; 79).

leaders singled them out and deliberately excluded them from participating in communal committees. For instance:

> 'For me, I would say violence against HIV positive women includes *being pointed out, gossiped about as HIV positive*[586] by fellow community members, and that is hurtful emotionally': **Participant 16, WLH.** (Participant's emphasis)
>
> '. . . if you had been elected to community committees, when they find out about your status and that you are on ART, you are reduced to someone who is sick and who cannot do things right. At times your nomination is turned down': **Participant 3, WLH.**
>
> 'In the community, they disregard women with HIV; that is why many people are not openly living with HIV in this community. They discriminate against them': **Participant 15, WLH.**
>
> 'Well in communities, I can say yes they disregard women with HIV as they gossip about HIV positive people a lot and they look down upon HIV positive women, and you do things *they criticize you by saying, it is the effect of ART that is causing you to be crazy, even if you have a good point*:[587] **Participant 6, WLH.** (Participant's emphasis)
>
> 'The community too looks down upon HIV positive women because if you happen to be appointed to serve the community-by-community members, you find that the chief's kraal objects that you be part of the committees': **Participant 20, WLH.**

The quotes suggest that participants viewed community leaders to be indifferent to and even prejudiced against WLH, and this undermined their dignity. The quotations further seem to suggest that some community leaders saw WLH as less deserving of respect when it came to serving in any of the leadership positions to which that a person could be appointed.

Stigma and discrimination were also perceived to be perpetrated by healthcare workers in health institutions. Again, participants emphasised their HIV status as being the central reason for the violence being perpetrated against them. Women noted that they received hostile treatment from health workers when seeking SRH services. The participants saw this as stripping them of their sexual reproductive health rights and their right of choice.

> 'I once went there to do a pregnancy check-up, the nurses were angry asking me 'checking pregnancy for what as I was on ART, you shouldn't be bearing children you.' They said they don't want ever to see me pregnant and that the child I was carrying was the last one; this means now they are at liberty to determine the number of my children. This, they say in the presence of everyone else within the sound of their voices humiliating me. They disclose for me by default': **Participant 27, WLH.**
>
> I felt really pressurized by nurses. I was pregnant then, and they told me that since you are HIV positive, you must now enrol on ART, as you are pregnant and your CD4 cell count is low. I said they must give me time to process this, but they refused. They said what time because I might infect the child in the process; I reasoned with them and told them that I needed to think briefly then I would come back for ART': **Participant 29, WLH.**

[586] Emphasis added.
[587] Emphasis added.

> ‘Beliefs to the effect that women who are HIV positive should not give birth are there, and they are very strong. Fortunately for me, I have worked in a clinic setup, even the nurses themselves when they speak you find them saying ‘what is wrong with this one who keeps on giving birth, yet she is HIV positive’ do see such things. So, I think if it is being said by a nurse, how much more for someone who is an accountant, who has an HIV positive friend who is making children, he will gossip about her saying she keeps on giving birth, yet she is HIV positive. So, it is a very strong view that we have’: **Participant 32, KI.**

The extracts suggest that health workers are opposed to WLH bearing children. This opposition is voiced through nurses and doctors exposing pregnant WLH to abuse and discrimination. The second quotation seems to suggest that nurses are primarily concerned with protecting the unborn child, even where this disregards WLH’s feelings and rights. Culturally, a woman’s value is tied to her ability to bear more children.[588] Therefore, the health workers’ sentiments do not consider that women are under constant pressure from in-laws and IPs to increase the family name by giving birth to more children.

Participants perceived attitudes of healthcare workers with regard to coerced and forced sterilisation as violence coupled with discrimination against WLH, as no men were reported to have been sterilised. This kind of violence was not frequently mentioned by WLH. For example:

> ‘Yes, I know of three women who were forcefully sterilised. One of them was told that she was going to be sterilised as she was HIV positive and that they did not care if she consented or not; so, she did not sign any consent forms. One of the women really wants a child now, and her husband is busy using the fact that she can’t have children against her’: **Participant 23, WLH.**

> ‘Yes, I have been confronted by instances of coerced and forced sterilisation here at work; before that I was not aware that there is something called forced sterilisation. However, I have since learned that there are incidents of coerced sterilisation; there are women who say they have been coercively sterilised, for instance, there is a woman who tells her story that she was left to suffer labour pains for a long time whilst knowing very well that she can’t give birth the natural way and because they wanted to sterilise her they coerced her; the health workers’: **Participant 34, KI.**

> At that point in time because we didn’t have treatment options and the PMTCT was not there, there was no treatment, so it felt like it was a right thing to try and minimise; you know for a long time we have tried to promote family planning and trying to reduce unwanted births so, at that point in time instead of allowing people who are failing to use ordinary family planning methods to get maybe a permanent option, it looked like the best intervention than allowing them to get HIV positive children who were not going to live that much longer anyway; it looked like probably the best intervention to try and convince them that they needed it. So, it

[588] D Cooper et al ‘Life is still going on: Reproductive intentions among HIV-positive women and men in South Africa’ (2007) 65 *Social Science and Medicine* 274-283 at 275. See also, Chantal Jacqueline Badul *The coerced and forced sterilisation of women living with HIV in South Africa: A critical review of existing legal remedies* (unpublished PhD thesis, UKZN, 2018) 7.

> might sound very bad or unfair now or even atrocious now, but at that point in time, this is what most physicians were faced with: **Participant 37, KI**.

The quotes suggest that WLH were subjected to forced or coerced sterilisation in Eswatini and that this was done by some physicians as an appropriate response to the HIV and AIDS pandemic. Also, the excerpt suggests that there are WLH in Swaziland who were coerced into being sterilised by health workers, yet little has been done to get justice for the WLH affected.[589]

5.1.2 Experiences of financial violence by WLH

Participants described experiencing financial violence in the form of deprivation and lack of financial support. In this way, WLH were made to be dependent on others which undermined their autonomy. The WLH who participated in this study were a vulnerable group who were struggling to make ends meet. Financial violence was a constant feature in the lives of the HIV positive women interviewed for this study as elucidated below.

The family was viewed to have perpetrated acts of financial violence against WLH. Some of the participants noted that WLH were refused money sought for HIV-related care by spouses or families:

> 'Most of the women in this community don't work; when they negotiate condom use, the men withhold financial support until they agree to unprotected sex': **Participant 23, WLH.**
>
> WLH are abused financially as at times they don't receive financial support from their husbands which force women to embark on informal trading in order to make ends meet': **Participant 31, KI.**
>
> 'It is abuse through not being able to have finances so that you can go to the hospital for ART': **Participant 17, WLH.**

The quotes above highlight WLH's inability to access financial resources; apparently financial resources are leveraged to disempower WLH by their families and IPs – to the detriment of safe sex practices and life-saving treatment. Some of the reported reasons for WLH suffering financial abuse included limited opportunities to participate in the economy, getting work, marrying, or obtaining education. (see **Table no 3**: Participants' demographic information, Chapter 4).

The issue of their late husband's estate benefits being seized also featured in their responses. Some women reported having experienced financial violence by being deprived of

[589] In 2016, the Southern Africa Litigation Centre (SALC) supported a case which was before the Swaziland High Court of a women who sued the Government of Swaziland for being forcefully sterilized in a government hospital. The Government offered a confidential settlement of 50 000 Emalangeni (USD3 850).

their late husbands' death benefits, with in-laws occupying the home of the deceased and evicting the widow:

> 'It has been financial abuse concerning the death benefits of my late husband as well as emotional abuse as the family blamed me for the death of our husband': **Participant 15, WLH**.

> '. . . my in-laws even confiscated my assets, such as my late husband's work benefits and I was forced by them to go out of my home and live with my children in a rented flat . . . I was blamed for having brought HIV to the home and that I should be the one who died not their son': **Participant 23, WLH.**

> . . . when my husband died, my in-laws abused me greatly as they wanted me to leave my home together with my children so that they can have it. I was severely affected because later, I suffered a minor stress stroke where my mouth twisted: **Participant 22, WLH.**

The extracts suggest that financial and emotional violence were linked. Blame for the deceased's death was a reason for not offering financial support. WLH were mistreated, evicted from their homes and others banished by their in-laws, and this was all linked to their infection.

However, participants noted that their parental or biological families were mostly supportive and compassionate to their HIV positive status, for example:

> 'Your side of the family is most of the time, supportive. It is the in-law's side of the family where one is treated badly': **Participant 26, WLH**.

> 'In families, your side of the family (parental side) as women is more supportive than the in-law's family. My family, for instance, is very supportive': **Participant 2, WLH**.

The quotations seem to suggest that while in-laws were presented as prejudiced and violent, biological families were described as supportive and helpful.

5.1.3 Experiences of physical violence by WLH

Participants described experiences of physical violence which consisted of beatings (and to a lesser extent included forced or coerced sterilisation by healthcare workers). The study participants perceived physical violence as pervasive and prevalent to the extent that, it was normalised by many WLH. Both WLH and KIs noted that physical violence was a common form of abuse, for instance:

> . . . when the woman discloses her HIV positive status after testing; you will find that *she will be beaten for that*.[590] He will ask her why she went test for HIV and then beat her; some women have their ARVs treatment confiscated and thrown away by their partners';[591] **Participant 38, KI**. (Participant's emphasis)

[590] Emphasis added.
[591] Emphasis added.

> My late husband *prohibited me from going to hospital*[592]*. . . My husband beat me so hard once*[593] such that when I escaped, I ran to the police station in Manzini. Since I was hurt, the police took me to the hospital': **Participant 2, WLH.** (Participant's emphasis)
>
> 'He used to be argumentative and *then beat me when I disagreed with him.*[594] He would hunt me down if I tried to escape until he found me to hit me again. At times I would get piece jobs, he would come and beat me up at my work, and I would get fired as a result, yet he was also not working; then the child would suffer': **Participant 11, WLH.** (Emphasis added)

The quotations suggest that physical violence was indeed widespread. There are no accounts of people coming to the aid of the victims as fighting between partners or spouses is seen as a private matter. The above excerpts also reveal that physical violence was linked to their HIV status – a punishment, for bringing HIV into the relationship or for being ill and needing care.

5.1.4 Experiences of sexual violence by WLH

Participants defined sexual violence as forced sex and refusal to wear protection during sex. As with other forms of violence, participants linked experiences of sexual violence to their HIV infection or re-infection. WLH did not spontaneously raise sexual violence as part of the definition of violence against WLH, and this seems to suggest that women in relationships have normalised this kind of violence. Also, it may be attributed to the fact that in some cultural spheres, domestic violence, and sexual abuse, in particular, are still a private matter hidden from the public gaze and therefore outside the scope of public intervention.

The participants perceived that since WLH existed in a conservative society, they had no say in negotiation of sex and safer sex with their partners, for example:

> 'My husband would have it in his mind that since he is "the man" he is entitled to sexual privileges regardless of how I felt. I have had to cope with that because if I insisted on not having sex with him; he would then be violent': **Participant 1, WLH.**
>
> '. . . it has been my husband; when I don't feel like sex, he will proceed': **Participant 28, WLH.**
>
> '. . . my very first sexual encounter was coerced by my boyfriend': **Participant 6, WLH**.

The quotes suggest that women face difficulties in negotiating safer sex due to gender imbalances. Also, it shows that when women say no to sex while in a relationship, they are not taken seriously and will nonetheless be violated.

[592] Emphasis added.
[593] Emphasis added.
[594] Emphasis added.

The participants in this study reported forced sex by IPs, but they did not label it as a crime. For instance, some WLH reported that they could not successfully negotiate safer sex after being diagnosed HIV positive.

> '…if your husband is beating you so that you sleep with him; obviously, you will not protect, and at times you find that he rapes you and you get cuts or injuries that way it will be easy for the virus to be transferred': **Participant 3, WLH.**
>
> When my husband was still in denial about his HIV positive status, he would sleep with me without protection, something I would object to in fear of re-infection as I felt that was detrimental to my health − the next day I would feel down: **Participant 29, WLH.**
>
> '. . . you find that with a woman with HIV and AIDS, *she is subjected to forced sexual intercourse without her will'*: **Participant 32, KI.** (Participant's emphasis)

The quotations suggest that WLH experienced forced sex as a significant form of violence perpetrated by their IPs and that they did not feel that they had the power to negotiate condom use. As indicated by the demographic information in **Table 3** in chapter four, most of the women were in relationships of some form. In Eswatini marital rape (in the past five decades since independence) has not been regarded as a crime; however, the 2018 SODV Act removes the defence that married man can raise in a charge of marital rape, even though the Act does not expressly criminalise marital rape.[595]

5.2 Disclosure as a vector of violence

In this study, the participants perceived that WLH were called upon by healthcare workers to disclose their HIV status. However, disclosure occurred in a patriarchal and highly stigmatising context, which amplified WLH's to vulnerability to VAW. The findings below highlight the perceived different causes of violence against WLH, including public health focus on HIV disclosure, disclosure amid ignorance about HIV transmission, disclosure in context of patriarchy and poverty and disclosure in a context of lack of women's agency and autonomy.

5.2.1 Public health focus on HIV disclosure led to vulnerability to violence

The Eswatini social context in which women lived was unconducive to HIV disclosure (see section 5.2.3 below), often resulting in violence, for instance:

> 'You see, if you do the right thing and disclose your status to your partner (that's a right thing to do) but if he discloses your HIV status to his girlfriend, then that teaches you that you should never disclose again (which is wrong)': **Participant 30, WLH.**
>
> 'When you disclose to the family after the test that you are HIV positive, there will be no peace, and you will not be treated in a humane way, or as if you are an animal of some sort; for

[595] S 151 of the SODV Act of 2018. See also this thesis in chapter 3 para b 57.

> instance, when you cook food for everyone, the family will distance themselves as if they will get the virus from you somehow': **Participant 27, WLH.**
>
> The discrimination of HIV positive women was much high, particularly because most of the housework is made to be the sole responsibility of women: **Participant 42, KI.**

The quotations suggest that HIV disclosure increases the risk of being subjected to violence and discrimination.

The participants perceived that the public health focus on HIV disclosure was one of the primary drivers of violence against HIV positive women. Participants noted that the problem began with the separation of services for HIV positive and negative people which often led to involuntary disclosure of women's HIV status within healthcare provision.

> '. . . the harassment comes when we finish prayers at the hospitals; soon after the service, they announce that those with HIV they should go this way, pregnancy this way, and children vaccinations that way. If I am there and there is a neighbour that I don't want to know my status, she will then see that I am positive. I think at the hospital they should stop the announcement that HIV positive patients should go to designated rooms as it amounts to involuntary disclosure of our status by default': **Participant 22, WLH.**
>
> 'Women coming out to talk about their experiences especially of gender-based violence, where they talk about how their families treat them when it comes to disclosing their HIV status or if their HIV status is known; a lot of women are beginning to even report issues of violence': **Participant 42, KI.**

In addition to the separation of services for HIV positive patients, participants felt under pressure from nurses and doctors to disclose, as they (medical personnel) had a duty to encourage testing of partners and families and to promote disclosure to mobilise support for treatment and prevention. However, these objectives often counteracted their duty to guarantee absolute patient confidentiality.

The National HIV Prevention Policy of 2012, which provides for mandatory disclosure, was seen as perpetuating violence against WLH. The Policy provides that:

> 'All clients who undergo HIV testing and counselling shall receive information on risk reduction. Couple/partner testing and counselling and disclosure of status among spouses and partners shall be promoted for risk reduction. [596]

The participants felt that they were compelled by health care workers to disclose their HIV status and that this had negative consequences.

[596] Para 2.1.9.6 of the National HIV Prevention Policy – Swaziland of 2012, available at: *https://www.infocenter.nercha.org.sz/sites/default/files/PreventionPolicy.PDF* accessed on 06.12.2018.

> ‘At the hospital, they tell us to disclose our HIV status . . . when I disclosed to him that I was HIV positive and wanted to enrol in ART, he said if I take ART, he would rather leave, and he left me with the child with no financial support’: **Participant 3, WLH**.
>
> There are so many women I have seen been forced to leave their matrimonial homesteads for disclosing that they are HIV-positive. This has led many women to think twice before they can disclose their statuses. They argue that what would be the use of disclosing if I end up unhappy in my home: **Participant 1, WLH.**

The excerpts suggest that messages on disclosure though given with good intentions by healthcare workers may prove to be dangerous for WLH due to violence and stigma and discrimination. Further, the excerpts seem to suggest that the fear of violence after an HIV positive diagnosis was real for WLH.

Also, the Swaziland Integrated HIV Management Guidelines of 2015,[597] which guide the ‘test-and-treat’ programme in hospitals among patients diagnosed as HIV-positive, are regarded by WLH as exposing them to domestic violence.[598]

> ‘…it has to do with stigma more than anything; for example, yesterday I had a client who is married and is afraid to take ARVs treatment because if her husband finds out about the treatment, he will beat her; when I asked her if her husband habitual[ly] beats her and she said yes, he does beat her frequently. So, when you analyse the situation you become helpless to what kind of life is this person going to lead because she is pregnant, she needs to protect her unborn baby as the days are progressing’: **Participant 38, KI**.
>
> ‘Nurses sometimes do force us, for instance, there was once a period when it was a policy here at ##### clinic that you will not be offered treatment unless you undertake the HIV test first and disclose your status’: **Participant 20, WLH.**
>
> ‘. . . at the hospital, they pressurise you either through forced TB tests, or HIV tests as they don’t allow people to be treated unless they know your status’: **Participant 28, WLH.**

The excerpt underlines a disconnect between the public health programme on disclosure, test-and-treat and community responses to HIV.

It was perceived by the participants that when telling partners and family members that they were HIV positive, there was a possibility that they were putting their lives in danger. Many of these negative consequences of disclosure could be classified as rights violations; hence participants felt aggrieved about the process of disclosure.

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[597] The Swaziland Integrated HIV Management Guidelines of 2015. Available at: *https://aidsfree.usaid.gov/sites/default/files/tx_swaziland_2015.pdf* accessed on 06.12.2018.

[598] Swaziland has reported much success in the HIV/AIDS fight recently and the success can be attributed to moving to a test-and-treat strategy (where patients are immediately placed on antiretrovirals regardless of their health status). Available at: *https://www.health-e.org.za/2017/07/25/swaziland-beating-hiv/* accessed on 06.12.2018.

The participants noted that whether WLH disclosed their HIV positive status voluntarily or involuntarily, the violence they experienced was the same.

> '. . . when a woman discloses her status; you find that she is then treated as a secondary human being and not a full human being. It will be like it is enough that they are putting up with her HIV status, so she must tolerate any abuse dished her way': **Participant 30, WLH**.

> '. . . when, the woman discloses her HIV positive status after testing; you will find that she will be beaten for that. He will ask her why she went test for HIV and then beat her; some women have their ARVs treatment confiscated and thrown away by their partners, so I feel strongly that HIV and VAW are linked – it goes together': **Participant 38, KI.**

The excerpts suggest that HIV-positive women become devalued when they disclose their HIV status.

5.2.2 Disclosing amid ignorance about HIV transmission

In this study, participants perceived the lack of adequate knowledge about HIV transmission as a cause of violence against WLH. Study participants believed that family members and IPs did not have sufficient knowledge or information about HIV, leading to blame and the targeting of WLH.

The HIV positive women noted that ignorance about the transmission of HIV was responsible for making people afraid they would get the infection from them. WLH felt that if others had the correct information about living with HIV and its spread, they would be more understanding, for instance:

> '[S]ome HIV positive women fail to accept themselves such that some fail to disclose and other think of committing suicide yet that doesn't help': **Participant 40, KI.**

> I think what causes the problem of violence against HIV positive women is a lack of knowledge. People need to understand that being diagnosed as HIV positive is not a curse or life sentence and that all they can do is to manage it once they are diagnosed with it so that they can live longer. **Participant 31, KI.**

> 'When you disclose to the family after the test that you are HIV positive, there will be no peace, and you will not be treated in a humane way, or as if you are an animal of some sort; for instance, when you cook food for everyone, the family will distance themselves as if they will get the virus from you somehow': **Participant 27, WLH**.

> Once you disclose your status, things change drastically in the homestead. If you were cooking for everyone in the homestead, they will now ask you to start cooking alone for yourself; and that hurts you *emotionally. You are not allowed to do many things in the homestead*: **Participant 26, WLH.** (Participant's emphasis)

The above excerpts from WLH participants indicate that ignorance about HIV infection and its spread leads to WLH being discriminated against or subjected to violence and other human

rights abuses. It also suggests that the violence experienced by HIV-positive women stems directly from their HIV positive status, demonstrating that there is still a great need for information dissemination on how HIV spreads from one person to another so that those who are HIV positive can lead dignified lives in the absence of violence.

5.2.3 Disclosure in the context of patriarchy and poverty

The study participants perceived that the social environment was not conducive for HIV status disclosure due to patriarchy and poverty, because Eswatini was a patriarchal society and, as such, WLH existed in the social context of patriarchy. Patriarchy connotes that in society men are regarded as superior and women inferior. The participants in this study perceived the minority social status of women as a cause of violence. For example:

> 'Violence against HIV positive women includes a lot of things. It stems from the fact that a woman is regarded as minor in the home, and it entails stigma and discrimination': **Participant 43, KI.**
>
> '. . . it is culture as a woman is referred to as a child and if she is a child Swazis usually quote the biblical verse which says foolishness is found around the neck of a child and a stick will remove it; so, it is believed that a man is above a woman and therefore there is need to beat her up in order for her to be straight; yeah so those are the issues': **Participant 36, KI.**
>
> '. . . to deal with gender-based violence issues . . . the fact that we live in a country where women status is still, to a greater extent, equal to the status of a minor. They are limited or cannot preview; they cannot access a number of opportunities and benefits that their male counterparts ordinarily enjoy. The woman is a minor; the in-laws have more access and power and say over your relationship; especially when the male spouse is dead': **Participant 39, KI.**
>
> '. . . because there is the minority status of the women in the homestead; I would also say that it is something that doesn't give her enough power in the homestead': **Participants 42, KI.**

The quotations suggest that a driver of violence against HIV positive women may be the position women occupy in Eswatini society. This is common to all women due to their minority status regardless of their HIV status.

Study participants also considered that men having multiple concurrent partners contributed to violence against WLH as it brought strife to the relationship. Participants observed that because their partners were not faithful, for some reason their partners then accused them of being promiscuous, for instance;

> '. . . the issue of unfaithfulness on the part of the man, the tendency is, it is the cause of the violence, and I am not sure why but the very person *who* is unfaithful he comes back and be violent in the house and then a fight will break out and afterwards it leads to sexual intercourse which is unprotected which leads to HIV infection . . . . Swaziland is very strange, the man that cheats is the very one that will accuse the woman of cheating even if she is not and then

because of that there would be violence in the home': **Participant 35, KI.** (Participant's emphasis)

'. . . husband is having an affair, and he is cheating with another woman; you find that he will stop calling on the phone; if he was calling three times per day to check on me at home, he will stop. He will even stop sleeping with his wife, and when you ask him why my husband, he will be like he is not feeling well, yet, he is lying. Even the manner of speaking to you will change, he will be like he is talking to a stranger. Even when I give him food, he doesn't show appreciation like he used to and the reason for all of this is his love affair: **Participant 28, WLH.**

The excerpts suggest that indeed IPV is caused by unfaithfulness, which is also one of the significant triggers of violence against WLH.

The participants in this study noted that patriarchal tendencies associated with men having younger sexual partners made mainly unemployed young black women vulnerable to HIV and VAW. Young women were the most vulnerable to VAW and HIV infection through heterosexual intergenerational sex. This perception was held by most of the KIs, for example:

'Young women from the ages of 15 to 25 are more attractive, and you find that they are approached by older men, so it is an issue of intergenerational sex, yet those men now have got a long sex history and the likelihood of them to be HIV positive is high: **Participant 32, KI**.

What I have been observing of late is that the young adults are the most affected, those that are in their 20s and 30s those are the ones we read about that they have been murdered. I always say that when I look at the drivers of HIV in Swaziland, we have intergenerational sex, we have multiple concurrent partners: **Participant 35, KI.**

The above quotes indicate that young women are at the epicentre of the two pandemics: HIV and VAW due to intergenerational relationships, suggesting that inherent power imbalances in intergenerational relationships lead to young women's HIV infection and vulnerability to violence.

Participants considered the way Emaswati[599] are socialised as reinforcing the notion of a gender-segregated and unequal society in which men are presumed superior and women inferior. It was felt that the traditional cultural context was fuelling VAW by men. The participants were of the view that the patriarchal system permeated all aspects of their lives.

'Socialisation drives violence against women and patriarchy because they grow up in families where the father is beating the mother or where the girl [is] used to see her father beating her mother so what happens as she grows is that a guy will beat her, and she would think it is right because that is what she has been seeing in all her life': **Participant 44, KI**.

[599] Citizens of Eswatini are referred to as Emaswati and one citizen is referred to as Liswati as a result of the country's new name.

> ‘It is societal norms and also the economic status of the women being less empowered in terms of jobs of being gender imbalance, in terms of being discriminated at work and not given equal opportunities makes them more likely to be abused’: **Participant 37, KI.**
>
> We come from a background where women have been socialised in a patriarchal society, and some of the women believe that the social ills that are there are normal or right because that is what they have grown up seeing’: **Participant 43, KI.**

Eswatini’s patriarchal society was believed to underlie the power imbalances that contribute to men using violence on women to compel them to comply, the more so among those who witnessed violence as children. The extracts suggest further that women are disadvantaged on this account and so subordinated to their male counterparts. The understanding of violence along these gender lines must also be seen in the context of violence being accepted and condoned as part of normal societal behaviour.

Also, women were called upon to disclose their HIV status in a social environment characterised by of poverty; in consequence participants perceived that poverty was an indirect cause of violence against WLH as they depended on IP for financial support and day to day upkeep. Men were also frustrated by lack of employment opportunities and other economic challenges; hence, they were perceived to have become more violent against women, for example:

> ‘With the economic meltdown came a situation where there is a patriarchal system where men are told they have the power to take care of the family and feed it. When he is dismissed from work, he gets back home with frustrations which he will take out on the wife and kids’: **Participant 43, KI.**
>
> ‘I found myself compelled to be sexually involved with a man I had no feelings for. My challenge was that I had nothing to support my children with; I was beginning to take ART medication yet food I did not have, so I resorted to having this relationship as a way out as I had no financial support whatsoever’: **Participant 3, WLH**.

The excerpts suggest that it would then be difficult for women to escape violent relationships as they have no means of sustaining themselves and that violence against women is perceived as an outlet for men to release their tension when frustrated.

5.2.4 Disclosure when women lacked agency and autonomy

Even though public health messages called on women to act with agency and autonomy by protecting themselves once diagnosed as being HIV positive, the study participants perceived that women’s agency and autonomy in protecting themselves against HIV infection was non-existent due to contradicting messages from cultural and church bodies which compelled women to be subordinate and obey their husbands’ demands and wishes at all times. The

dictates of culture and some church doctrines held that women did not have agency and autonomy over decisions affecting their bodies, but the partner and husband did. The challenge lay in reconciling the conflicting messages directed at women and gauging which directive should supersede the other.

Women live in traditional communities in which they may find themselves compelled to obey the community's cultural norms or the church's dictates. As a result, participants were of the view that culture and religion were responsible for reinforcing the subordination of women, thus making women vulnerable to HIV:

> 'I wouldn't even say it is our customs; I think it is the kind of traditional practices that we have made up for ourselves as opposed to the real traditional ones – because there is the minority status of the women in the homestead, it is something that doesn't give her enough power': **Participant 42, KI.**

> 'In theory, it may sound good how respected in Swazi culture women are, but in practice, the culture perpetuates gender-based violence and by extension, the increase in the infection by HIV of women': **Participant 26, WLH.**

The quotations suggest that culture *per se* does not expose women to VAW, but it was the incorrect interpretation and application of culture to further the interests of men. Further, the excerpts seem to suggest that culture favours men and that men perpetrate violence against women with HIV infection, particularly in relationships. This must be seen against the right to cultural values being protected both by international instruments and domestic law. The African Charter on Human and Peoples' Rights provides that an individual has the duty to preserve and strengthen the positive cultural values of the society.[600] This point is buttressed further in the African Charter on Human and Peoples' Rights on the Rights of Women in Africa to the effect that women are entitled to the right to a positive cultural environment.[601]

Study participants further lamented that culture in conjunction with religion was central in causing women's vulnerability to violence:

> 'I have also heard a male pastor preaching saying I know we are promoting that Parliament should pass a Bill against women rape, if a man wants sex, a woman has got no right to say no to it; so religious leaders are against criminalising marital rape. Religion and culture have united against women': **Participant45, KI.**

> 'A woman getting married is told to absorb pain; you are taught that a real wife is the one who doesn't speak, who absorbs pain. And the funny thing is that even religion preaches the same thing; that a wife holds an iron whilst it is hot, that marriage is the end of things (Kukamkhatsali)

[600] Art 29 (7) African Charter on Human and Peoples' Rights adopted in the General Assemble in 1981, (Banjul.)
[601] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

> all these things trains you and prepares you as a woman to stomach oppression, to stomach abuse and live with it as it is part and package of a life of a woman': **Participant 39, KI.**
>
> 'I have heard a woman preaching saying a woman must submit to her husband even if she is being clapped (slapped with an open hand). Saying a woman must persevere and that she holds an iron whilst it is hot (kuyabeketelwa mfati, umfati ubamba insimbi ishisa)': **Participant 45, KI.**

The quotes indicate that both under cultural and religious norms women are viewed as minors and that women are expected to internalise the violence and expect it from their IPs.

5.3 Violence and HIV as dual epidemics

Violence and HIV were perceived as being inextricably interconnected at many levels. The 45 study participants perceived HIV and VAW to be linked, so as to render a woman with HIV-positive status vulnerable to GBV and vice versa. The participants believed that being diagnosed HIV-positive precipitated multiple layers of violence; that an HIV positive status triggered VAW, and that certain forms of medical violence only affected HIV-positive women as discussed below.

5.3.1 Being HIV positive linked to VAW and vice versa

In this study, WLH felt that VAW and HIV were linked in that their HIV-positive status triggered specific acts of violence against them. As a result, a woman's HIV-positive status was seen as a cause of HIV-related violence and a cause of other human rights abuses, for example:

> '. . . society labels a woman with HIV and she is seen as a woman who was a prostitute, you see. They haven't thought of the fact that a man can also get HIV and bring it at home to infect the wife. So, HIV is always associated with the woman being a sexual deviant': **Participant 36, KI.**
>
> '. . . HIV positive women are accused of bringing the virus at home, and they are beaten up for it. I have been insulted, beaten and rejected by my husband on several occasions for being HIV positive': **Participant 17, WLH**.

The extracts seem to suggest that PLH are regarded in their communities as sexual deviants who are responsible for spreading HIV. The excerpts further suggest that WLH saw their HIV positive status as the main reason why violence was perpetrated against them.

The study participants perceived that women could not escape violence and the risk of HIV infection. WLH alleged that men who are diagnosed first as HIV-positive do not protect their partners and as a result, expose them to HIV. The WLH described their partners knowingly infected them with HIV as violence.

> '. . . yes, that happens especially when he doesn't disclose to you that he is now on ART but continue to have unprotected intercourse with you; definitely, the virus will be passed on to you': **Participant 4, WLH.**
>
> My husband was diagnosed as HIV positive and did not tell me. When I became pregnant, I was diagnosed HIV positive, I told my husband, and he said he was HIV positive too and that he was sorry that he did not tell me. You see, that is violence as I was HIV negative when I met him, and he knew that very well. When I asked him why he didn't tell me of his HIV status, he *said he was afraid I would have refused to marry him'*:[602] **Participant 30, WLH.** (Participant's emphasis)

It is accepted that as condom use is only possible if the male partner complies; in this study, the participants felt that most men declined the use of condoms in long-term relationships.

Interestingly, taking ART in line with the nationwide test-and-treat programme was also seen as a critical factor that often-triggered stigmatisation and discriminatory violence. Taking ART was viewed as 'proof' of HIV positive status; hence, to avoid violence, WLH avoided taking ART or had to take extreme measures to keep their treatment secret. This included hiding the tablets:

> 'Some women are being beaten up for going to the hospital, and some women are being beaten for taking ART pills. One woman said her ART pills she keeps in the maize meal bag so that she can take them unsuspected by her husband as she cooks the maize meal because if her husband would find out, she would be in trouble of beatings and being kicked out of the home': **Participant 33, KI.**
>
> Yes, when she discloses that she is HIV positive, she may suffer GBV because her husband would look at her as if she is a prostitute and ask her where she got the HIV, and maybe the husband will get a second wife as a result, or the woman will be chased from the homestead. Some women are being beaten up for going to the hospital, and some women are being beaten for taking ART pills': **Participant 36, KI.**

WLH may be put in a precarious position if their partners discover they were HIV-positive leading them to be uncertain whether to take ART and be beaten for it or not to take ART and die of HIV and AIDs.

5.3.2 Certain forms of medical violence only affect HIV positive women

The participants reported stigmatisation and discrimination from healthcare professionals when they received treatment, in contrast to HIV negative patients. For example:

> 'Coercion was used to sterilise HIV positive women more than force because as a medical practitioner I would not do forced sterilisation, but rather coerced sterilisation is the right term for it, and definitely, it was done at that time': **Participant 37, KI.**

[602] Emphasis added.

> '. . . the hospital staffs do not care about ordinary patients like me. They hurry to treat their family members first, and they make us on ART to wait for a very long time for our tablets refill': **Participant 24, WLH.**
>
> It is not the same. With some of the nurses, you feel the prejudice in their voices when they speak to you': **Participant 16, WLH**.

The participants emphasised that healthcare workers treated patients living with HIV differently to other patients. However, some of the participants believed that there was a recent improvement in the way in hospital workers related to WLH, for example:

> 'Of late, the treatment of patients has improved. It is the same for HIV positive patients and other patients': **Participant 23, WLH.**
>
> 'Right now, it is the same; but there was a time when HIV positive patients were not treated the same way as others': **Participant 29, WLH**.
>
> 'I think HIV positive patients are treated well more than the others': **Participant 18, WLH**.

The accounts suggest that some of the participants observed a difference between the way WLH were treated in the past by health workers and the way they are currently treated, and they are convinced that the situation is much better than it was at the beginning of the HIV response.

5.4 Inadequate legal remedies

Most of the study participants were of the view that the way the Eswatini's legal framework addressed violence against WLH was either substantively or procedurally inadequate or both. Some of the substantive inadequacies were that the laws on marital and cohabiting relationships offered little protection although the Constitution provided that 'women have the right to equal treatment with men'.[603] This proviso offered little assistance as customary law was commonly used in contrast to constitutional rights law. The women felt that even when the (constitutional) law existed, it was not adequately implemented or somehow it did not work due to procedural technicalities. In total, the consequences of the perception that the law would not assist them led to the women lacking faith in the legal system and seeking remedies in other structures, in NGOs, family and community leaders.

5.4.1 The lack of legal protection in the law

The participants pointed to a lack of adequate laws specific to VAW. Some participants went further stating that it was the lack of laws dealing with the vulnerability of women with HIV to

[603] S 28 of the Constitution of the Kingdom of Eswatini 001 of 2005.

violence that was the problem. This was not a plea for HIV-specific laws but rather that WLH be treated equally under the law. A key concern was the lack of legislation dealing expressly with domestic violence, for example:

> 'No. I don't see the current laws being protective to women who are being abused. I am not pleased, at all, with the current law': **Participant 37, KI.**
>
> 'We need laws that will respond to the issues of women living with HIV and AIDS so that they are more protected and are able to enjoy their human rights like all of us': **Participant 32, KI**.
>
> It is the lack of the law that will be specific and give harsher punishment to offenders that drives violence against women; because it is not there, the court ends up using this and that law to try and dress up the offence. So, the fact that there is no law on domestic violence, a lot of women are going to die: **Participant 41, KI**.

These accounts suggest that WLH felt that they would be better protected from VAW if there were adequate domestic violence laws in place. WLH noted that the current laws of Eswatini did not speak to the lived realities of HIV positive women.

a) *The lack of awareness of women's rights in the area of family law was a key concern and a driver of intimate partner violence*

The study participants felt that legislation protecting women in marital and cohabiting relationships was ineffective in addressing women's rights to equality. The three forms of relationship that are most common in Eswatini are cohabitation, civil marriage, and customary law marriage. Almost half the study participants were of the view that civil marriage offered more protection against violence than the other two forms of relationship. They noted that women who entered into civil marriages ('western marriage' as they termed it) with an antenuptial contract were better off as they had greater legal freedom, for example:

> 'I have observed that males fear civil marriage as it curtails their freedom to fool around; so, I would say it is a civil marriage that mostly protects women': **Participant 22, WLH.**
>
> I think it is a western form of marriage because there you have an option to marry out of community of property, so that what is yours remain yours throughout the marriage. In the customary law, it is said what is mine is yours, and then when there is a fallout, you (the woman) are sent back to your parental home with nothing': **Participant 13, WLH.**
>
> In western marriage, one will have the right to go to court to have her matter heard, and a decision issued so that your husband can continue to support you if you are positive. In the families when they hear that you are HIV positive, they fear that you are there to cause death in their family; therefore, they will ignore you and your problems': **Participant 3, WLH.**
>
> 'It is the western form of marriage because when you are married by civil rites, it is monogamous; he is not to have other unions': **Participant 18, WLH.**

The participants felt that the western form of marriage was protective because it was monogamous in its design. WLH felt multiple concurrent partnerships brought strife into their relationships which ultimately led to vulnerability to violence and possible HIV infection.

On the other hand, most of the KIs noted that the critical problem with the family law was not the legal classification of relationship but rather that it viewed women as minors. As such it did not protect WLH from VAW, for example:

> 'I think there are none of the relationship arrangements that protect women from VAW. It happens all over. Like I have told you that I was analysing cases, there are those who are cohabiting being affected, married civil or customary being affected, so it is the same': **Participant 32, KI.**
>
> 'There is none that protects a woman from VAW. In my observation it is the same whether you are cohabitating, you are married by civil law, or you are married under custom, it is the same; when a man wants to abuse you, he will − nothing will stop him. There are many I know who are not protected by either of the relationships': **Participant 41, KI.**
>
> 'I am afraid there is none that protects a woman from VAW. You have marital power, and when you read the content of what marital power means, it is unbelievable what it means, yet it is in our law. Let us be honest and unpack what marital power is and means; doesn't it give men power, unlimited power, and real legal power over the woman? It does': **Participant 39, KI**.
>
> 'I wouldn't say as even in civil marriages men there do get mistresses, so according to me, the marriage laws are the same': **Participant 17, WLH.**

These quotes identify the heart of the problem as the lack of legal and social value that women have in society which underlies the high levels of violence against all women. However, it sometimes has a disparate impact on women living with HIV as they are further marginalised from the community because of their HIV status.

Participants identified the need for the abolition of marital power and harmful cultural practices as important law reforms. Key informants agreed and suggested that marital power be abolished altogether. The participants felt marital power in civil marriages was inconsistent with section 20 of the Constitution – the equality clause. The participants also believed that certain harmful cultural practices which made women vulnerable to both HIV and VAW should be done away with, for example:

> 'Let us be honest and unpack what marital power is and means; doesn't it give men power, unlimited power, and real legal power over the woman? It does. Let us get rid of it now, as it has done so much harm to women in this country': **Participant 39, KI.**
>
> 'Culture is dynamic; we should always pick up the good things and discard the bad things. Let us also do away with societal norms which make women subordinate and make them feel they need to submit, as such norms expose them to infection with HIV, and now when they are infected, they are again blamed for the HIV as they are usually the ones to find out first or the ones who have to negotiate for safe sex': **Participant 37, KI.**

The quotations strongly suggest that the principle of marital power exposes women to violence from their partners and that society should purge itself of harmful traditional practices that make women vulnerable to violence and exposes them to HIV infection.

Participants also spoke of the need for WLH to be educated about their rights. They identified the need for laws that would deal decisively with violence in communities and that law enforcement officials should stop charging offenders with minor offences:

> 'So, for me it's mainly what we need to do to put the laws in place but make sure that the laws are really working, they are implemented, and people are informed or empowered to know as I live with HIV/AIDS I have a right to go to the hospital to seek a doctor's attention, and I have a right to decide on these': **Participant 35, KI.**

> 'I once reported at the police station. What I noticed is that the police do not like to take the matter to court immediately; so, they talked to us and warned my husband that if he continues to beat me, he will be taken to court; yet you as a victim your wish is that he be taken to court': **Participant 26, WLH**.

Participants noted the challenges associated with the implementation of the laws and the need for people to be educated about the law and its execution.

b) Granting of bail to offenders

A common complaint with the legal system was the granting of bail to offenders. The participants felt that this undermined their reporting the offenders as they were simply released back into the community before the trial:

> 'The issue of bail should be revisited as it makes it difficult for us women; you report, and then the culprit is out in two days boasting that his money is serving the sentence for him': **Participant 19, WLH.**

> '. . . the people had reported to the police, but the offenders both paid bail and came out and they repeated the offence (beating her again): **Participant 32, KI**.

The excerpts illustrate that the under-reporting of cases of VAW is related to issues of bail or premature release of suspects; and the fact that many women who experienced violence did not understand the law relating to bail and fines.

c) The pluralistic legal system undermines legal protections for women living with HIV

Eswatini is a dualistic legal system with the constitution and statutes existing alongside customary law. Some of the reasons WLH had limited confidence in the law included cultural pressures and poverty which placed pressure on women to conform or abide by customary law principles, undermining their ability to use protective laws, where they existed.

> 'The constitution is just there, but we rarely use it, we only use it in courts of law, but it takes someone to know their rights to know the Constitution to get to that level where we are going

> to use it. But, on an ordinary day-to-day basis, we are still using customary laws and values; actually people are accustomed to fulfilling customary values as opposed to constitutional rights that are there': **Participant 37, KI**.

The excerpt suggests that women find themselves in a situation where they must choose to follow traditional and customary rules and practices in their communities despite their knowledge of the existence of protective constitutional norms. The participants noted that family members enforced customary laws. The community disapproved of women who did not follow traditions, for example:

> '. . . a woman who refuses to wear mourning gowns after the demise of her husband: in my opinion, she is not doing the right thing. The family can meet and decide that she should leave her house and return back to her parental home: **Participant 10, WLH.**

There were, however, some positive responses. Some participants spoke about how they challenged customary law norms:

> 'My opinion is that the woman should be left alone and not forced to wear mourning gowns. Her right should be guaranteed. I used that constitutional provision to decline wearing mourning gowns for my husband. I had my husband's permission when he was still alive not to mourn. When my community and my in-laws insisted that I should wear mourning gowns, I told them that the Constitution was on my side . . . and the fact that I would not have been able to sell in my market stall as customers would have isolated me as being in black clothes is associated with bad luck. I told them that I will mourn my husband in my heart: **Participant 23, WLH**.

This suggests that certain women use the law to assert their rights despite the existence of rigid cultural practices.

5.4.2 The failure to implement protective laws

The women highlighted the issue of laws not being implemented, especially in the case of VAW. Some of the participants believed current laws might have been capable of protecting WLH from violence if they were implemented; however, the police were ineffective in handling domestic violence matters and facilitating access to justice for WLH.

a) Ineffectiveness of the police

A key stumbling block in accessing the justice system appeared to be that the police did not want to get involved in domestic matters:

> 'My rights were violated by the police as I wanted my matter to go to court so that my husband could learn that if you hit a woman, there are consequences for it − the police do not like to take the matter to court immediately': **Participant 29, WLH.**

Several reasons were given by WLH for not wanting to report assaults, including the view that the police preferred to play a mediatory role between the parties rather than apply the law, for example:

> 'I reported to the Sigondweni police station as well as on 999. The police called them, one of the perpetrators asked for my forgiveness, and the other did not: **Participant 23, WLH**.
>
> 'I once reported at the police station; so, they talked to us and warned my husband that if he continues to beat me, he will be taken to court; yet you as a victim your wish is that he be taken to court. Instead, they tell you that he will lose his job, then how are you going to survive after that, that is their reasoning': **Participant 29, WLH.**
>
> 'She insulted me using my status. I was angry, and I laid a charge against her at the police station; she then tried to get people to talk to me so that I can drop the charges against her and that exacerbated my anger as it meant now she was busy airing my HIV status to all these people. I dropped the charges': **Participant30, WLH**.

Women who did go to the police either did not lay a charge or had the police play a mediating role. The WLH participants who laid charges ended up withdrawing them. It also appeared that the police would offer practical assistance, such as taking victims to hospital, but did not assist them with laying a criminal charge, for example:

> 'Yes, I did. This was during my late husband's time. He beat me so hard when I escaped I ran to the police station in Manzini. I did not lay a charge against him. Since I was hurt, they took me to the hospital': **Participant 2, WLH**.

One woman reported success in reporting an assault to the police, for example:

> 'I reported the physical abuse to the police, and we came to talk about it here at the community. Another one is in jail for verbally assaulting me about being HIV positive; he even beat me up, and I lost two teeth as a result of the assault': **Participant13, WLH**.

The excerpt seems to suggest that the police can assist victims of violence who lay charges to access justice. However, WLH indicated that law reform was needed. For example:

> 'The laws we have are reactionary in nature, yet it would be great to have laws that are proactive and protect women before they suffer abuse': **Participant 31, KI.**

This supports the view that law reform is needed in line with international trends to allow victims to apply for protection orders as a way of proactively ending further abuse. The

alignment of all laws with constitutional provisions was perceived to be crucial to protect women from VAW. The participants in this study noted that WLH would be better protected from violence if law reforms ushered in equal treatment and respect for every individual. The participants agreed that equal treatment and respect for everyone depended on review and amendment of laws and practices that were discriminatory against women:

> 'Also, there is a need for stiffer punishment for offenders who violate women, and the courts should conduct fair hearings especially when I report that someone has insulted me by referring to my HIV status; they shouldn't rate my case as a minor case but should be taken seriously': **Participant 36, KI.**
>
> 'Parliament must align every law to the constitutional provisions so that women can be protected from violence and other rights abuses': **Participant 43, KI.**
>
> 'Also, the law should be strengthened so that women are protected when their husbands have passed on. In-laws must be stopped from property grabbing': **Participant 22, WLH.**

The above excerpts suggest that the strengthening of the law on violence as well as stiffening of sentences would make women free from violence. However, studies done in SA have shown that the existence of the legal framework in a country does not necessarily mean its implementation will take place.

b) Access to justice for WLH

Participants spoke out on the need for access to justice for WLH. Key informants noted that constitutional rights promoting women's freedom should be reinforced through enabling legislation in order to be realised by women.

> 'Some women who are HIV positive are openly abused in communities, but no one rush to their defence and some are being raped. The law will only kick-in if there is an opening of a case file; it doesn't ensure that the person was protected in the beginning': **Participant 1, WLH**
>
> 'The laws we have are reactionary in nature, yet it would be great to have laws that are proactive and protect women before they suffer abuse': **Participant 31, KI.**
>
> 'I think the laws and institutions including the courts in dealing with these cases – it takes a very long time to conclude a case here in Eswatini, and the cases of gender-based violence, I think they are not a priority of the courts; if there were specialised courts, for example, to deal with these cases, it would be better: **Participant 32, KI.**

Whilst the views suggest that women can be legally protected from violence, the process could be made more efficient if the court processes and procedures were strictly adhered to.

5.4.3 A lack of faith in the legal system leads to the use of extra-legal remedies

The study participants perceived that the legal remedies in Eswatini did not adequately ameliorate VAW against HIV positive women. However, there were non-legal measures which

better addressed the fight against VAW, including empowerment initiatives to generate their own income, activism, and advocacy on issues of VAW.

a) Reporting to alternative structures

Most participants expressed a lack of faith in the legal system and invoked non-legal remedies such as approaching traditional structures, NGOs, and family members for help with resolving disputes. The legal and policy framework of Eswatini was perceived to be inadequate to protect women from violence. Many reported to their families, for example:

> 'I did report him to my in-laws who sat down with us and advised him never to do it again': [604] **Participant 10, WLH.**
>
> 'I have never reported to the police, *but I would report to my family*':[605] **Participant 17, WLH.** (Participant's emphasis)

Others reported to traditional authorities, for instance:

> *'I reported to the family and to traditional leaders*[606] when my husband was still alive. He once abused me and told me to leave. I then left for my parental home, where I was sent back to my husband and reported the matter to the traditional leaders, which ruled that my husband should not chase me from our home;: **Participant 21, WLH**. (Participant's emphasis)
>
> *I reported to the traditional leaders and at the police station*:[607] **Participant 22, WLH.** (Participant's emphasis)

WLH did not report to the police but used alternative non-legal structures such as the family and traditional leaders before attempting to report to the police.

Finally, some found some relief in reporting to NGOs, for example:

> I reported at SWAGAA (Swaziland Action Group against Abuse) when my husband had taken and misused the money; I had saved for my first child's school fees. Secondly, I reported at the police station – the domestic violence department when he had left, and he was refusing to maintain his children. The police transferred the matter to social welfare so that he could be compelled to pay maintenance for the children: **Participant 1, WLH**.
>
> I have reported to the Council of Churches (a faith-based organisation). It's about child support, and he pays the amount they set for him: **Participant 18, WLH.**
>
> Yes. I once reported to Positive Women Together (NGO). I even tried reporting to the police by I was further victimised by them; it is better if you report to the police designated for domestic violence; my husband beat me at night, so I had to call 999 the emergency police line. When I reported the matter, the police I found said it serves me right to be beaten, why I was grabbing my husband's phone: **Participant 26, WLH**.

[604] Emphasis added.
[605] Emphasis added.
[606] Emphasis added.
[607] Emphasis added.

The excerpts suggest that victims of violence are likely to first report a case of abuse to NGOs.

Many of the reasons given for not using the law were the same as those identified in the literature relating to domestic violence, namely contrite partners, and financial dependence on their male abuser, for example:

> 'No, I have never reported to the police. I would say that I was going to lay charges only to scare him off. At the hospital, they did advise me to lay charges, but I could not because he had paid for my hospital bills and he had begged me not to say it was him who had done this to me so that we can have a secured future': **Participant 10, WLH.**

The excerpt suggests that WLH did not report violence to the police even after being advised to do so by healthcare workers.

b) WLH's empowerment initiatives to generate their own income

WLH perceived that women would be less dependent on men and more able to be independent and free from violence if they were able to generate their own income. The respondents believed that economic empowerment of WLH was necessary for independence. They recommended that the government should support WLH with income-generating projects so that they could create wealth for themselves and defeat poverty, for example:

> 'I wish that government should enable us with income-generating projects, something which will keep us busy as women instead of thinking about our troubled lives. We are also interested in handy craft as we are not working, and we have no one to support us as our spouses died': **Participant 10, WLH.**
>
> 'I wish that there would be income-generating projects initiated in our community; that we can be trained on how to farm poultry and to do vegetable gardens and be given start-up capitals as we don't have anything': **Participant 15, WLH.**
>
> 'The government should empower support groups of HIV positive women with training on income-generating projects so that they can sustain their homes': **Participant 26, WLH.**
>
> 'Women should be supported with skills so that they can be financially empowered to stop them from being dependent on men': **Participants 32, KI.**

The excerpts suggest that government empowerment policies should target WLH as income-generating projects were vital to reducing women's dependence on others for financial support.

Also, WLH participants felt that their lives would improve if PLH were given financial assistance such as social grants, especially those who did not have anyone to take care of them:

> 'I feel that the *government should issue HIV positive women who can't work social grant*[608] so that they can afford vegetables and fruits or if they can be given food parcels': **Participant 9, WLH.** (Participant's emphasis)
>
> 'We should get income-generating projects start-ups, *as well as social grants*[609] so that we can be able to get a balanced diet': **Participant 28, WLH.** (Participant's emphasis)
>
> 'Most of the challenges centre around the issues of poverty, in that you talk to women and you tell them about their rights, that they can claim their rights, how they can get things, how they should stand up for themselves, but it becomes difficult if you don't have anything, say financial tool to support them': **Participant 41, KI.**

The views suggest that some PLH are struggling to meet day-to-day supplies due to abject poverty, hence the need for inclusion in social security schemes.

c) Activism and advocacy on issues of VAW

Participants perceived that activism and advocacy on issues of VAW would protect WLH from VAW. Key informants believed that civil society organisations in Eswatini needed to engage in robust activism to create awareness of VAW and women's rights abuses in the country, for example:

> 'So, I would say it is the lack of advocacy, lack of activism, lack of political will, and vigorousness when it comes to issues of abuse. We don't have the fighting spirit. You see Swazis they keep nursing the hope that things will turn around for the better, or that it was by mistake or that they understand. *It is the lack of advocacy, lack of activism, lack of political will, and vigorousness when it comes to issues of abuse, which must come to an end*:[610] **Participant 45, KI.** (Participant's emphasis)
>
> '. . . there should be a policy that should regulate that a person's HIV status should not be used anyhow. I think we should advocate for such a policy': **Participant 31, KI.**

The extracts suggest a call for civil society to work harder in bringing issues of VAW to the attention of policymakers.

Other participants felt that community perpetration of violence against WLH changed for the better when the community received in-depth knowledge and understanding about the HI virus, for example:

> '…it depends on the level of the community's understanding of HIV. If it is a well-informed community, they would offer support. I disclosed to the community health motivator *(umgcugcuteli),* and she immediately disclosed her positive status to me as well, which made me very happy: **Participant 1, WLH.**

[608] Emphasis added.
[609] Emphasis added.
[610] Emphasis added.

> Well, in the community, I cannot say there is any problem. We are staying together, and all is well as the people I talk to most are also on ART: **Participant 7, WLH.**

The views suggest that community dialogues on health matters assist communities in acquiring much-needed information about health matters, including HIV and AIDS. In turn, the knowledge facilitated a reduction of stigma and discrimination on HIV and AIDS.

5.5 Conclusion

This chapter has provided a breakdown of the key research findings, finding that violence against WLH was multifaceted, involving different perpetrators. The violence included experiences of emotional violence as well as stigma and discrimination. Furthermore, it included financial, physical, and sexual violence. The perpetrators of violence included those in the private and public spheres. Intimate partners and the family were viewed as the perpetrators in the private and community spheres, and healthcare workers were perpetrators in the public sphere.

Secondly, the study found that disclosure of HIV status was a source of vulnerability to violence for WLH. The study participants noted that they lived in a social context of patriarchy, poverty, and lack of knowledge about HIV transmission. Public health messages on HIV disclosure did not take into account their lived experiences. There were virtually no positive experiences in the disclosures, although, they did report that their own families rather than their partner's families were supportive. The notion that WLH would be safe from violence if they were silent about their HIV status is very concerning, as it indicates that support policies are not being implemented and so not helping to support the identification and treatment of all persons vulnerable to HIV.

Thirdly, the study found that violence and HIV were interconnected, in that being HIV-positive was linked to VAW and vice versa; that being HIV-positive resulted in multiple layers of additional violence for WLH. The HIV-positive status triggered VAW, and certain forms of 'medical' violence only affected HIV positive women. Women also said the way they became infected was a form of violence − forced sex and a lack of power to negotiate safer sex practices. There was deep anger towards their male partners for infecting them in a non-consensual way. Whilst they saw themselves as victims, the community saw them as the offenders who had brought HIV into the family.

Lastly, the study found that legal remedies available to WLH were substantively and procedurally inadequate, and where they existed, they were not applied. The participants also felt that the criminal justice system, especially the availability of bail, undermined the courage

needed to report offences. As a result, WLH had little faith in the legal system, and women sought remedies in other structures such as the family, community leaders, and NGOs. This was surprising as women felt that generally that these structures were not supportive of them and expressly excluded them in many instances. Finally, the participants perceived that the laws on marital and cohabiting relationships offered little protection to WLH; and that constitutional provisions also offered little protection due to the clash of formal law with cultural practices.

The next chapter presents an interpretation and discussion of the research findings detailed above. Also, it looks at the implications of such findings for policy and law reform in Eswatini as well, as the limitations of the research study.

CHAPTER SIX
DISCUSSION

6. Introduction

> 'The people in society that are most susceptible to HIV infection are those that are most vulnerable to human rights violations. . . . and the protection of human rights is the only real solution to this HIV/AIDS immediate and pressing crisis.'[611]

This quotation reflects the premise upon which this thesis is built, namely that human rights violations and in particular VAW, increase the vulnerability of women to HIV infection and make them less able to manage their infection if they are HIV-positive. Chapter five presented the overall findings of the research study. The purpose of this qualitative study, based on a human rights approach, is to document the experiences of violence by WLH and critically evaluate how Eswatini's legal and policy framework protects WLH from VAW. This chapter is devoted to the discussion of the major research findings, linking the results back to the human rights-based conceptual framework, which underpins the framing of this study.

Studies have shown that HIV and human rights are inextricably linked, thus, making human rights violations the primary drivers of the HIV epidemic − also magnifying the impact of HIV on individuals and communities.[612] VAW is one of the most pervasive human rights violations in the world; many women experience it in their families, in their workplaces, and communities – places where they are supposed to be most secure and protected.[613] The connection between human rights and HIV and AIDS was established in the first decade of the epidemic, which led to the protection and promotion of human rights as part of the global public health response to the pandemic.[614] This health and human rights approach proceeds from the basis that these concepts are intertwined and that one cannot achieve public health goals without protecting human rights.[615] Likewise, one cannot meet human rights standards without addressing the

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[611] F Viljoen & S Precious 'Introduction: Human rights under threat in attempts to address HIV and AIDS' in F Viljoen & S Precious (eds) *Human Rights under Threat: Four Perspectives on HIV/AIDS and the law in Southern Africa* (2006) 3.

[612] UNAIDS 'Act to change laws that discriminate' (2019), available at *https://www.unaids.org/sites/default/files/media_asset/2019_ZeroDiscrimination_Brochure_en.pdf* accessed on 18.01.2020.

[613] Bond & Phillips (note 224, above; 481).

[614] World Health Organization, World Health Assembly, Resolution WHA 40.26, Global Strategy for the Prevention and Control of AIDS, Geneva, WHO, 5 May 1987. See also, S Gruskin and others, Human Rights and HIV/AIDS 2002 available at: *http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07* accessed on 03.03.2020.

[615] S Gruskin, M J Roseman and L Ferguson 'Reproductive Health and HIV: Do International Human Rights Law and Policy Matter?' (2007) 3(1) *McGill International Journal of Sustainable Development Law and Policy* 75. See also D Reubi 'The promise of human rights for global health: A programmed deception? A commentary on

'fundamental human rights to the highest attainable standard of healthcare'. Therefore, adopting this human rights approach, the discussion chapter highlights the following three themes:

- The social context within which HIV and VAW coexist;
- VAW as a global health problem requiring a public health response;
- Violence against WLH is a human rights violation that requires a human rights response.

The chapter looks at available literature on VAW and HIV, thereby pointing out similarities and divergences between previous scholarship and the findings of this study. It critically analyses the legal and policy framework on VAW and HIV at both national and international levels.

6.1 The social context within which HIV and VAW coexist

This study found that the social environment made VAW and HIV mutually reinforcing in Eswatini. Women's status in customary law, in which women are not equal to men and their inequality under other laws leave them with low social status. They live in a patriarchal society where structural factors such as patriarchy, poverty, and low social status, make it difficult for women to live without fear. An HIV positive woman's disclosure of an HIV positive status is difficult in itself and at times leads to violence and human rights abuses. This finding is in line with other studies that have posited that HIV and gender inequalities must be recognised as twin and intersecting challenges.[616] The key is to take action to combat HIV/AIDS, gender inequality and poverty simultaneously.[617] Several factors shape the social context of Eswatini, and they include gender inequality, poverty, as well as the highest HIV prevalence in the world, which has dramatically affected the social fabric of this small country. [618] Women are disproportionately affected by Eswatini's HIV epidemic,[619] especially in view of the high levels of HIV stigma and discrimination.[620]

Schrecker, Chapman, Labonté and De Vogli' (2010) "Advancing health equity in the global market place: How human rights can help" (2011) 73 *Social Science & Medicine* 625

[616] Bond & Phillips (note 224, above; 481-499).

[617] Ibid.

[618] Avert 'Women and girls, HIV and AIDS' available at *https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/swaziland* accessed on 29.01.2020.

[619] Ibid.

[620] Avert (note 620, above).

6.1.1 Patriarchy and poverty

This study found that patriarchy and poverty were damaging to the health and human rights of the participants quoted above. Both had the effect of watering down the efforts of health and human rights interventions in the fight against VAW and HIV infection in that they inhibited women from acting autonomously.

a) Patriarchy

WLH were of the view that patriarchal tendencies associated with older men having younger inexperienced women as sexual partners made young unemployed women vulnerable to HIV infection and violence. This is a form of patriarchy as it is associated with 'compulsory heterosexuality' in which sexual double standards are adopted for men and women, and different rules apply for their sexual behaviours.[621] However, with this in mind, it is easy see why it is common practice in Eswatini for 16-year-old girls to be given in marriage (arranged or not) to older men (50 or 60-year-old rich men) by parents (poor or not poor) for prestige purposes, whereas it is a taboo for an older woman to be sexually involved with a younger man.[622] Cultural norms often encourage men to have younger sexual partners,[623] exposing young women to HIV.[624]

The 2012 National HIV Prevention policy contains interventions to address the sensitive but common issue of multiple concurrent partnerships, including intergenerational sex, gender power imbalances, VAW, women's economic dependence on men, and harmful cultural norms.[625] The authors, Higgins, Hoffman, and Dworkin say that evidence has emerged over the years to support the findings that young women are biologically, socially and economically more vulnerable to HIV infection.[626] Even though young women may have sufficient agency to gain the attention of older men, they are unable to negotiate condom use or safer sex.[627] Under the patriarchal structure, violence is utilised as a tool to control women and their sexuality, particularly in low-income families.[628] Women are considered incapable of thinking for themselves − inferior and subordinate in all aspects of life.[629]

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[621] U Soman 'Patriarchy: Theoretical postulates and empirical findings' (2009) *Sociological Bulletin* 253-272.
[622] Nhlapo (note 363, above).
[623] Nhlapo (note 363, above).
[624] J A Higgins, S Hoffman and SL Dworkin 'Rethinking gender, heterosexual men and women's vulnerability to HIV/AIDS (2010) *American Journal of Public Health* 439.
[625] Eswatini Government, *The National HIV Prevention Policy of 2012*, par 2.1.2.1.
[626] Higgins, et al (note 626, above; 439).
[627] Ibid.
[628] M G Tarar & V Pulla 'Patriarchy, gender violence and poverty amongst Pakistani women: A social work inquiry' (2014) 2 *International Journal of social Work and Human Services Practice* 56-63.
[629] ibid.

WLH viewed patriarchal norms such as men's multiple concurrent partnerships as the source of strife in their relationships. In a study carried out in Togo, it was reported that multiple concurrent partner relationships were linked to higher incidents of physical and sexual violence amongst intimate partners despite serological status.[630] It revealed that women whose partners had many sexual partners were more likely to report sexual abuse and women who confronted their partners about infidelity were at a higher risk of any form of a violent act perpetrated by the male partner.[631] This study resonates with studies done in Tanzania[632] and South Africa, where it was found that 'men with multiple concurrent sexual partners reported becoming violent when their female partners questioned their fidelity and also reported forcing regular partners to have sex when these partners resisted their sexual advances'.[633] Indeed, women are especially disadvantaged in societies such as Eswatini, where they are considered subordinate to their male counterparts; hence, the debased social status that women occupy in society was found to make women vulnerable to violence which led to their susceptibility to HIV infection.

This study reveals that the socialisation of men and women in Eswatini was the cause of the distorted notions of masculinity and femininity. Every society or culture decides for itself on what is feminine or masculine.[634] Also, 'a society is considered a masculine one if the gender roles visibly vary: men should be controlling, harsh and focused on material success, while women should be shy, gentle and concerned with the quality of life'.[635]

The social constructs of gender roles are internalised by people in society and are passed on from one generation to the other.[636] Therefore, there are historical, cultural, social and economic contexts that shape women's higher susceptibility to HIV infection and violence which must be taken into consideration when interventions are being framed.[637] For instance, in this study, WLH felt that they could not successfully negotiate condom use even after they had disclosed their HIV infection to intimate partners. Robinson and others postulate that many

[630] J Burgos-Soto & others 'Intimate partner sexual violence and physical violence among women in Togo, West Africa: Prevalence, associated factors, and the specific role of HIV infection' (2015). *Global Health Action Journal*
[631] Ibid.
[632] K Curran, et al 'HIV-1 prevention for HIV-1 serodiscordant couples' (2012) 9(2) Curr HIV/AIDS Rep. 160-170.
[633] N Abrahams, et al 'Intimate partner violence: prevalence and risk factors for men in Cape Town, South Africa' (2006) *Violence and Victims* 248.
[634] A N Neculaesei 'Culture and gender role differences' (2015) 17 *Cross-Cultural Management Journal* 34.
[635] Ibid, 33.
[636] I A Phiri & M A Phiri 'HIV and AIDS, Gender violence and masculinities: A case of South Africa' *J Hum Ecol* (2016) 53, 74-86.
[637] S M Vettori 'Gender-specific HIV policies and programmes at South African workplaces' in Y Jorens ed *HIV & social security law: the SADC Region* (2013) 51-60.

WLH experience gendered power inequalities, in particular, in their intimate relationships.[638] As a result, women are prevented from asserting their sexuality free from coercion and deciding about reproductive health options and exercising their fundamental rights.[639] It must be noted that the understanding of violence along these gender lines also looks at the extent to which violence is accepted and condoned as part of the normal social structure. [640]

This study also found that WLH perceived culture or tradition and religious norms as enforcing the subordinate status of women, which in turn made them vulnerable to violence. For example, negative cultural and religious norms were found to have been utilised to the detriment women's health, making women susceptible to HIV infection. These included preachers who sermonised that wives must submit to their husbands when beaten or sexually assaulted, and that a real wife stays with her partner especially when she is abused − *emendvweni kukamkhatsali; umfati umbamba insimbi ishisa*. Such sayings are only said to women and not men.

In essence, this thesis argues that responses to HIV and violence must consider this patriarchal context if the underlying roots of the problem are to be addressed. Women's agency is severely compromised by the structure of society in Eswatini. Unless law reform, which is supported by programmatic interventions is introduced, current HIV responses will continue to fail women.

b) Poverty

The gender-based nature of society is also reflected in women's economic dependence on men.[641] The fact that most women are found in the lower economic echelons of society means that WLH's physiological vulnerability, low socio-economic status in the community and at home and discriminatory cultural practices cannot be overemphasised. In this study, poverty was perceived to be an indirect cause of violence against WLH. Sometimes violence is used to dispossess women of their finances. Studies have shown that family poverty is another issue that illustrates class, gender, and race intersectionality.[642] The forces of gender, race, and class disadvantage black women to the extent that they are vulnerable to HIV and VAW.[643]

[638] J L Robinson, et al, 'Interventions to address unequal gender and power relations and improve self-efficacy and empowerment for sexual and reproductive health decision-making for women living with HIV: A systematic review' (2017) *PLoS ONE* 1.
[639] Ibid.
[640] Robinson et al, (note 640, above).
[641] Robinson et al (note 640, above).
[642] J A Belkhir 'Race, Gender and Class Intersectionality (2001) 8 *Jean Ait Belkhir, Race, Gender & Class Journal* 168.
[643] Ibid.

Studies have also shown that extreme poverty acts as a direct cause of some forms of VAW; thus, women who are poor may suffer different types of violence from women who are not living in abject poverty.[644] For women with HIV, a combination of poverty and violence denies women choices, limits their capabilities, and inhibits their access to safety.[645] In this study, most of the WLH were living in abject poverty. Research shows that poverty invites gender-unequal norms, violence against women and psychological distress.[646]

This study found that poverty caused VAW in two ways: First, poverty compelled WLH to tolerate abuse as well as engage in toxic relationships so that they could be taken care of by intimate partners. This was because for women had limited opportunity to be involved or engaged in gainful employment and obtain skills.

Other studies have shown that poverty and inequality are so strongly gender-based, that black women are the most disadvantaged and marginalised in society. Due to cultural practices such as male primogeniture, and where resources are scarce, girls may be unlikely to be taken through schooling in favour of boys, and women may be prohibited from inheriting property or estates of their late parents. Therefore, achieving effective gender equality in Eswatini urgently requires lessening the effects of the HIV pandemic on women.

Other studies have also shown that when women work to make up family expenses, husbands or partners use physical violence to control their financial and social activities.[647] The studies have attempted to calculate 'the economic cost of women's suffering due to VAW because VAW is a significant human rights issue, both in itself and because certain men use it to prevent women from realising other rights—be they economic, social, cultural, civil, and political'.[648] Studies conclude that the public cost of VAW is exponentially high, creating the need for legislators to recognise and respond to the interface of poverty and VAW.[649]

The significance of poverty as a contextual issue in this study is reflected in the epidemiology of the epidemic. HIV is more prevalent in poor and marginalised sectors of society. Most of the participants in this study were not working and their lack of financial independence impacted on their sense of agency. They articulated deep desires to be assisted

[644] M G Tarar & V Pulla 'Patriarchy, gender violence and poverty amongst Pakistani women: A social work inquiry' (2014) 2 *International Journal of Social Work and Human Services Practice* 56.
[645] Ibid.
[646] A C Tsai 'Intimate partner violence and population mental health: Why poverty & gender inequalities matter' (2013)10 *PLoS Med* 2.
[647] G Terry 'Poverty reduction and violence against women: exploring links, assessing impact' (2007)14 *Development in Practice* 470.
[648] Tarar & Pulla (note 646, above; 63).
[649] Ibid 473.

to enter the formal economy as a way of lessening their dependence on men and helping them to be more resilient to violence.

6.1.2 Structural violence

Structural violence describes social institutions that put individuals such as WLH in harm's way by stopping them from meeting their basic needs.[650] Structural violence needs to be identified and explored for its contribution to women's suffering, in particular, HIV positive women in the Eswatini context. This is because poverty exacerbates the effects of structural violence brought about by structural impediments such as lack of autonomy, healthcare, and education.[651] The commission of structural violence by the state and the healthcare sector in particular, within the context of the HIV and AIDS epidemic, culminates in HIV positive women experiencing violence in the medical sphere.

The medical abuse suffered by only HIV positive women in this study consisted of forced and coerced sterilisation which undermined further their self-worth and standing in society. Durajaye points out that WLH have continued to be targeted for sterilisation without their knowledge or consent, an irreversible procedure likely to cause psychological harm and lasting mental anguish.[652]

In this study, healthcare workers perceived coerced and forced sterilisation as violence coupled with discrimination against WLH, as no men were reported to have been sterilised. Healthcare workers share the widespread view that WLH should not bear children.[653] According to Strode, healthcare workers play a critical role in shaping the reproductive choices available to women and may project their prejudices to stigmatise patients.[654]

There are many accounts of HIV positive women saying that they were coerced into being sterilised or never agreed to it. Strode surmises that before ART became widely accessible, HIV might have been perceived to have had a negative impact on women and their children's health, which then led to the adoption of a misguided belief that WLH ought not to have children.[655] However, this approach was taken without consulting WLH and continued even after the advent of the PMTC programme as evidenced by the 2015 complaint to the South

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[650] P E Farmer, (et al) 'Structural violence and clinical medicine' (2006) *PLOs Med* 1686.
[651] V Wadhwa 'Structural violence and women's vulnerability to HIV/AIDS in India: understanding through a "grief model" framework' (2012) 102(5) *Annals of the American Association of Geographers*.
[652] E Durajaye 'Involuntary Sterilisation as a form of violence against women in Africa' (2017) *Journal of Asian and African Studies* 1-12 1.
[653] M Magagula, No babies for HIV+ Women? *Times of Swaziland* 17/11/2013. Available at *www.times.co.sz/news/93328-no-babies-for-HIV-women.html* accessed on 10.12.2018.
[654] Strode & Others (note 138, above; 6)
[655] Ibid.

African Commission on Gender Equality from WLH who alleged forced, and coerced sterilisation by healthcare workers.[656] In 2020 the commission found that there had been a blatant violation of WLH's rights through sterilisation without informed consent.[657]

Literature reveals that new medicine allows HIV-infected women to live normally and have healthy children; however, many HIV positive women are told they must not get pregnant.[658] In a study by Essack & Strode, forced and coerced sterilisation of HIV positive women was found to have happened worldwide.[659] Women's groups maintain that coerced sterilisations are examples of the continuing stigma and discrimination suffered by WLH, as their male counterparts who are HIV positive are not subjected to sterilisation.[660]

Forced and coerced sterilisations represent grave violations of women's human rights and medical ethics and should be perceived as 'acts of torture and cruel, inhuman, and degrading treatment'.[661] However, no one has taken responsibility for it in Eswatini, with scarce reports of justice being handed out for the women who alleged they had been involuntarily sterilised.[662] In other jurisdictions, however, legal claims have been filed against the states; for instance, the cases of the sterilisation of 20 Namibian women have been extensively documented.[663]

WLH have been shunned, rejected, and discriminated against by physicians, family, and close friends, raising the dilemma whether to disclose their status or not. In Eswatini 94 per cent of new infections are reported to occur through heterosexual relations and 68 per cent of new HIV infections in adults take place amongst those married or cohabitating with a steady partner above 25 years of age. [664] Therefore, reducing VAW among people at risk of HIV is

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[656] Commission for Gender Equality, Investigation Report on the forced sterilisation of women living with HIV/AIDS in South Africa (*Her Rights Initiative v National Department of Health Complaint* Ref No: 414/03/2015/KZN) released 23.02.2020 49 available at *http://www.cge.org.za/wp-content/uploads/2016/12/Forced-Sterilisation-Report.pdf* accessed on 31.03.2020

[657] Ibid.

[658] L Guterman 'Women in Namibia Fight Back against Forced Sterilization' 21 November (2010) available at *https://www.opensocietyfoundations.org/voices/women-namibia-fight-back-against-forced-sterilization* accessed on 03.03.2020.

[659] Essack & Strode (note 139, above).

[660] Ibid.

[661] Essack & Strode (note 139, above). See also Open Society Foundation *Against Her Will, Forced and Coerced Sterilization of Women Worldwide* (2011) available at: *http://www.soros.org/sites/default/files/against-her-will-20111003.pdf* accessed on 05.03.2018.

[662] In 2016, the Southern Africa Litigation Centre (SALC) supported a case in the Swaziland High Court of a woman who sued the Government of Swaziland for being forcefully sterilized in a government hospital. The Government offered a confidential settlement of 50 thousand Emalangeni (USD 3850).

[663] G York *HIV+ women in Africa sterilized, stigmatized* 2 May 2018 *The Global Mail* available at *http://www.theglobeandmail.com/news/world/hiv-women-in-africasterilized-stigmatized/article4262581/* accessed on 03.03.2020

[664] National HIV Prevention Policy – Swaziland (2012) 13.

perceived to be at the heart of creating an enabling environment where HIV and VAW prevention and care can be realised.

Another key example of structural violence is how the women perceived the policy of disclosure. This study found that healthcare workers' insistence on HIV positive status disclosure to intimate partners and family members increased WLH vulnerability to violence. The health system and stakeholders must rethink how they handle the messaging about the disclosure, because when WLH HIV status is disclosed, they become less valued than other human beings. This leads to dejection, rejection, and ejection from the homestead.

Rochat and others identified the need for interventions for disclosure,[665] revealing that in communicating of information, guidance and support, parents could engage 'in HIV disclosure at much higher rates than previously reported'.[666] This would take care of the fear of violence after disclosure. In this study, WLH were of the view that whether they disclosed voluntarily or by default (through being seen visiting HIV/AIDS facilities) the outcome was the same in terms of the negative backlash they received.

With regard to the Eswatini HIV policy framework, the Integrated HIV Management Guidelines of 2015[667] propose the 'test-and-treat' programme in hospitals for patients diagnosed as HIV positive, but WLH participants perceived that the programme was exposing them to possible domestic violence and stripping them of their rights to choose.[668] The Eswatini National HIV Prevention Policy of 2012 (2012 Policy), which was perceived to provide for mandatory disclosure, was seen as perpetrating violence against WLH. The policy provides that:

> 'All clients who undergo HIV testing and counselling shall receive information on risk reduction. Couple/partner testing and counselling and disclosure of status among spouses and partners shall be promoted for risk reduction.' [669]

Any statute or policy document that purports to make disclosure of HIV status mandatory is contrary to international norms and HIV and AIDS guidelines as a violation of WLH's rights to privacy and autonomy.

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[665] Rochat & et al (note 126, above; 2).
[666] Ibid.
[667] The Swaziland Integrated HIV Management Guidelines of 2015.
[668] A Green 'How Swaziland is beating down HIV' 25 July 2017 *Health-E News* available at *https://www.health-e.org.za/2017/07/25/swaziland-beating-hiv/* accessed on 06.12.2018. Swaziland has reported much success in the HIV/AIDS fight recently and the success can be attributed to moving to a test-and-treat strategy (where patients are immediately placed on antiretroviral regardless of their health status).
[669] S 2.1.9.6. National HIV Prevention Policy – Swaziland of 2012, available at: *https://www.infocenter.nercha.org.sz/sites/default/files/PreventionPolicy.PDF* Accessed on 06.12.2018.

In Eswatini's case, no policy document was found providing for mandatory disclosure; hence there must have been a practice that encouraged or coerced WLH to make known their HIV status to intimate partners and families. In the absence of a mandatory disclosure policy, WLH should only disclose their status voluntarily. The Eswatini policy encourages people to do just that. For instance, its objective is to prevent or reduce the infection with HIV in Eswatini.[670]

The 2012 Policy also purports to adopt certain guiding principles in the fight against HIV and AIDS, including the following:

> 'Gender equality and equity shall be applied in all programming and prevention interventions to meet the unique needs of women, girls, men, and boys; and the promotion, protection, and respect for human rights shall be observed.'[671]

A human rights approach includes a commitment to the reduction of stigma and discrimination.[672] The response to HIV and AIDS must take into account the extent to which the disease is societally and culturally embedded, including the context in which 'messages, knowledge, experience, and practice are produced, reproduced and expressed'.[673]

6.1.3 A dual legal system that results in a clash in the way women's rights and social status are framed in the customary law as opposed to the Constitution

This study found that Eswatini has a dual legal system (constitutional and customary law) that results in a clash between women's constitutional rights and customary law. Legal pluralism refers to a situation where more than one body of laws co-exists pertaining to the same issue within the social order or geographical space.[674] The state is required to determine which laws apply in cases of conflict.[675] However, in Eswatini, the Constitution recognises both customary and formal law as equally valid. This creates legal uncertainty and disjunctive approaches.

Since WLH lived in traditional rural areas, they felt pressured to obey the dominant cultural and religious norms of their communities, even where these enforced the subordination of women. In this context, women did not use the formal legal system to seek redress for

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[670] Ibid para 1.7.
[671] Para 1.8 National HIV Prevention Policy – Swaziland of 2012.
[672] P Eba, 'Pandora's Box: The criminalisation of HIV transmission or exposure in SADC countries in F Viljoen & S Precious eds *Under Threat: Four perspectives on HIV, AIDS, and the law in Southern Africa* (2007) 13.
[673] J Baxen & A Breidlid, 'Researching HIV/AIDS and education in Sub-Saharan Africa: Examining the gaps and challenges in *HIV/AIDS in Sub-Saharan Africa: Understanding the implications of culture & context* (eds) J Baxen & A Breidlid (2009) 3.
[674] R Perry 'Balancing rights or building rights – Reconciling the right to use customary systems of law with competing human rights in pursuit of indigenous sovereignty' (2011) 24 *Harvard Human Rights Journal* 71.
[675] Ibid.

violence against them and other human rights abuses. Although the study participants were critical of traditional law, they bought into its systems as the preferred method of dispute resolution.

In other jurisdictions, such as South Africa, conflicts between two legal systems are invariably resolved by the courts testing whether the customary law conflicts with the Constitution as the supreme law. [676] Section 2(1) of the Eswatini Constitution provides that it is the supreme law of the land and that all other laws are subject to it.[677] The Constitution then recognises both the Roman-Dutch common law and siSwati law and custom,[678] providing as follows:

> Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.[679]

Traditional structures are mandated to use customary law, as well as formal Swazi traditional courts known as Swazi Courts, which have jurisdiction to deal with any dispute arising from a deceased estate where the spouses were married under siSwati law and custom.[680] In the case of *Attorney General v Titselo Dodge Ndzimandze (Attorney General v. The Master of the High Court)*,[681] three widows married by customary law claimed that section 34 of the Constitution should be invoked for the distribution of their late husband's estate.[682] On review, the Supreme Court pointed out that the principle of primogeniture governed succession in customary law and, this principle was fundamental to succession under customary law in southern Africa.[683] The court set aside its earlier decision on the subject and reminded Parliament of the duty to align existing laws with the Constitution.

This study found that some cultural norms in Eswatini override women's rights, consistent with, for example, a Due Diligent Project (DDP) survey, which found that many

[676] Perry (note 676, above).
[677] S 2(1) Constitution 001 of 2005.
[678] S 252 of the Constitution 001 of 2005.
[679] S 252(2) of the Constitution 001 of 2005.
[680] Ss 9 and 11 of the Swazi Courts Act 80 of 1950.
[681] *Attorney General v Titselo Dodge* Ndzimandze unreported: civil appeal case No. 55/2014 (Attorney *General v The Master of the High Court* (55/2014) [2014] SZSC10 (30 June 2016).
[682] S 34 (1) of the Constitution protects the property rights of surviving spouses and entitles them to a reasonable provision out of the estate of the deceased spouse who died intestate irrespective of whether their marriage was by civil or customary rites.
[683] *Attorney General v The Master of the High Court* unreported: (55/2014) [2014] SZSC10 (30 June 2016) para 31.

customary and religious legal systems condoned and justified VAW.[684] Customary and religious legal systems, based on patriarchal structures, often discriminate against women; and in rural communities, women are expected to utilise this form of law to claim their rights.[685] Section 20 of the Constitution guarantees equality for all 'before and under the law in all spheres of political, economic, social and cultural life and in every other respect shall enjoy equal protection of the law'. However, the Universal Periodic Review (UPR) report of 2016, revealed to the Committee of CEDAW that most women still faced hindrances in acquiring gender equality through the customary laws and structures.[686] Women continued to suffer violence in Eswatini, according to the National Surveillance system on violence (2016) report, and there was an increasing trend in reported cases on VAW, particularly in the period January 2014 to December 2016.[687] For instance, a total of 6 154 incidents were reported in 2014 and 7 729 in 2015, while in 2016, the total number of reported incidences were 10 504.[688]

This study revealed that cultural and religious practices were invoked by family and community members to dispossess HIV-positive women of property, thereby subjecting WLH to human rights violations such as access to housing, food, and health. According to Von Kaori Izumi, the property grabbing from widows and orphans that occurs in Southern and East Africa today is a sign of increasing poverty and greed which has resulted in the 'breaking down of social norms, family ties, and social safety nets'.[689] The author argues that HIV and AIDS is a widow-and-orphans-creating disease, in that women are blamed for demise of their husbands for having infected them.[690] This exposes women to violence, in particular domestic violence, and property grabbing once the husband dies.[691] In consequence, many women have been left vulnerable, distressed and poverty-stricken; yet little attention is given to their plight in the development agenda.[692]

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[684] Z Abdul Aziz & J Moussa *The due diligence principle and the role of the state: discrimination against women in the family and cultural life (*Submission to the United Nations Working Group on Discrimination against Women in Law and in Practice) (2015).
[685] Ibid.
[686] Human Rights Council Working Group on the Universal Periodic Review − compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annexure to Human Rights Council resolution 5/1 and paragraph 5 of the annexure to Council resolution 16/21 Swaziland (2-13 May 2016) para 29.
[687] *The Swaziland National Surveillance System on Violence Report* (2016).
[688] Ibid.
[689] V K Izumi 'Property grabbing from women in the context of AIDS (2008) MMS Bulletin 109 August 2008
[690] ibid.
[691] Izumi (note 691, above).
[692] Izumi (note 691, above).

A study carried out in a selected ward district in Zimbabwe confirms the problem of property grabbing from widows and orphans, caused by poverty, greed, and custom under which women and girls do not have the right to inheritance.[693]

In conclusion, this thesis identified the cultural and socio-economic context in Eswatini as a key factor underpinning the violence experienced by HIV-positive women. The participants all identified patriarchy, cultural practices, poverty, and traditional law as barriers to their being able to live lives free of violence. The dominance of men in the society coupled with their own lack of economic opportunities caused them to feel that emotional, financial, and physical violence were all-encompassing, and that there were no pathways out of this situation.

Patriarchy, poverty, and the lack of legal protection are all structural issues which run parallel to health interventions. Without addressing these issues, HIV-positive women will struggle to protect themselves from violent relationships.

6.1.4 VAW as a global health problem requiring a public health response

Violence against WLH should be seen as a public health concern, generally and specifically with regards to HIV. Globally, VAW remains one of the most serious stumbling blocks to the attainment of gender equality.[694] VAW is a global public health problem of epidemic proportions[695] in which many women continue to experience violence both at the hands of the state and private individuals.[696] VAW is an unacceptable violation of fundamental human rights, and its eradication must be made a global public health priority.[697]

WHO and the UN have declared VAW a public health issue that demands a concerted response from healthcare providers and health systems worldwide.[698] Since violence against WLH as described in this study is violence against a group of women with a specific health condition that requires treatment over their lifetime, it strengthens the argument that violence is not only

[693] M Dube 'The ordeal of "property stripping" from widows in a peri-urban community: The case of a selected ward in Binga district, Zimbabwe' (2017) 53 *Social Work Journal* 347-349.
[694] UN Women, 'Ending violence against women' available a t: *https://www.unwomen.org/en/what-we-do/ending-violence-against-women* accessed 10.10.2019.
[695] WHO 2013 report as cited in G Leburu, and N Phetlho-Thekisho 'Reviewing gender-based violence against women and HIV/AIDS as intersecting issues' (2015) 50 *Social Work Journal* 399.
[696] Bond & Phillips (note 224, above).
[697] UNAIDS, 'Women living with HIV speak out against violence: A collection of essays and reflections of women living with and affected by HIV' available at: *https://www.unaids.org/sites/default/files/media_asset/womenlivingwithhivspeakout_en.pdf* accessed on 20.12.2019.
[698] UN Declaration on the Elimination of Violence against Women of 1993. Also see WHO *Strengthening Health Systems to Respond to Women Subjected to Intimate Partner Violence or Sexual Violence*: A manual for health managers (2017).

a social problem requiring a legal response but a public health problem requiring public health response in conjunction with other interventions.[699] The fact that violence impacts on WLH's ability to manage their condition bolsters this argument. In the case of HIV, violence is a significant health issue that impacts an individual at both prevention and treatment levels.

6.1.5 At the prevention level, violence undermines agency and autonomy – central factors in HIV prevention

Violence against women, whether HIV-positive or not, hinders women from protecting themselves from HIV infection and re-infection.[700] This study found that WLH's lack of agency and autonomy impacted on their ability to prevent HIV infection. Public health messages urging women to take the initiative to protect themselves in fact exposed them to violence and other human rights abuses. The study exposed healthcare workers' messages as being sharply contradicted by cultural and the religious messages which compelled women to submit to and obey their husbands. Agency and autonomy were a zero-sum game for WLH.

It was clear from the findings that women lacked autonomy, bodily integrity in sexual relations, and IP prevented some WLH from taking ART. This is associated with the lack of autonomy and agency of WLH, which is embedded in the cultural norms relating to gender.[701] Such cultural norms are enforced by violence and are a disservice for women.[702] Scholars are of the view that addressing the HIV/AIDS epidemic 'is inextricably linked to the ability to undo gendered inequalities at all levels and promote women's equal autonomy in all spheres, including economic, social, political, and cultural life'.[703]

The participants pointed out that most men declined to use condoms in long-term relationships, thereby exposing WLH to HIV. Despite HIV-positive women regarding deliberate infection and re-infection with HIV as violence, there were no legal actions available to them. It was unclear whether they were aware that criminal law remedies such as attempted murder were available to hold their partners accountable. In many other jurisdictions, exposing another to the risk of HIV is a crime.[704] Gable and others point out that by the year 2009 many countries had established criminal penalties for individuals living with HIV/AIDS who

[699] WHO guidelines for the health-care sector: 'Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines' (2013) and the WHO *Health Care for Women Subjected to Intimate Partner Violence or Sexual Violence*: Clinical Handbook (2014).
[700] This point is expounded upon in the social context section as it relates to women's agency and autonomy.
[701] L Mills 'Empowering Battered Women Transnationally: The Case for Postmodern Interventions' (1996) 41 *Journal of Social Work* 261-268.
[702] Ibid.
[703] UNAIDS *International Guidelines on HIV/AIDS and Human Rights* (2006).
[704] *Phiri v S* 2013 ZAGPPHC 279 (8 August 2013).

engaged in behaviours that risked transmission of HIV infection.[705] In Africa, many countries have enacted HIV specific crimes dealing with deliberately putting other people at risk of HIV infection.

HIV-specific laws criminalising HIV exposure and transmission are presumed to have the practical effect of driving these individuals underground with no access to public healthcare services and contributing to increased HIV/AIDS morbidity and mortality.[706] Also, women appear be the most affected by HIV-specific laws since, in many settings, they are likely to know of their HIV status before men do.[707] However, the extent to which HIV criminalisation represents a barrier to healthcare engagement by WLH is not known.[708]

Other countries penalise individuals who deliberately put others at risk of HIV infection; the common law crime of attempted murder has been invoked in South Africa.[709] In *Phiri v State*,[710] the state prosecuted an HIV/AIDS counsellor who allegedly infected the respondent with HIV. Phiri worked in a clinic and met the respondent when she came for an HIV test which the appellant administered, and she tested HIV negative. Later, the two had a sexual relationship during which the appellant twice declined to use a condom. She later tested HIV-positive, and she laid a charge against Phiri (the appellant) as he was the only one she had had sexual relations with. The court found that the appellant had known about his HIV-positive status three years before meeting the respondent, and he knew that the respondent was HIV negative, and ruled that Phiri was guilty of attempted murder as he had knowingly put the respondent at risk of contracting HIV.[711]

Whilst there are no such reported criminal cases in Eswatini, the case of *Phiri* is a persuasive precedent because Eswatini shares the common law which was transported to the two countries during colonial times. Also, South African common law decisions are binding in Eswatini unless the common law has been modified through statute.[712]

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[705] L Gable, et al 'A Global Assessment of the Role of Law in the HIV/AIDS Pandemic' (2009) 123 *Public Health* 260.
[706] Ibid.
[707] UNAIDS Action Linking Initiatives on Violence Against Women and HIV Everywhere, ALIV(H)E framework (2017).
[708] S E Patterson et al 'The impact of criminalisation of HIV non-disclosure on the healthcare engagement of women living with HIV in Canada: a comprehensive review of the evidence' (2015) *Journal of the International AIDS Society* 1-15.
[709] M Lubombo 'Re-thinking HIV disclosure as ubuntu: Towards a social theory of communicative responses to the sub-Saharan epidemic' (2018) 15 *African Renaissance* 12.
[710] *Phiri v S* 2013 ZAGPPHC 279 (8 August 2013).
[711] *Phiri v S* 2013 ZAGPPHC 279 in para 15, the court found the fact that he worked in a clinic as an HIV counsellor an aggravating factor.
[712] See chapter three of this thesis on the reception on Roman-Dutch Law in Eswatini.

An HIV specific law criminalising HIV exposure and transmission is not supported by this study in the Eswatini context as it would be likely to place HIV-positive women at the receiving end of blame, violence and legal sanction.[713] What makes the scenario more undesirable is that women are targeted for HIV routine testing and disclosure (especially pregnant women) and as such women learn of their HIV status before men do.[714] Also, HIV-specific laws are not supported because evidence from UNAIDS have shown that overly broad criminalisation of HIV exposure, non-disclosure, or transmission deters people from seeking knowledge about HIV and from accessing HIV services.[715]

Furthermore, although participants expressed anger about the way they were infected, they maintained relationships with the men who had infected them and did not appear to seek to have them punished through the criminal law. Public health responses must address violence as a factor which increases vulnerability to HIV infection. This would include screening for risks of abuse as part of HIV testing campaigns.

6.1.6 Treatment: violence and ART non-adherence, stigma, and self-blame

Violence against HIV-positive women is a critical health issue as it can directly prevent women from being able to access or adhere to ARV programmes. Violence can interrupt WLH enrolment into HIV care,[716] and as alluded to in the previous chapter, intimate partners have prevented WLH from taking their ART medication, forcing women to adopt secretive stratagems to ensure that they are not prevented from accessing care.[717] This finding resonates with findings of other studies, such as the 2019 biomedical study that violence was linked to many other grave and long-lasting consequences.[718] A 2020 study carried out in Nigeria in 2020 found that PLH experienced acts of violence and social exclusion in real life.[719]

[713] UNAIDS, Action Linking Initiatives on Violence against Women and HIV Everywhere (note 709, above).
[714] N Chingore, 'Routine testing of individuals attending public health facilities: Are SADC countries ready'? In Viljoen & Precious eds *Human rights under threat: four perspectives on HIV, AIDS, and the law in Southern Africa* (2007) 55.
[715] UNAIDS *Global AIDS Update 2018 - Miles to go, closing gaps breaking barriers righting injustice* (2018) 156.
[716] A M Leddy et al 'Gender-based violence and engagement in biomedical HIV prevention, care and treatment: a scoping review' (2019) *BMC Public Health* 2.
[717] Ibid.
[718] Leddy et al, (note 718, above).
[719] A S Yakasi & N A Ghani 'Exploring the social exclusion of people living with HIV/AIDS in Kano State, Nigeria' (2020) 10(4) *International Journal of Academic Research in Business and Social Sciences* 371-379.

All this underlines the impact of violence on the ability of WLH to access treatment, with women being afraid of informing their partners about their ARVs, so hampering adherence. This is a critical public health issue that requires urgent attention.

6.1.7 Emotional violence was the most frequently experienced type of abuse

One profound finding of the study is that emotional abuse in the form of blame and humiliation was perceived to be the most prevalent form of violence. It undermined women's self-esteem and impacted on their ability to focus on self-care. This finding is in contrast to other studies on the experiences of violence in HIV-positive women;[720] for example, a 2005 WHO study on Women's Health and Domestic Violence against Women, which collected data from 17 countries, showed that physical violence was the most frequently reported form of abuse[721] in which women reported suffering physical and sexual violence perpetrated by their intimate partners.[722]

The finding that emotional abuse often takes the form of blame leading to stigma, discrimination, and obstruction resonates with the findings of other studies, such as that of Paudel and Baral.[723] They found that WLH were often blamed for acquiring HIV, and they were viewed as a threat to the health of the entire family.[724] Also, the authors postulated that plight of WLH, has been mainly ignored in HIV/AIDS research literature.[725] As a result, very few research studies have been done on the experiences of violence by WLH. The only such study is a 2012 study in Nepal, where it was revealed that self-humiliation was linked to experiencing violence and that the vast majority of female HIV-positive participants experienced shame.[726]

Studies reveal that emotional violence is complicated by lack of visible signs on the victims, enabling perpetrators to get away with this type of violence.[727] The WHO study posited that women who had at some point in their lives experienced physical or sexual partner violence also suffered higher levels of emotional distress leading to suicidal thoughts and attempted suicide than women who had not experienced partner violence in their lifetime.[728] In worse

[720] C Garcia-Moreno et al *WHO multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses* (2005).
[721] World Health Organisation (WHO) *World report on health and violence: Sexual violence* (2006).
[722] Garcia-Moreno et al, (note 722, above; 28).
[723] Paudel & Baral (note 155, above; 5). See also, Kehler, et al (note 156, above).
[724] Paudel & Baral (note 155, above). See also, Kehler et al (note 156, above).
[725] Paudel & Baral (note 155, above).
[726] Aryal, Regmi and Mudwari (note 135, above; 121)
[727] WHO 2013 report as cited in Leburu & Phetlho-Thekisho (note 79, above).
[728] Garcia-Moreno, et al., (note 722, above; 64).

scenarios, emotional distress culminated in mental ill-health,[729] meaning that healthcare workers must be trained on how to screen patients for emotional and psychological abuse.

There is an increasing body of evidence that suggests that PLH feel bad about themselves (self-stigma) and in-turn, anticipate that other people will judge them harshly.[730] This could be one of the explanations why the participants perceived the community to be gossiping about them. According to Livingston and Boyd, self-stigma is 123

> a subjective process, embedded within a socio-cultural context, which may be characterized by negative feelings (about self), maladaptive behaviour, identity transformation, or stereotype endorsement resulting from an individual's experiences, perceptions, or anticipation of negative social reactions based on their [socially devalued identity or] illness.[731]

This definition supposes that the self-stigma maybe come from anticipation and may even not be real. However, self-stigma is a serious issue for PLH as it contributes to AIDS-related deaths and illnesses by hampering adherence to life-saving treatment such as ART, and constraining people's quality of life and causing suicidal thoughts.[732] It is argued that self-stigma impacts a person's ability to provide self-care. According to the Eswatini National Multisectoral Strategic Framework of 2018-2023 (NSF), stigma hinders access to HIV services,[733] adding that among PLH, self-stigma and fear account in part for late initiation on ART.[734] In a Tanzanian study, however, self-stigma among HIV-positive patients was associated with low self-esteem and anger.[735] The research shows that greater self-stigma predicted lower levels of adherence and at worst, to alcohol abuse and denial about HIV infection.[736]

Many public health responses which do address violence focus on physical violence, with limited attention directed at discrimination as a form of violence. This study shows that measures are needed to address the continuing differential treatment of women with HIV as the emotional impact of discrimination is profound.

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[729] Ibid.
[730] M Pantelic, et al 'Management of a spoiled identity': Systematic review of interventions to address self-stigma among people living with and affected by HIV (2019) *BMJ Glob Health* 1-17 2.
[731] Livingston and Boyd as cited in Pantelic, et al., (note 732, above; 2).
[732] Ibid.
[733] NERCHA *The Kingdom of Eswatini National Multisectoral HIV and AIDS Strategic Framework* 2018-2023 (2018) 43.
[734] Ibid.
[735] R A Lyimo et al 'Stigma, disclosure, coping, and medication adherence among people living with HIV/AIDS in Northern Tanzania' (2013) 28 *AIDS Patient care and STDs* 98-105 102.
[736] Ibid.

6.1.8 Healthcare programme responses to HIV and violence

The government of Eswatini (in terms of the country's Vision 2022) has set a target to make Eswatini an AIDS-free by 2022.[737] Other public health targets include enrolment of more people on ART and reducing AIDS-related deaths, HIV testing services, and the reduction of HIV prevalence. The (NSF) includes a programme that targets the reduction of GBV and the provision of post-care to survivors of sexual abuse.[738] In this study, emotional violence was found to be prevalent in the lives of HIV-positive women and this was not explicitly targeted by the health response in Eswatini.

The public health response to violence related to HIV in Eswatini is weak. Although it is identified as an issue in national policies, this has not been followed up with programmes at a local level.

6.2 Violence against WLH is a human rights violation which requires a human rights response

Violence against WLH is a human rights abuse, a public health challenge, and a barrier to the attainment of civic, social, political rights, and economic participation.[739] Human rights are indeed universal and are considered legal guarantees that protect groups and individuals against conduct, acts and omissions that usurp their human dignity, basic freedoms and other entitlements.[740] A human rights-based approach is, however, a conceptual framework that is adopted in human development programmes and is underpinned by international human rights norms aimed at protecting and promoting human rights.'[741] The basic characteristics of human rights include the following:[742]

- Universality, which entails that human rights apply to everyone and all times.
- Inherent, which entails that human rights exist independent of the will of any individual, group or state or pre-existing law.
- Inalienable entails that rights cannot be removed by oneself or be removed by anyone else.

[737] Statement by Prime Minister of the Kingdom of Eswatini Ambrose Mandvulo Dlamini at the visit to NERCHA headquarters NERCHA offices, Mbabane Thursday 21 March 2019. Available at: *http://www.gov.sz/index.php/component/content/article/131-prime-ministers-office/2203-pm-calls-for-accelerated-efforts-to-conquer-aids?Itemid=799* accessed on 06.02.2020.
[738] NERCHA (note 735, above; 43).
[739] T Komalavalli 'Prevention and safety measures on gender-based violence (2020) *Our Heritage* 3964.
[740] United Nations, 'The Office of the United Nations High Commissioner for Human Rights' Frequently Asked Questions' (2006) available at: *https://www.ohchr.org/Documents/Publications/FAQen.pdf* Accessed on 10.01.2020.
[741] Ibid.
[742] Para 1.5 of the Vienna Declaration of 1993 postulates that all human rights are universal, indivisible, interdependent and interrelated.

- Equality entails that everyone is equal, and that no human being is above the law.
- Inviolable, which entails that human rights cannot be transgressed or dishonoured by the state or private citizens.
- Integral entails that rights are indivisible, interdependent, and interrelated.

6.2.1 VAW and HIV and human rights

International instruments on VAW and HIV were discussed in chapter two of this thesis. In general, the response of the international community to VAW does not have a long history. The Convention on the Elimination of All Forms of Violence against Women (CEDAW) was adopted 40 years ago,[743] before which there was barely any public recognition of VAW, as domestic violence was perceived as a private matter.[744] Following the adoption of CEDAW by the United Nations (UN), VAW and its threat to women's well-being and health was recognised as a legitimate international human rights issue.[745]

There are now clearly stated international norms on violence against women, including violence against women living with HIV and AIDS. The norms are enunciated mainly in the CEDAW,[746] the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[747] and the SADC Protocol on Gender and Development. [748]

There is, however, a paucity of legal norms addressing the link between HIV and violence. This is concerning as it has been shown it be a significant issue that impacts on the public health responses. This article aims to interrogate how international law and standards address the link between VAW and HIV concerning HIV-positive women's access to justice and healthcare, in the context of the state's duty to respect, protect and fulfil all human rights and fundamental freedoms of women, regardless of the political, economic, and cultural systems in which they live.[749]

At the domestic level, the Eswatini Constitution provides for women's fundamental rights and freedoms in sections 14 to 34 of chapter three of 'the Bill of Rights. The Constitution does not explicitly mention HIV or VAW, but the rights of PLH to equality, non-discrimination, human dignity, privacy, and confidentiality are protected. Although the right to access to healthcare is found under the directive principles of state policy, ART for PLH is

[743] UN Convention on the Elimination of All Disrimination Against Women, of 1979.
[744] Suaad Elabani *Attitudes to and Perceptions of Domestic Violence against Women in an Arab Community: A Case Study of Libyan Migrants in the UK* (unpublished PhD thesis Manchester Metropolitan University 2015) 59.
[745] Ibid.
[746] UN Convention on the Elimination of All Disrimination Against Women of 1979.
[747] Maputo Protocol of 2003.
[748] SADC Protocol on Gender and Development of 2008, Art 6 (1) and (2)(a)-(d).
[749] The Vienna Declaration of 1993.

widely accessible in public health facilities. It is regarded as a non-justiciable right which is subject to progressive realisation by the state party.

The right to dignity is protected by section 18(1) of the Constitution as follows: 'The dignity of every person is inviolable'. The right to equality is found in section 20 as follows:

> 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and every other respect and shall enjoy equal protection of the law.'[750]

The Constitution further prohibits discrimination:

> 'A person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.'[751]

The Constitution does not include HIV status as a prohibited ground; however, HIV is a ground on which an individual may not be discriminated against in Eswatini as HIV is treated as a disability. The Constitution refers to discrimination as 'different treatment to different persons' based on the above-listed grounds.

The objective of NERCHA is to 'reduce HIV-related stigma, discrimination, and human rights violations'.[752] It accurately embraces stigma and discrimination, while ensuring there are no human rights violations or barriers to accessing HIV services.[753] The SODV Act of 2018 places an obligation on police and prosecutors to ensure that victims of violence are referred to support services and given information about access to post-exposure prophylaxis (PEP) intervention as part of post-rape care services.[754] It also provides for protection orders as remedial measures in cases where a person experiences domestic violence.[755]

A study conducted by Ntshakala in Eswatini in 2012 found that there was a need for healthcare workers to be role models in the fight against stigma and discrimination as it was found that healthcare workers did indeed stigmatise and discriminate against PLH.[756] Therefore, there is a great need for healthcare workers, communities and families to move beyond the disease and stigma with support and compassion in order to create an enabling environment for WLH to lead dignified lives in society.[757] The need for a caring environment cannot be overemphasised as other studies have confirmed that 'HIV stigma in women was

[750] S 20(1) of the Constitution 001 of 2005.
[751] S 20(2) of the Constitution 001 of 2005.
[752] NERCHA (note 626, above; 44).
[753] Ibid.
[754] S 72 of Sexual Offences and Domestic Act of 2018.
[755] S 100 of Sexual Offences and Domestic Violence Act of 2018.
[756] T T Ntshakala, *Quality of life of people living with HIV and AIDS in Swaziland who are on antiretroviral therapy* – unpublished PhD thesis University of South Africa (2012) 230.
[757] Ibid.

associated with rejection from friends and family and society, feelings of uncertainty and loss, low self-esteem, fear, anxiety, depression and even suicidal ideation'.[758]

However, this study found that WLH perceived a lack of laws dealing with the vulnerability of women with HIV from violence. The use of criminal law was not favoured,[759] and people advocating the rights of PLH resisted criminal law intervention in matters dealing with HIV unless it was absolutely necessary. [760] Scholars believe that the criminalisation of HIV would lead to people shunning programmes intended to address the HIV pandemic,[761] a stance endorsed by the International Guidelines on HIV/AIDS and Human Rights of 2006, which states as follows:

> '. . . People will not seek HIV-related counselling, testing, treatment, and support if this would mean facing discrimination, lack of confidentiality, and other negative consequences. . . . that coercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care, and health support'.[762]

Watchers argue that augmented compliance with human rights norms would be achieved where laws being implemented are benchmarked by the norms in the International Guidelines on HIV/AIDS and Human Rights.[763] This study demonstrates the value of a human rights approach as useful and necessary to advance gender equity, respond to VAW and reduce women's vulnerability to HIV. This approach obliges countries, including Eswatini, to adopt and enforce legal and other measures that outlaw all forms of discrimination against women, including VAW i.e., CEDAW and the Maputo Protocol. The value of this approach is further amplified in that this study has shown a need for the creation of synergy between human rights and public healthcare. This thesis found that violence against WLH was both a public health

[758] Paudel & Baral (note 155, above).
[759] UNAIDS *Criminal Law, Public Health and HIV Transmission: A policy options paper* (2002) 6 available at *http://data.unaids.org/publications/irc-pub02/jc733-criminallaw_en.pdf* accessed on 03.03.2020. Although criminal sanctions incapacitate the offender from harming anyone else during imprisonment, rehabilitate the offender, enable the offender to change his mind about harming others, impose retribution and deter the individual offender and others from engaging in the prohibited conduct in the future, these functions are seen as making insignificant contribution to preventing HIV transmission.
[760] Patrick Michael Eba *Righting laws: An appraisal of human rights in the context of HIV and their applicability to the normative content and implementation of HIV-specific laws in sub-Saharan Africa* (unpublished PhD thesis UKZN 2017) 34. See also P Eba, 'Pandora's Box: The criminalisation of HIV transmission or exposure in SADC countries in Human Rights' in F Viljoen & S Precious eds *Under Threat: Four perspectives on HIV, AIDS, and the Law in Southern Africa* (2007) 32 & 44.
[761] Ibid.
[762] UNAIDS *International Guidelines on HIV/AIDS and Human Rights* (2006) para 96.
[763] H Watchirs 'A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws' (2002) 22 *Aust. Y.B.I.L.* 77-112

concern and a human rights violation. According to Mann, one of the champions of health and human rights, there is a meeting point between public health goals and human rights norms as they are inextricably linked.[764] The interdependence has necessitated the adoption of a human rights approach in exploring the link between HIV and violence against WLH in the Eswatini context.

6.2.2 Under-utilisation of legal remedies

The study found that WLH who were victims of violence were reluctant to report that they had been violated for fear that their HIV status might be revealed and also due to the cultural practice of sweeping family secrets under the mat. Most WLH did not rely on the legal and policy framework protecting them from VAW and HIV. Although violence perpetrated against women (HIV-positive or not) is regarded as a crime, focusing primarily on this intervention is hindered [765] by women victims of violence being unwilling to report cases of VAW to the police, and not seeking immediate help where help is available, meaning that they may delay seeking help until long after the abuse began.[766] The SODOV Act of 2018 imposes harsher sentences for the offence of domestic violence; the perpetrator may be able to pay a fine of up to 75 000 emalangeni (US$ 5 000) or an imprisonment of a term not exceeding 15 years or both.

WLH participants viewed legislation aimed at protecting women in marital and cohabiting relationships as ineffective in protecting women's rights. Studies have shown that in countries where gender inequality is entrenched in law, women's rights are not protected by marriage laws.[767] Gender inequality is seen as the crucial impediment that makes women vulnerable to VAW, including rape, and stops them from adequately protecting themselves from HIV and AIDS.[768]

The SODOV Act provides for civil protection orders as a response to violence or domestic violence, and studies show that protection orders do safeguard the victim of violence from further immediate violence or threats. However, such orders have limited value as a means to curtail violence in many women's lives because studies reveal that of the women who

[764] J Mann et al 'Health and Human Rights' (1994) 1 *Health Hum. Rights* 7-23. See also E Fee & M Parry 'Jonathan Mann, HIV/AIDS, and Human Rights' (2008) 29(1) *Journal of Public Health Policy* 61.
[765] Mills (note 703, above).
[766] Ibid.
[767] UNAIDS *Act to change laws that discriminate* (2019) available at https://www.unaids.org/sites/default/files/media_asset/2019_ZeroDiscrimination_Brochure_en.pdf accessed on 03.03.2020
[768] Ibid.

obtained temporary protection orders, 60 per cent of them experienced more violence in the year after the order was issued. [769]

A few participants in this study further found that the western type of marriage offered more protection to women with HIV by allowing them access to courts where they could be heard, and access to divorce, which was not available in customary marriages and cohabitating relationships. However, the Eswatini Marriage Act of 1964 does not provide for *violence or 'irretrievable breakdown as grounds for divorce*.[770] (Emphasis added)

This study found that WLH did not approve of the granting of bail to perpetrators of violence against women as it had the effect of discouraging women from reporting cases to law enforcement only for the offenders to be released. They attributed this to the fact that intimate partners were able to pay bail because they were participating in the economy and had the financial means. This shows a need to educate people on how the law operates and the pivotal role played by the police in the preventing VAW.[771]

The UN guidelines on effective police responses to VAW proposes that the police:

1. Make mandatory arrests where appropriate;
2. Lay charges against the perpetrator (where evidence permits);
3. Issue bail or release the accused on conditions during law enforcement exercise. [772]

Whilst participants in this study opposed the granting of bail for the men, it remains an international human rights norm. Advocates for women's rights argue that bail places women at risk as police or courts fail to impose appropriate bail conditions,[773] which had nothing to do with international law and human rights law. The release of the accused on bail should entail that conditions of release or bail are explained to both the accused and the complainant so that the complainant did not think that the reporting of the crime to the police was a waste of time.

A study done in four countries revealed that there are other measures which can be adopted to protect victims of VAW from immediate danger, and the responsibility of the execution of such measures lay with the police and other specialised services to provide safe

[769] Mills (note 703, above).
[770] Emphasis added.
[771] M Lila, E Gracia & F Garcia 'Ambivalent sexism, empathy and law enforcement attitudes towards partner violence against women among male police officers' (2013) 19 *Psychology, Crime & Law* 907-919
[772] United Nations 'Responding to violence against women: the role of the police' *in Handbook on effective police responses to violence against women* (2010) 44.
[773] *https://www.endviolenceagainstwomen.org.uk/police-failing-to-use-bail-conditions/* accessed 20.01.2020.

accommodation for women.[774] For instance, the study found that in England and Wales, the police had broad powers to arrest and set bail in a way that hindered perpetrators from committing further violence.[775] Therefore, courts need to set conditions that would prevent perpetrators of VAW from being in contact with the victims, instilling a sense of justice in WLH. The UK is reported to have made progressive advances in domestic violence cases by progressively expanding the arresting powers of the police.[776] In cases where the arrest does not warrant to the offender being charged with an offence, the arrest is used as a deterrent.[777] The police are trained to set bail conditions to keep the victim safe.[778]

6.2.3 Access to socio-economic rights a panacea for violence

This study found that violence against WLH could be ameliorated through the adoption of social, economic, and cultural rights interventions, in particular women's economic empowerment. It is imperative in the fight against VAW and HIV that women do not entirely depend on their partners for financial support, in that a woman's own income could make a difference in how she responds to violence. Other studies have found that VAW and poverty are intimately connected and as such, 'measures to address this violence must tackle the social and economic factors that contribute to gender inequality'.[779] Studies have revealed that violence against women cannot be decisively dealt with in isolation of other social challenges such as poverty and poor education.[780] This study found that WLH sought empowerment opportunities to participate in the economy, convinced that they would be less dependent on men, more independent and free from violence if they were able to generate their own income. Most of the WLH study participants were unemployed, had little or no education and were struggling to pay for their day-to-day supplies. Hence the issue of women's economic empowerment was more frequently referred to by WLH than legal remedies.

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[774] C Hagemann-White 'Redress, rights, and responsibilities-institutional frameworks of domestic violence intervention in four countries' in C Hagemann-White, L Kelly, & T Meysen (eds) *Interventions against child abuse and violence against women*' (2019) 92.

[775] Ibid.

[776] Hagemann-White (note 776, above).

[777] Ibid.

[778] Ibid.

[779] B Goldblatt 'Social and economic rights to challenge violence against women – examining and extending strategies' (2019) *South African Journal on Human Rights* 169.

[780] K J Amaka 'The girl child and gender-based violence: Implication on education performance and women empowerment' in U Azikiwe et al *International Journal of the Forum for African Women Educationalists (Nigeria)* 3 (2015) 1-9.

Some scholars believe that policies regarding poverty alleviation and educational attainment are overriding priorities for empowerment of women in society.[781] Other scholars view women's empowerment as a useful tool for strengthening women's autonomy, agency, and voice so that they participate at all levels of society.[782] The empowerment of women in society is lauded for getting them more involved in decision- making and activities touching upon their lives.[783] In particular, the right to education is perceived as a vehicle for the upliftment of socially and economically marginalised women.[784]

Goldblatt advocates the adoption of measures to address violence and social and economic factors that contribute to gender inequality in society.[785] Even though VAW is now considered a human rights violation, it is often narrowly construed as a violation of civil and political rights. As such, the state would tend to enact legislation to outlaw acts of violence without first addressing the real causes, which include gender inequality, toxic patriarchal attitudes, and poverty.

Access to social and economic rights offers a rich possibility for solutions beyond punitive criminal law responses to violence by providing more preventive measures that take cognisance of systemic inequality.[786] Allendorf opines that through empowerment and land ownership, women can decline men's power and authority over their lives, and make decisions which can clear the pattern of IPV.[787] The key to attaining women's rights in Eswatini entails empowerment of women, fulfilling their socio-economic rights and the adoption of an enabling environment that ensures their fair and active participation in the economy.[788]

Countries such as Zambia and Mauritius have adopted social security measures to address the intersection of economic empowerment and HIV and AIDS. Studies suggest that increasing women's ownership over productive resources and involvement in the economy and society at large is a matter of justice.[789]

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[781] S Pokharel 'Exploring intimate partner violence: seeking solutions to empowerment in Nepal' *Minnesota State University* (2017).
[782] Mills (note 703, above).
[783] Amaka (note 782, above).
[784] Ibid.
[785] Goldblatt (note 781, above).
[786] Ibid.
[787] K Allendorf 'Do women's land rights promote empowerment and child health in Nepal?' (2007) 35 *World Development* 1975.
[788] Mills (note 703, above).
[789] Amaka (note 782, above).

Eswatini has no specific provisions for social security and assistance for PLH within the legal framework; neither are they eligible for disability grants.[790] Without access to any form of social assistance,[791] WLH in Eswatini have a particularly hard life due to gender inequality, coupled with the inability to participate in the economy and suffering the effects of VAW and HIV. Therefore, there is a need for WLH empowerment as studies have shown that when women are empowered, they lead dignified lives.

Furthermore, empowered women can gain financial independence and seek help from organisations, law enforcement, social workers, and the legal system. They can also seek shelter (currently there are no public shelters for victims of violence in Eswatini).[792]

The constitution of Eswatini provides for economic empowerment of women in section 28(2) of the Bill of Rights as follows:

> Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.

Nearly a decade and a half after the adoption of the Constitution, the country is in the process of drafting a Citizen's Economic Empowerment Bill with specific provisions aimed at empowering women. In Eswatini one Bill may take a few months to be enacted into law and then more than a decade to come into force − if the SODV Act is anything to go by.

Several customary practices persist that impact negatively on women's empowerment and freedom of movement. For instance, the custom of *kuzila* (wearing of black gowns by widows) strongly affects their right to work and provide economic sustainment for their families, and further increases their vulnerability to violence. During this period, a woman is not permitted to undertake any commercial activities, and so their right to work is compromised. Furthermore, women in mourning gowns are prohibited from entering public areas, such as a chief's residence, the royal residence, and public gatherings such as schools and courts despite international norms prohibiting discrimination and section 268(1) of the Constitution which provides that 'all existing laws, including customary laws, are to be modified, adapted, qualified and exceptions made in so far as is necessary to bring that law in conformity with the Constitution.' Moreover, section 28(3) provides that 'A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed'.

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[790] S D Mavundla 'The Impact of HIV/AIDS on social law in Swaziland: HIV/AIDS in the workplace, social assistance, and treatment' in Y Jorens ed *HIV & Social Security Law: the SADC Region* (2013) 91-100.
[791] *The Eswatini National Social Development Policy of* 2010 seeks to protect the rights of older persons.
[792] Pokharel (note 783, above).

6.2.4 Conclusion

Chapter six comprised discussion of the study findings. Three major themes emerged from this study i.e., the social context within which VAW and HIV coexisted; VAW as a public healthcare issue; and the desirability of a human rights approach to violence against WLH. Approaching violence against WLH on this basis enabled the researcher to understand how the social context created an environment where women's rights were chronically violated, and at the same time leaving them vulnerable to HIV and other human rights abuses. Women's low social status in society was linked to women experiencing gender inequalities, gender-based violence and being vulnerable to HIV infection as well as further human rights abuses once infected with HIV.

For WLH, violence was a public healthcare concern as well as a human rights issue, in that their obtaining ART was tempered with their right to access healthcare services being violated. The human rights approach adopted in this study enabled the researcher to assess WLH's vulnerability to the dual epidemics at an individual, societal, and programmatic level, thereby highlighting the direct and indirect factors that increased WLH's vulnerability to both violence and HIV. Human rights norms are universal, interdependent, and indivisible and as such, countries such as Eswatini are obliged to adopt legal and other measures to tackle the social context and structural factors that put WLH at risk of HIV infection or re-infection and increase their vulnerability to violence. When appropriate laws are adopted and implemented, intending offenders and perpetrators of violence against WLH would be forewarned and then punished for breaking the law.

If human rights norms were to be adopted in the healthcare sector, it would prevent violence being perpetrated by healthcare workers, such as coerced and forced sterilisation of WLH. The government of Eswatini must ensure that efforts are made to improve the healthcare system's response to victims of violence. This study argues that when healthcare workers are made aware that VAW is a human rights violation they would be equipped to respond to it holistically. Policies must be put in place to deter healthcare worker from violating WLH's rights. In fact, healthcare workers are better positioned to play the role of assisting victims of violence and in raising awareness on the issue VAW and HIV in the society at large.

Chapter seven discusses the policy implications of the findings of this study and recommendations for the different stakeholders, which would play a significant role in the promotion, protection, and fulfilment of the rights of WLH against violence.

CHAPTER SEVEN
CONCLUSION AND RECOMMENDATIONS

7 INTRODUCTION

> You can judge a nation, and how successful it will be, based on how it treats its women and its girls.[793]

The preceding chapter discussed the research findings of this study. It explained the significance of the research findings, in relation to previous scholarship and offered an interpretative approach to explaining the results.

Chapter seven is the last chapter of this thesis. It answers the research questions posed at the commencement of this study and discusses policy implications and the limitations of this study. It concludes by offering recommendations for different stakeholder groups instrumental in the fight against the dual epidemics of HIV and VAW.

7.1 Findings on the research questions

This study sought to answer three main questions. The first looked into the experiences of WLH regarding violence, collecting data from WLH and KIs. From these interviews, it concluded:

(i) HIV-positive women in Eswatini reported living within a patriarchal society in which traditional male stereotypical behaviour was reinforced by cultural norms, traditional Swazi law and strong family structures. Under customary law, women moved to their male partner's family on marriage, and many participants linked their experiences of violence to this family structure. Women reported violence from both their IPs and his family, which they perceived to be linked to their positive status. WLH felt trapped in this cultural context.

(ii) In describing violence, the participants went beyond the traditional definitions and included feelings of alienation, marginalisation, separation, stigma, and discrimination. Most participants described violence very broadly, and it appeared that there were no aspects of their lives that were untouched by it.

(iii) WLH described their exposure to the virus as being a form of violence even though it was generally transmitted within the context of a long-term relationship. Women

[793]Former USA president Barack Obama available at *https://twitter.com/barackobama/status/426379154896871425?lang=en* 23 Jan 2014 accessed on 26.01.2020.

reported deep anger towards what they considered to be the inexcusable actions of their partners who refused to wear condoms, were unfaithful and did not disclose their HIV status. Although they categorised all these actions as forms of violence and saw their infection as having occurred in a non-consensual manner, they did not describe this as a legal problem. None of the participants indicated any desire to lay criminal charges against their partners for infecting them.

(iv) Participants also reported that living with the virus exposed them to many more forms of violence. They categorised most of these as various forms of emotional abuse. Generally, they associated the treatment they received with *stigma and discrimination*.[794] Participants also identified being blamed for bringing HIV into their homes as the key reason for the emotional violence. (Emphasis added)

(v) Outside of their personal, family and community relationships, women also felt that they experienced violence when attempting to access health care services. They linked this abuse to stigma and discrimination, illustrated by allegations of coerced sterilisations.

(vi) Physical violence appeared to be normalised in society: women reported being beaten for disclosing their status or attempting to negotiate safer sex. This was another example of how the women saw themselves trapped in a cycle of violence relating to HIV.

(vii) The participants saw the harm they suffered as emanating from their HIV status, and most, in turn, blamed this on public health disclosure programmes which publicly disclosed their HIV-positive status.

(viii) HIV-positive women saw a clear link between violence and access to healthcare and identified violence as a barrier to effective prevention and treatment of HIV.

(ix) Despite identifying violence as being pervasive, the women seldom used legal remedies or turned to the criminal justice system. They were largely distrusting of these systems and saw them as ineffective. Ironically, women turned to traditional or community structures (which they reported as being discriminatory) for assistance with resolving disputes.

(x) The views of HIV-positive women on how VAW against HIV-positive women could be eradicated showed that socio-economic rights in Eswatini are non-justiciable. Yet, this study revealed that fulfilment of economic and social rights

[794] Emphasis added.

had the potential to prevent women from being dependent on abusive partners. Socio-economic rights entail access to food, shelter, health, water, and social security, amongst other rights. Policymakers need to address the issue of shelter for abused women because, as of 2019, there were still no public or private shelter facilities that could be used by women escaping from violent partners. Also, policymakers need to consider social grants for WLH widows who have no one to take care of them.

In short, WLH experienced violence as being linked with and mutually reinforcing of HIV. They indicated that they were at the epicentre of the two pandemics.

The second question posed by the study was the extent to which Eswatini's legal and policy framework responded to violence against HIV-positive women. The study concluded that:

(i) The Eswatini legal framework did not address the two epidemics jointly; the policy framework dealt with HIV, whereas the legal framework dealt with violence. In other words, the health policy framework does recognise the link between HIV and violence; and criminal justice policies are silent on this issue.

(ii) There are laws that address certain acts of physical violence and sexual violence such as in the common law, the Crimes Act of 1889, and the Women and Girls' Act of 1920 which prohibit murder, common assault, and rape. These laws address violence in general, without factoring in domestic violence or VAW specifically.

(iii) These laws are not in touch with the reality of the offence of domestic violence as they proscribe only certain forms of violent conduct as criminal conduct, premised on the notion that violence in the private sphere was not a crime, or if it was a crime, various defences could be raised to nullify culpability. As such, these laws failed to combat violence against WLH. and were not in line with modern approaches to domestic violence which combine civil and criminal law through protection orders and criminal prosecution of offenders.

(iv) The study found that since the inception of the study, there had been reform to the legal system, challenging practices enshrined in the law that further subjugated women, including HIV-positive women. One significant law reform has been the enactment of the SODV Act of 2018, which aims to protect 'women from *all forms of sexual violence and domestic violence*' (emphasis added)[795]. The recent enactment of the

[795] Emphasis added.

progressive Sexual Offences and Domestic Violence Act of 2018[796] will be a *positive step* towards combating violence against HIV-positive women provided that it is fully implemented. The Act provides for criminal prosecution of offenders as well as civil protection orders. It provides for the '*protection'*[797] of women, regardless of HIV status, from violence, and sexual offences, offering the hope of some protection against the perpetuation of violence by intimate partners and families. (Emphasis added)

(v) This new law was ten years in the making before it was assented to by the King. In the meanwhile some women brought cases that aimed at protecting women from violence and gender inequality, including the recent case of *Sacolo v Sacolo*[798] in which the Eswatini High Court found the principle of marital power of husband to be 'discriminatory against married women and offending their constitutional right to *equality before the law'*.[799] (Emphasis added) Also, the case of *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane*[800] dealt with the concept of marital power regarding the administration matrimonial property and the right of the husband to administer the matrimonial possessions.

(vi) Participants in this study noted, however, that, legal remedies did not protect them as the police were not always responsive to their plight in domestic disputes and the system of bail resulted in violent men being released before their trials. There are also legal remedies for medical violence by healthcare workers against women with HIV i.e., reporting a healthcare worker to their professional body. Such claims are likely to meet resistance and take a long time to probe and finalise. Another remedy is for the aggrieved party to bring a civil claim against the hospital. However, this remedy is reactive in nature as it comes after a violation has been committed and requires financial resources to take the matter through the courts. Most of the WLH in this study had no means or knowledge to even consider these remedies. The criminal law is not viewed as an appropriate vehicle to pursue claims on account of the technical difficulty of proving all the elements of the crime beyond a reasonable doubt.[801]

[796] Emphasis added.
[797] Emphasis added.
[798] *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law - Eswatini v Jukhi Justice Sacolo and Others* Unreported (1403/16) 2019 SZHC (166).
[799] Emphasis added.
[800] *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* Unreported High Court Case No. 470/2013 A.
[801] Eba (note 581, above; 13-54).

(vii) A key weakness of the legal framework was its pluralistic nature by which it combined formal statutory law with customary law. Women's rights and their protection offered by one of the system of laws were negated by the other system.

Finally, despite the existence of legal remedies, most participants in this study preferred to deal with IPV or family violence through alternative and non-legal means.

The third question that this study sought to answer was how the legal framework protected HIV-positive women from violence and its consequences in light of international law. In this regard, the study found:

(i) There are international human rights norms on violence against women. These are primarily found in international conventions and declarations e.g., the Declaration on the Elimination of Violence against Women, CEDAW, Maputo Protocol and the SADC Protocol on Gender and Development. These documents obligate countries to adopt legal and other measures to criminalise and punish all forms of violence and discrimination against women.

(ii) No binding international law conventions or treaties address the link between HIV and violence, except the Maputo Protocol which obligates state parties to adopt measures to ensure that women protect themselves against HIV infection.[802]

(iii) However, there are a number of soft law documents that address the link between HIV and violence, such as the Declaration on the Elimination of Violence against Women, the Beijing Declaration and Platform of Action, the Millennium Declaration and Sustainable Development Goals, and the UN Guidelines on HIV and AIDS and Human Rights. These documents recommend that states adopt measures to tackle VAW, gender inequality and lack of access to healthcare for women.

(iv) Eswatini is a party to all the international instruments mentioned above. Some of the international norms on women's rights were either not domesticated or partially domesticated. Resultantly, the country is bound by but is not implementing these norms.

(v) Eswatini is yet to fulfil many of its international and domestic obligations on gender equality and women's emancipation.

[802] E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006)6 *African Human Rights Law Journal* 188-207.

7.2 Study limitations

The findings of this study represent the views of the 45 study participants who took part in the research and therefore, cannot be generalised beyond this context. Only HIV-positive women in support groups were invited to participate. This is because the design of the study was focused on WLH who were openly living with HIV and had disclosed their HIV status. However, the study may have benefitted nonetheless from the views of men living with HIV. It is yet to be explored whether the struggles faced in living with HIV are peculiar to HIV-positive men or HIV-positive women. Engaging men and alerting them of some of the disadvantages that women face would be beneficial for future research.

This study may also have benefitted from the views of HIV-positive women who are not part of a support group. It is possible that these women (many of whom may not have disclosed their HIV status) would have offered different views. However, given the social context of stigma and discrimination and perceptions that HIV is a private issue, recruiting from HIV support groups was considered the most appropriate way to respect rights to privacy and confidentiality. This exercise (approaching women outside support groups) would not have been viable due to ethical considerations as HIV is a private issue. Furthermore, this study finding purports to present the perceptions of the study participants on what they viewed as causes and or drivers of violence against women, hence it cannot be generalised.

Given its qualitative nature, this study attempted to understand how WLH made meaning of the violence they experience and their perceptions of the links between HIV and VAW. This study cannot draw conclusions about the correlations between HIV and VAW but is an important step in unpacking the human experiences of these dual epidemics.

7.2.1 Recommendations

This empirical study explored WLH experiences of VAW and considered the policy and legal frameworks which respond to the needs of WLH in Eswatini. The following section considers recommendations in relation to the major study findings, including recommendations for future research, policy, the socio-cultural context, the public health response, and socio-economic rights.

7.2.2 Recommendation for future research

While other studies confirm that violence against women cuts across class, the study findings suggest that women's access to amenities of life such as finance, housing and health would

enable women to better oppose violence against them.[803] It is recommended that future research investigates whether women's access to social-economic rights has any impact in reducing women's vulnerability to violence and HIV in Eswatini.

Given the finding of this study that emotional violence is prevalent in the lives of HIV-positive women, accompanied by blame and shame as well as stigma and discrimination; there is need for further quantitative research to look into the scale of the problem and propose new responses to tackle emotional violence as well as self-stigma in HIV-positive women.

7.2.3 Recommendation for public health policy

There is international guidance regarding a public health response to deal decisively with HIV and VAW: the WHO's 2019 curriculum for training healthcare providers caring for women subjected to violence should be adapted in such a way that healthcare workers holistically assist WLH suffering from violence. The adaptation of the policy should provide for penalties or sanctions to ensure public healthcare workers do not subject women to violence with impunity. It is the strength of penalties that deters would-be offenders from deviant conduct or action.

The policy should be accompanied by budget allocations and training of healthcare workers on how to screen WLH for emotional abuse and other human rights abuses not obviously visible in terms of visible scars in these cases. Currently, the national budgetary allocation to health stands at 10.1 per cent of the GDP, which is 5 per cent short of the allocation envisaged in the Abuja Declaration.[804] It is, therefore, incumbent on Eswatini government to ensure that the healthcare system, in particular public healthcare, operates effectively. The government should endeavour to comply with the 15 per cent allocations suggested by the Abuja Declaration because there is a great need for public health institutions to address HIV prevalence, as it risen from 21 per cent in 2016 to 27 per cent in 2018.[805]

Policy addressing violence against HIV-positive women should incorporate treating emotional abuse. Public health responses should consider the prevalence of experiences of emotional violence by WLH, which is accompanied by stigma and discrimination. The public health and human rights interventions should also address self-stigma among WLH, as it has been reported that it is responsible for ART non-adherence as well as depression and suicide among HIV-positive people.[806]

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[803] Goldblatt (note 769, above).
[804] See the Eswatini National Budget Brief as reported by UNICEF for the period 2018/2019.
[805] Eswatini Government *Multiple Indicator Cluster Survey (MICS) Report* 2019.
[806] Aryal, Regmi and Mudwari (note 135, above; 121).

Also, a policy should be put in place to ensure that healthcare facilities and personnel do not subject WLH to violence and other human rights abuses, in particular coercive sterilisation. This policy should ensure that the public health facilities are enabled to address violence holistically by creating an environment that responds to WLH's needs and make referrals to other stakeholders where needed.

The importance of implementing successful disclosure interventions in Eswatini is very important, because disclosure is linked to several positive health and family-level benefits. It is recommended that public healthcare policies on HIV adopt and implement disclosure interventions that empower WLH and their families as well as the society at large.

For the public health sector to better deal with VAW, healthcare workers must have ongoing training and capacitation on issues of VAW. This would enable them to identify WLH experiencing violence, in particular, emotional abuse. According to Garcia-Moreno, healthcare workers must provide the first line of supportive care to victims of violence, and this should include 'empathetic listening, ongoing psychosocial support, and referral to other services.'[807]

The study recommends that HIV-positive women's experience of VAW should be taken into consideration when programmes and or policies tackling HIV are being formulated. This will ensure that the rights and freedoms of women are included in policy and programmes aimed at eliminating the scourge of HIV and VAW. Implicit in this study was the fact that violence against WLH was multifaceted and was perpetrated by the family, community members, and healthcare workers alike. Thus, multifaceted responses must be adopted to tackle violence against HIV-positive women as a matter of policy.

Involvement of PLH: The study recommends that, for the formulation of programmes and policies targeting PLH, PLH should be consulted and be part of the policy/programme-setting agenda through the involvement of organisations of PLH and their representatives. Specialised treatment centres exclusively for PLH are recommended, which would encourage voluntary disclosure.

7.2.4 Recommendation on human rights responses

Parliament: there is a need for the alignment of siSwati law and custom with the provisions of the Constitution on gender equality, as women in domestic violence situations commonly rely on customary structures to enforce their rights. The legislature needs to domesticate and

[807] Garcia-Moreno et al (note 722, above).

align national laws with international, regional, and sub-regional instruments to ensure that women benefit from the protection offered by those instruments.

The legislative arm of government should align all legislation with the Constitution and international norms. This can be done through a law commission that can review laws with the view of identifying provisions that negate women's rights and then bring those to the attention of Parliament. Parliament would then repeal the negative provisions and enact legislation to ensure that women, in particular, WLH, are protected from domestic violence perpetrated by IPs, family, community members and service providers.

The Eswatini Human Rights Commission should ensure that there is always access to justice for women who find themselves abused in one way or the other, including in reported cases of forced or coerced sterilisation.

The study recommends that the judicial arm of government should ensure that there is justice for women who are victims of GBV arising in the private and public spheres. Hence, there is a need for training the judiciary, police, traditional leaders, and service providers on the rights of women and gender equality so that women's rights are seen as human rights worthy of promotion and protection.

There is also is a need to publicise the positive provisions of the SODOV Act. This would inform the population what actions and conduct are proscribed and how victims may go about asserting protection from violence under the Act. This should be coupled with readily available access to legal assistance.

The policy and legal framework of Eswatini should take cognisance of the fact that class and gender cause unequal distribution of social opportunities to the detriment of women.[808] The intersection of class and gender implies that government measures and interventions must ensure effective equality in society in order to aggressively deal with the negative status of WLH. These are structural challenges which demand both legal and extra-legal interventions. The law should be cognisant of the convergence of violence and HIV. Constitutional provisions on human rights should be wholly implemented as the study has observed that VAW can be only eliminated once women's equal autonomy and their rights to bodily integrity are realised.

The inclusion of community and traditional leaders: The study observed that community and traditional leaders play a significant role in enforcing acceptable moral behaviour and setting social norms in communities. Therefore, it is recommended that

[808] E Bonthuys & C Albertyn, *Introduction* in Gender, Law, and Justice (eds) E Bonthuys & C Albertyn (2007) 1-10.

community and traditional leaders form an integral part of the fight against VAW and HIV. It also recommended that community and traditional leaders be targeted for literacy programmes on legal rights and constitutional rights so that they can ensure that women have the protections guaranteed by the Constitution. This will ensure that women are in a position to obtain redress and justice for human rights violation at the traditional courts level. The study recommends that traditional leaders, as role models in their communities. be involved in campaigns against VAW and HIV stigma and discrimination.

Women's economic emancipation: The study further recommends that policymakers should put in place programmes aimed at women's economic emancipation, particularly for WLH, as women often stay in abusive relationships simply because they do not have the financial means to live independent lives.

Non-governmental organisations/Rights advocates to lobby for rights of WLH: The study recommends that NGOs and rights advocates should be robust in lobbying for and advocating the protection and advancement of the rights of WLH. There should be interventions addressing the plight of violence against women living with HIV (including stigma and discrimination they suffer) so that WLH can live their lives free of violence, stigma and discrimination and have access to health services without fearing health providers.

A**ctivism:** NGOs leading the fight against VAW and HIV should undertake robust activism to claim and secure the rights of their members by marches, public lectures, research; and seek judicial interventions through test cases or strategic litigation where gross abuse of the rights of WLH have been reported, including reports of sterilisation of WLH without consent.

7.3 Conclusion

The law is a powerful tool to regulate the distinction between acceptable and prohibited conduct. Violence against women is prohibited both at national law and at international law levels. In this study, WLH were found to be subjected to many layers of violence. The thesis argues that violence against HIV-positive women is both a public healthcare concern and a human rights violation. As such, public healthcare and human rights interventions were found to be best suited to deal with the twin epidemics of HIV and VAW. However, a social environment that promotes toxic patriarchal tendencies and the subordination of women was found to have hampered efforts by the public healthcare system. It negated human rights norms on gender equality, the right to enjoy the best attainable state of physical and mental health, the right not to be subjected to inhuman, humiliating, or degrading treatment and bodily integrity.

Women and society members should be educated about the new law dealing with VAW and women should be encouraged to report cases of violence, as this study found that women did not use mechanisms available for law redress. There is impetus for Eswatini to decisively promote and protect the rights and welfare of HIV-positive women and to eradicate violence against women in general. However, for that to happen there should be sufficient political will on the part of the government and stakeholders.

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