

# Conventions, customs and beliefs – social determinants and realising the right to health in Malawi and Uganda

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## *Abstract*

This article will focus on the importance of committed and participating civil communities in the realisation of health rights on the African continent. The various social, material, organisational, religious and cultural conceptions unique to the Malawian and Ugandan communities will be touched upon to show that community-specific responses to health rights are shaped by and are being informed by the social and cultural milieu of these African societies. From the examples put forward in this article it will become clear that the realisation of health rights on the African continent will remain a mere pipe dream if the social and cultural milieu of health needs and rights in Malawi and Uganda are ignored. First, the constitutional and legislative frameworks for health rights in Uganda and Malawi will be outlined whereafter the most pertinent social, religious and cultural conceptions that currently impact on the realisation of the right to health in these two countries will be discussed. The importance of recognising and addressing these social determinants of health on the African continent will be emphasised and a more contextualised approach to the realisation of health rights will be advocated for.

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## **INTRODUCTION**

... human rights law has so far had only limited success in actually improving the lives of persons living with HIV/AIDS in sub-Saharan Africa.<sup>1</sup>

Over the past fifty years many countries have experienced vast improvements with regard to national health indicators and the health status of their citizens. Among these improvements are an improved life expectancy

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<sup>1</sup> Chan 'From legal universalism to legal pluralism: expanding and enhancing the human rights approach to HIV/AIDS' (2005) 21 *South African Journal of Human Rights* 191–214, 192.

and child mortality rate, the eradication and successful treatment of many communicable diseases, and the improved provision of primary health care services to the broader population without discrimination.<sup>2</sup> These achievements can, however, not be extended to all countries on the African continent: For some countries in sub-Saharan Africa the average age of death declined from five years to two years over this same period,<sup>3</sup> and in post-apartheid South Africa the infant mortality rate in 2001 was five times higher among black persons than among their white counterparts.<sup>4</sup> This article is concerned with these inequities in health outcomes – inequities that are especially evident on the African continent.

The crucial insight in this article is that certain obstacles to the realisation of the right to health on the African continent cannot be addressed without the assistance of committed and participating civil communities. However, such community-specific responses to health rights are, in turn, influenced and sustained by various social, material, organisational, religious and cultural conceptions, unique to and historically deeply imbedded in the social order of the particular community/society. The milieu of changing African societies and cultures can therefore not be separated from the civil society organisations operating within them.<sup>5</sup> This article will focus specifically on the social and cultural milieu of health needs and rights in Malawi and Uganda. The choice of these two countries is informed by the fact that they share many of the socio-economic challenges as highlighted by, for instance, studies on the realisation of the Millennium Development Goals.<sup>6</sup> ‘Culture’ in this article refers to ‘...that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society’.<sup>7</sup>

First, the constitutional and legislative frameworks for health rights in Uganda and Malawi will be outlined, after which some of the most pertinent social, religious and cultural conceptions that currently impact on the realisation of the right to health will be discussed. In Uganda, the effect of

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<sup>2</sup> Evans *et al* (eds) *Challenging inequities in health: from ethics to action* (2001) 3.

<sup>3</sup> *Id* at 3.

<sup>4</sup> *Ibid.*

<sup>5</sup> Feierman & Janzen *The social basis of health and healing in Africa* (1992) The University of California Press 1.

<sup>6</sup> Wanjiku *et al* ‘A comparative assessment of ICEIDA’s Rural Development Programmes in Uganda and Malawi with Millennium Villages Project approach’ available at: [http://www.iceida.is/media/pdf/A\\_Comparative\\_Assessment\\_of\\_ICEIDA\\_and\\_MVP.pdf](http://www.iceida.is/media/pdf/A_Comparative_Assessment_of_ICEIDA_and_MVP.pdf) (last accessed 13 January 2012).

<sup>7</sup> Gausset ‘AIDS and cultural practices in Africa: the case of the Tonga (Zambia)’ (2001) 52 *Social Science and Medicine* 509–518, 510.

legislative mechanisms aimed at controlling vulnerable minorities generally associated with the spread of HIV/AIDS and fuelled by traditional cultural conceptions about sexuality and HIV/AIDS will be considered. The fact that the majority of Ugandans, especially those in rural areas, do not see health as a human rights issue will also be highlighted as a factor limiting the realisation of health rights in Uganda. In Malawi, the gendered power relationship between men and women will be singled out as an exceptionally adverse force to the true realisation of the right to health for women. It will be shown that gender equality and women's empowerment in Malawi are crucial to improving women's overall health status. The important role of religious beliefs and religious leaders in the fight against HIV/AIDS will also be discussed.

The importance of recognising and addressing the social determinants of health on the African continent will then be highlighted and a more contextualised approach to the realisation of health rights will be advocated. It will ultimately be shown that many of the current obstacles to the realisation of the right to health on the African continent can be overcome if due consideration is given to community specific social, material, organisational, religious and cultural conceptions with regard to health and disease.

## **UGANDA**

The Constitution of Uganda 1995, is based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. The commitment of the government and people of Uganda to establish a socio-economic and political order by way of these principles is also confirmed in the preamble.<sup>8</sup> The National Objectives and Directive Principles of State Policy (hereafter NOPNP) is viewed as a codicil to the Constitution<sup>9</sup> and comprises all the objectives and principles that organs and agencies of the state, citizens, organisations and other bodies/person should apply or consider when interpreting the Constitution or any other laws of the country.<sup>10</sup> The President of Uganda is furthermore responsible for an annual report to parliament and the nation, to ensure that all possible steps are taken to realise these policy objectives and directives.<sup>11</sup> However, the language used in the NOPNP, specifically with regard to the realisation of the ideals contained therein, only requires of the government to be 'guided' by the principles. This, at best,

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<sup>8</sup> Constitution of Uganda, 1995. (Commenced on 8 October 1995).

<sup>9</sup> It is included immediately after the preamble to the Constitution and before Chapter One.

<sup>10</sup> Constitution of Uganda, 1995 NOPNP I(i).

<sup>11</sup> *Id* at I (ii).

imposes a moral obligation on government and provides no mechanisms to ensure enforcement.<sup>12</sup> The NOPNP can consequently be described as a non-binding aspiration of ideals and objectives.<sup>13</sup>

The NOPNP includes the following categories of objectives: political objectives, fundamental human rights and freedoms, social and economic objectives, accountability, the environment, foreign policy objectives, and the duties of citizens. With regard to social and economic objectives, the state is required to fulfil the fundamental rights of all Ugandans to social justice and economic development, and to ensure, in particular, that all developmental efforts are directed at realising the maximum social and cultural well-being of the people.<sup>14</sup> The state is also required to ensure that all Ugandans enjoy rights, opportunities and access to health services, as well as various other underlying determinants of health.<sup>15</sup> Objective XX applies to medical services in particular and requires the state to take all practical measures to ensure the provision of basic medical services to the population.<sup>16</sup> It must be noted, however, that the objectives in the NOPNP – like the Fundamental Objectives and Directive Principles of State Policy in Chapter Two of the Nigerian Constitution – are not enforceable.

While the right to health is not explicitly incorporated among the operational provisions of the Constitution, many of the sections can be invoked to protect the health rights of Ugandan nationals. The Constitution of the Government of Uganda (1995), read together with the NOPNP, provides that the state shall ensure that all Ugandans enjoy rights, opportunities and access to education,<sup>17</sup> health services,<sup>18</sup> clean and healthy environment,<sup>19</sup> work, decent

<sup>12</sup> Mawa *Chapter IX Human rights development in Uganda: reflections on the constitutional provisions of the right to development in ethics, human rights and development in Africa cultural heritage and contemporary change* Series II, Africa 8 available at: <http://www.crvp.org/book/Series02/II-8/contents.htm> (last accessed 13 June 2012).

<sup>13</sup> Kapindu 'Poverty reduction strategies and the rights to health and housing: the Malawian and Ugandan experiences' (2006) 6 *African Human Rights Law Journal* 493–523, 505; Other examples of African countries where the right to health is provided for in the fundamental objectives and directives principles of state policy are: Namibia, Nigeria, Ghana and Malawi.

<sup>14</sup> Constitution of Uganda, 1995 NOPNP XIV(a).

<sup>15</sup> Including education, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits. NOPNP XIV(b).

<sup>16</sup> Kapindu n 13 above at 517.

<sup>17</sup> Section 30, Chapter Four of the Constitution of Uganda, 1995.

<sup>18</sup> National Objectives and Directive Principles of State Policy (NODPSP) XIV(b) of the Constitution.

<sup>19</sup> Section 39, Chapter Four of the Constitution of Uganda, 1995.

shelter, adequate clothing, food, security, pension and retirement benefits.<sup>20</sup> In addition, fundamental human rights are described as inherent to human dignity and not dependent on any action or inaction by the government,<sup>21</sup> while section 45 of the Constitution provides that

... the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.<sup>22</sup>

The constitutional provisions furthermore do not affect any treaty, international agreement or any other convention to which Uganda may be party.<sup>23</sup> It can therefore be argued that the right to health and the underlying determinants of health, though not explicitly recognised as enforceable rights in the Constitution, are implicit to the current constitutional provisions, and are based on the content and scope of the sections referred to above.

There are many initiatives to promote a more human rights-based approach to health in Uganda. In September 2008, the Uganda Human Rights Commission (UHRC) officially launched its 'Right to Health Unit' to monitor and ensure accountability of the implementation of the right to health in Uganda.<sup>24</sup> The unit has been operational since 2007 and has paid specific attention to policies, programmes and projects relating to neglected tropical diseases. It also supports training on a human rights-based approach for health professionals and is specifically mandated to monitor compliance by the government with health rights in general.<sup>25</sup> Much has also been written of Uganda's success in HIV-prevention – it is estimated that the HIV prevalence in the country declined from some fifteen per cent in the early 1980s to approximately six per cent by 2005.<sup>26</sup>

However, despite the progress made through initiatives like the UHRC and the Right to Health Unit, one of the greatest obstacles to the realisation of the

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<sup>20</sup> Section 40 Constitution of Uganda, 1995, National Directive Principles of State Policy: XIV General social & economic objectives (b); see also: [www.who.int/entity/hhr/news/hhr\\_factsheet\\_uganda.pdf](http://www.who.int/entity/hhr/news/hhr_factsheet_uganda.pdf) (last accessed 13 June 2012).

<sup>21</sup> Section 20 of the Constitution of Uganda, 1995.

<sup>22</sup> Twinomugisha 'Implications of the TRIPS Agreement for the Protection of the Rights of Access of Medicines in Uganda' (2008) 2/1 *Malawi Law Journal* 253–278, 261.

<sup>23</sup> Section 287 of the Constitution of Uganda, 1995; ICESCR: Uganda – 21 January 1987 (accession), Uganda – 1 May 1986 (ratification).

<sup>24</sup> [www.who.int/entity/hhr/news/hhr\\_factsheet\\_uganda.pdf](http://www.who.int/entity/hhr/news/hhr_factsheet_uganda.pdf) (last accessed 13 June 2012).

<sup>25</sup> [www.who.int/entity/hhr/news/hhr\\_factsheet\\_uganda.pdf](http://www.who.int/entity/hhr/news/hhr_factsheet_uganda.pdf) (last accessed 13 June 2012).

<sup>26</sup> J Cohen, R Schleifer & T Tate 'AIDS in Uganda: The Human Rights Dimension' (June 2005) 365 Issue 9477 *The Lancet* 2075–2076.

right to health in Uganda is that the majority of Ugandans, especially those in rural areas, do not see health as a human rights issue. For people to grasp that health is indeed a human rights issue and that everybody has a right to health and basic health care, effective communication is required. Effective communication is a consequence of people's ability to read and to comprehend concepts that would otherwise not be self-evident to them on the basis of that reading.<sup>27</sup> The most vulnerable in this regard are the illiterate, uneducated communities living in rural areas. In *The ecology of South Africa's AIDS epidemic* published in 1999, Virginia van der Vliet puts the question: 'How do you reach a poor, isolated illiterate rural or urban woman, who is not at school, at work or at church or a clinic attender?'<sup>28</sup> Such absenteeism and unawareness leads to a lack of social mobilisation that influences the public's responses and activism towards the realisation of the right to health and adversely affects the potential of transformation in Uganda.<sup>29</sup> This is regrettable as it is not only politicians and courts that can play a vital role to effect change, agency is also pivotal for the realisation of health rights.

Another example of how a social context, in this instance specifically social perceptions and despondence, can adversely affect health rights is seen with the recent introduction of the Anti-homosexuality Bill in Uganda.<sup>30</sup> As section 31(2)(a) of the Constitution of Uganda, 1995, already prohibits marriage between persons of the same sex,<sup>31</sup> the proposed Anti-homosexuality Bill will tighten this existing ban on homosexuality.<sup>32</sup> The new Bill prescribes prison terms and fines for people who do not report homosexual and transgender individuals to the police; groups convicted of discussing homosexuality will be imprisoned or fined; and the death penalty will be imposed on homosexual men who are HIV-positive and sexually

<sup>27</sup> Van Niekerk 'Moral and social complexities of AIDS in Africa' (2002) 27/2 *Journal of Medicine and Philosophy* 152.

<sup>28</sup> Van der Vliet. *The ecology of South Africa's AIDS epidemic*. (July 1999) *Pulse Track* 1–5; Van Niekerk n 27 above at 153.

<sup>29</sup> Ngabiirwe *Promoting the right to health in Uganda – experience of Action Group of Health, Human Rights and HIV/AIDS* (paper delivered at the International Conference on Realising the Rights to Health and Development for All 26–29 October 2009 Ha Noi, Vietnam; London & Baldwin-Ragaven 'Human rights obligations in health care' (2006) 24/1 *CME* 20–24, 69.

<sup>30</sup> Alsop 'Ugandan Bill could hinder progress on HIV/AIDS' (2009) 374 *The Lancet* 2034–2044.

<sup>31</sup> Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277–288.

<sup>32</sup> Alsop n 30 above at 2034–2044.

active.<sup>33</sup>

A medical practitioner in Uganda described the effect that this Bill will have – if promulgated – on the health rights of many Ugandan citizens as follows: ‘As a doctor, the law infuriates me. We are only now getting to a point where people understand there is a problem [HIV/AIDS]. This law is going to erase all of that.’<sup>34</sup> The Anti-homosexuality Bill will make it impossible for most NGOs working with HIV-positive sexual minorities to register with the government, or conduct their operations without fear of prosecution.<sup>35</sup> The much needed research on the prevalence and transmission of HIV/AIDS among men who have sex with men in sub-Saharan Africa, and specifically in Uganda, will now also no longer be possible.<sup>36</sup> Ironically, however, many Ugandans and most of the prominent religious groups in Uganda, support this anti-gay Bill. Mujuzi argues that the main reason for this apparent support by civil society groups against homosexuality is the traditional African beliefs and culture relating to marriage and family life.<sup>37</sup> The notion that people of the same sex can also enter into sexual love-relationships stands in stark contrast to traditional African cultures and beliefs.<sup>38</sup>

Although generalisations about traditional African cultures and beliefs should not obscure the variability that exists among ethnic groups in Africa, it can generally be said that these beliefs and *mores* on same-sex marriages are shared by many other Africans across the continent.<sup>39</sup> In Malawi, for

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<sup>33</sup> *Ibid.*; the sanction of death penalty for HIV-positive homosexual men who actively take part in sexual intercourse might be removed from the Bill due to international pressure. This Bill was first tabled in 2009 and discussed by the Ugandan Parliament in early 2010. Although the Bill was dropped in August 2011, it was reintroduced in February 2012. The Bill was referred to a Parliamentary Committee consider.

<sup>34</sup> Also p n 30 above at 2034–2044.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Mujuzi n 31 above at 285.

<sup>38</sup> *Ibid.*

<sup>39</sup> For example, in Zimbabwe homosexuals are described by President Robert Mugabe as ‘worse than dogs and pigs’, and in The Gambia President Yahya Jammeh allegedly threatened to behead people in same-sex relationships. Mujuzi n 31 above at 285; In the Botswana Guardian of 15 February 1985 an official report by the government was quoted where it reportedly said that HIV/AIDS is not a problem in Botswana at all, as AIDS is primarily a disease of homosexuals and there are no homosexuals in Botswana. MacDonald (n 30 above) 1325. Also see Morgan & Wieringa ‘Tommy boys, lesbian men and ancestral wives: female same sex practices in Africa’ (2005) *Jacana Media* for more examples of anti-homosexual beliefs on the African continent; Draper ‘African marriage systems: perspectives from evolutionary ecology’ (1989) 10/1–3 *Ethology and Sociobiology* 145–169, 146; Mubangizi & Twinomugisha ‘Protecting the right to

example, a judge jailed two gay men in 2010, after they married in the first public homosexual marriage ceremony held on Malawian soil.<sup>40</sup> The gay couple was later freed by presidential pardon, but are now living in separate villages amid fears for their safety.<sup>41</sup> In the wake of pressure from Western governments, Malawian Justice Minister Ephraim Chiume recently announced that Malawi will be reviewing a series of controversial laws, including the ban on homosexual acts.<sup>42</sup>

Another controversial Bill being considered by Ugandan lawmakers is the HIV/AIDS Prevention and Control Bill that seeks to criminalise the intentional spread of HIV/AIDS in Uganda. According to a memorandum issued by the Uganda Health and Science Press Association (UHSPA-Uganda) in consultation with lesbian, gay, bisexual, transgender and intersex persons (LGBTI), the Bill is based on ‘...populism, moral outrage or religious feeling as opposed to being evidence-based and human rights centred...’. It is also suggested that it runs the risk of becoming a driver of the epidemic as opposed to being a part of the solution. The primary objections against the proposed Bill relate to the provisions dealing with mandatory testing (sections 13, 14, 15 and 17), the mandatory or unauthorised disclosure of HIV status testing (sections 4(2), 9(2), 12, 19(2), 21, 22, 23 and 25(3)), as well as the criminalisation of intentional transmission of HIV/AIDS (sections 39 and 41). It is argued that, in conjunction with Uganda’s penal law (specifically section 145 of the Penal Code) which criminalises sexual intercourse between consenting adults of the same sex, the spirit of the Bill specifically provides for the mandatory HIV testing of LGBTI persons engaging in same-sex practices and that this further marginalises vulnerable minority groups, including women.<sup>43</sup>

The Uganda Penal Code, the Anti-Homosexuality Bill, and the HIV and AIDS Prevention and Control Bill discussed above reflect traditional culture and beliefs about same sex partnerships and HIV/AIDS; they are said to be a tacit endorsement of the criminalisation of same sex practices to the

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freedom of sexual orientation: what can Uganda learn from South Africa?’ (2011) 22/2 *Stellenbosch Law Review* 330–351.

<sup>40</sup> [http://www.news24.com/Content/Africa/News/965/d282ced535194c72a20471e5db56485e/30-12-2009-10-27/Malawi\\_orders\\_gays\\_stay\\_in\\_jail](http://www.news24.com/Content/Africa/News/965/d282ced535194c72a20471e5db56485e/30-12-2009-10-27/Malawi_orders_gays_stay_in_jail) (last accessed 13 June 2012).

<sup>41</sup> ‘Gay Malawians freed’ *Mail and Guardian* 4 June 2010 23 & 29; President Bingu wa Mutharika, however, said that the two men were pardoned on humanitarian grounds and that they have ‘... committed a crime against our culture, our religion and our laws’.

<sup>42</sup> <http://www.bbc.co.uk/news/world-africa-16092694> (last accessed 14 December 2011).

<sup>43</sup> <http://www.africanactivist.org/2011/04/reasoned-analysis-of-ugandas-hiv-aids.html> (last accessed 14 December 2011).



detriment of the health and life of LGBTI persons in Uganda.

## **MALAWI**

The Constitution of Malawi, Act 20 of 1994, requires the state actively to promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the goal of adequate health care, commensurate with the health needs of Malawian society and international standards of health care.<sup>44</sup> While these fundamental principles in the Constitution<sup>45</sup> are only directory in nature, courts are entitled to have regard to them when interpreting and/or applying any of the provisions of the Constitution or of any other law, or when determining the validity of decisions of the executive.<sup>46</sup> The human rights enshrined in Chapter IV of the Constitution are enforceable,<sup>47</sup> and although the right to health is not explicitly provided for in this chapter, section 30(2) requires that the state shall take all the necessary measures for the realisation of the right to development, and that such measures shall include, amongst other things, health services, as well as underlying determinants of health. However, despite this official commitment to health rights, it has been suggested that the Malawian Constitution does not hold the same public profile or the substantive force as the Constitution of South Africa.<sup>48</sup> High levels of poverty and illiteracy have also slowed the development of a mobilised civil society.<sup>49</sup> In addition, human rights are generally viewed as an offshoot of ‘western values’ and a threat to Malawian tradition and culture.

Many of the community-specific obstacles to the realisation of the right to health identified in Uganda, can also be seen in Malawi.<sup>50</sup> For example, the gendered power relationship between men and women in Malawi is a force that impedes the true realisation of the right to health for women.<sup>51</sup> Women

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<sup>44</sup> Constitution of the Republic of Malawi Constitution, Act 20 of 1994, s 13, especially 13(c).

<sup>45</sup> Contained in chapter 3 of the Constitution.

<sup>46</sup> Constitution of the Republic of Malawi Constitution, Act 20 of 1994, s 14; Kamchedzera & Banda ‘Dignified rural living, the right to development, multiparty politics and legislation in Malawi’ (2009) 25 *South African Journal of Human Rights* 73–101, 83.

<sup>47</sup> Constitution of the Republic of Malawi Constitution, Act 20 of 1994, s 15(1).

<sup>48</sup> Chan n 1 above at 205.

<sup>49</sup> Chan n 1 above at 205; Ribohn ‘Human rights and the multiparty system have swallowed our traditions: conceiving women and culture in the new Malawi’ in England (ed) *A democracy of chameleons: politics and culture in the new Malawi* (2002) 166.

<sup>50</sup> Chan n 1 above at 204.

<sup>51</sup> *Id* at 205; Belhadj & Touré ‘Gender equality and the right to health’ (2008) 6736 *The Lancet*

are regarded as a subordinate group by many cultures in sub-Saharan Africa: ‘... they are expected to become pregnant, bear children and fulfill the sexual desires of their husbands without hesitation.’<sup>52</sup> This is worrying as over sixty-one per cent of adults living with HIV/AIDS in sub-Saharan Africa are female.<sup>53</sup> In the countdown to the deadline for the Millennium Development Goals in 2015, the promotion of gender equality and women’s empowerment are crucial to the improvement of women’s overall health status.<sup>54</sup> In addition to the existence of practices like wife-sharing, polygamy, and sexual initiation ceremonies in Malawi, there is also a widespread perception that women are the keepers of Malawian tradition, a notion which reinforces women’s disadvantaged social role and also places them outside of human rights concepts which are seen to threaten the true tradition and culture of Malawians.<sup>55</sup> These traditional assumptions, reinforced by the teachings of traditional religious leaders, predispose women to HIV infection and stigmatisation.<sup>56</sup> It is significant to note that the term for a sexually transmitted disease, regardless of its origin, is a ‘woman’s disease’.<sup>57</sup>

Religion is also very important in Malawian culture; about eighty per cent of the population is Christian, while thirteen per cent describe themselves as Muslim.<sup>58</sup> While missionaries provide almost half of the medical services in the country, civic education has become an important part of the work Christian churches undertake. The Blantyre Synod of the Church of Central African Presbyterian (CCAP), for example, introduced workshops for the youth on democracy, human rights, gender roles and community-based development.<sup>59</sup> The Christian Service Committee is another example; this group informs women leaders of women and children’s rights.<sup>60</sup> However, many community leaders and fundamentalist religious groups regard the HIV/AIDS problem in the country as a direct result of immorality and also speak out against the use of condoms.<sup>61</sup> The Malawi faith communities are said to have ‘... a long history of presence and persuasion, well-developed

<sup>52</sup> Rankin *et al* ‘The stigma of being HIV-positive in Africa’ (2005) 2/8 *PlosMed* 702–704.

<sup>53</sup> Belhadj & Touré n 51 above at 2008–2009; Serie ‘Public Hearings on “The Millennium Development Goals” and the realisation of economic and social rights in Africa’ (2009) 10/2 *ESR Review* 23–26.

<sup>54</sup> *Ibid.*

<sup>55</sup> Chan n 1 above at 206.

<sup>56</sup> Rankin *et al* n 52 above at 702–704.

<sup>57</sup> *Ibid.*

<sup>58</sup> Chan n 1 above at 206.

<sup>59</sup> Englund ‘The dead hand of human rights: contrasting Christianities in post-transition Malawi’ (2000) 38/4 *The Journal of Modern African Studies* 585.

<sup>60</sup> *Ibid.*

<sup>61</sup> Chan n 1 above at 206; Englund n 59 above at 581.

and self-sustaining institutions and structures, predictable leadership, a captive and loyal audience and grassroots support that cuts across gender, age and other lines'.<sup>62</sup> Religious leaders also speak out against homosexuality, and due to the standing of such leaders in the Malawi community, as well as their powers of influence and persuasion, societal discrimination against homosexual persons living with HIV/AIDS is said to be widespread. People prefer to keep silent about their HIV-status and sexual orientation rather than to seek help and risk being ostracised.<sup>63</sup>

Specific customary and cultural practices in Malawi – like the gendered power relationship between men and women and religious convictions with regard to condom use and immorality – impact negatively on the realisation of the right to health in this country, especially for vulnerable groups like women and children, and especially in the context of HIV/AIDS. HIV/AIDS is generally associated with foreigners, homosexuals and promiscuity, and these perceptions have had a devastating effect on the willingness of Malawians to protect themselves against the virus, or to seek testing and counseling services.<sup>64</sup>

#### **THE SOCIAL DETERMINANTS OF HEALTH ON THE AFRICAN CONTINENT AND THE NEED FOR A MORE CONTEXTUALISED HUMAN RIGHTS APPROACH**

Community-specific responses to health rights are influenced and sustained by a variety of social, material, organisational, religious and cultural conceptions, unique to, and historically deeply imbedded in, the social order of a particular community/society. Some of the main complexities that can have a negative impact on the realisation of the right to health for all include the social context of illness and disease; problems related to achieving behaviour change (including deprivation and illiteracy); the vulnerability of certain groups like women and children; and the politicisation of health development projects. While human rights discourse, and specifically the drive towards the realisation of a right to health for all, have made significant inroads in addressing the health needs of those most vulnerable on the African continent, it is submitted that human rights law has had only '... limited success in actually improving the lives of persons living with

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<sup>62</sup> Chan n 1 above at 207.

<sup>63</sup> Report compiled by the US Department of State, Bureau of Democracy, Human Rights, and Labor 6 March 2007 available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78744.htm> (last accessed on 13 June 2012).

<sup>64</sup> Chan n 1 above at 205.

HIV/AIDS in sub-Saharan Africa'.<sup>65</sup> This is due to a variety of reasons including the lack of political will and/or resources, and the community-specific social determinants of health that influence health and behaviour and require a more diverse and contextualised approach in dealing with health needs.

The objective of such an argument for a contextualised human rights approach, or put differently, an improved understanding of African perspectives on human rights, is not to do away with conventional 'human rights talk', or to present dominant human rights discourse in a dual with African culture and beliefs. It is rather suggested here that what is needed for the true realisation of rights is to understand how rights are enmeshed in a network of cultural practices. It is only through a collective understanding of all the social, material, organisational, religious and cultural conventions of traditional African society (and how it is understood and enacted in a particular community) that a comprehensive rights-based approach will convince people to take ownership of their rights and to strive for the full realisation of human rights ideals.

It is said that the roots of human rights lie in liberalism and the conception of natural (and by implication universal) rights.<sup>66</sup> The theory of natural rights (on which mainstream human rights scholarship is based) postulates the: equality of all human beings; absence of hierarchy in nature; inalienability of rights, which provides for the security of the individual; and the centrality of individualism.<sup>67</sup>

Human rights can also be defined in terms of the intrinsic human values inherent to the human person, and due to all persons on the basis of their human dignity.<sup>68</sup> This notion of individuality, which is central to the present understanding of human rights, was inherited by most African countries when the Universal Declaration of Human Rights was adopted by the General Assembly,<sup>69</sup> at a time when most African countries were still occupied by colonial powers. Today, the constitutions of most African

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<sup>65</sup> Chan n 1 above at 191–214.

<sup>66</sup> Cobbah 'African values and the human rights debate: an African perspective' (1987) 9/3 *Human Rights Quarterly* 320–321; Santos 'Toward a multicultural conception of human rights' in Hernández-Truyol (ed) *Moral imperialism: a critical anthology* (2002).

<sup>67</sup> Cobbah n 66 above at 314; Motala 'Human rights in Africa: a cultural, ideological and legal examination' (1988–89) 12 *Hastings International Law and Comparative Law Review* 373–410.

<sup>68</sup> Mawa n 12 above.

<sup>69</sup> United Nations, December 1948; Cobbah n 66 above at 316.

countries are based on this natural individual-rights-based approach. However, in contrast to this notion of individuality, the African philosophy of existence can be summed up as: 'I am because we are, and because we are, therefore I am.'<sup>70</sup> This notion of collectivity, also with regard to the entitlement and enjoyment of human rights, is reflected in the preamble of the African Charter on Human and People's Rights where it is affirmed that it is the duty of everyone to '...achieve the total liberation of Africa, the people of which are still struggling for their dignity and genuine independence'.<sup>71</sup> The Charter also makes provision for two main types of right, the rights of individuals and the rights of peoples. The latter, the rights of peoples, includes all social, economic and cultural rights in articles 19 to 24. The Algiers Declaration<sup>72</sup> (Universal Declaration on the Rights of the Peoples) is another example of a more collectivist approach to human rights.<sup>73</sup> The conventional categories of 'the state' and 'a person / individual' are absent from the declaration, and instead, reference to 'every people' is used throughout the document.<sup>74</sup> It should be noted that the Algiers Declaration is not an international instrument on human rights, but rather '...an ideological legitimiser and political manifesto...' of people's struggles.<sup>75</sup>

African social organisation is therefore said to require societal cohesion and kinship to the African lifestyle (as opposed to the high regard placed on individuality in western society). Respect for the hierarchy within a family/community, sameness and communality, as well as respect for the corresponding rights and duties of members of a family and society stand central to African social organisation. These corresponding rights and duties are based on the kinship of individuals to one another.<sup>76</sup> Some ethnic groups, like the Shona, also believe that human dignity is acquired by an individual, and not a given or intrinsic value.<sup>77</sup>

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<sup>70</sup> Mbiti *African religions and philosophy* (1970) 141; Cobbah n 66 above at 320–321.

<sup>71</sup> Mawa n 12 above.

<sup>72</sup> The Algiers Declaration (4 July 1976) is reflective of the ideals and hopes of many interest groups who met in Algiers under the auspices of the Lelio Basso Foundation. This event was prompted by the US defeat in Vietnam, the Kampuchean revolution and the victory of national liberation movements in Mozambique, Angola and Guinea-Bissau, in the hope for people's movements in Africa and Asia; Shivji *The concept of human rights in Africa* (1989) 95.

<sup>73</sup> Shivji n 72 above at 95.

<sup>74</sup> *Ibid.*

<sup>75</sup> Shivji n 72 above at 97.

<sup>76</sup> Cobbah n 66 above at 320.

<sup>77</sup> Englund n 59 above at 585 & 581; Santos n 66 above at 46.

Consequently, when human rights are described as rights inherent to all human beings and due to all persons based on their human dignity ‘...it becomes hard to appreciate the import which some people attach to the gradual social maturation and “growth” of...’ individuals.<sup>78</sup> In Malawi, the Kantian notion of human dignity<sup>79</sup> is also not congruent with the notions of dignity expressed by certain rural communities. It is said that communities’ general articulation of such concepts, including the statement ‘we too are people like you ...rather transcends the centrality of individuality...and links individuality with a communality of aspirations and being’.<sup>80</sup> According to this African understanding of existence, the pursuit of human dignity is ultimately not concerned with the vindication of a particular right against an individual or organisation, but rather the vindication of communal wellbeing.<sup>81</sup>

In 1993 a Danish newspaper published an article under the following headline: ‘The fight against AIDS is a fight against culture’.<sup>82</sup> This headline reflected the perspectives of many anthropologists and scholars from different disciplines during the nineteenth and early part of the twentieth century: that the patterned way of life shared by communities on the African continent are primitive and immoral and that this differentness is in many instances to blame for, and otherwise is contributory to, the health problems and challenges on the continent.<sup>83</sup> Thus, in addition to alternative intellectual conceptions of the values and norms underlying human rights and human dignity on the African continent – conceptions that purportedly hinder the realisation of a rights-based approach – it is also suggested by some that particular cultural practices ought to be abolished for the same reason.<sup>84</sup> Gausset argues that such reasoning tends to de-contextualise traditional practices like wife-sharing, polygamy and sexual initiation ceremonies. It ignores the fact that these practices are embedded in a specific and complex cultural, social, economic, and biophysical context. He further pleads that the importance of particular cultural practices for people’s identities should not be underestimated.<sup>85</sup> The absence of polygamy, for example, would not necessarily stop the spread of HIV/AIDS and it is unlikely that this practice

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<sup>78</sup> Englund n 59 above at 581.

<sup>79</sup> According to Kant every human being should be perceived as an end in him- or herself and never merely as a means; Kamchedzera & Banda n 46 above at 77.

<sup>80</sup> Kamchedzera & Banda n 46 above at 77.

<sup>81</sup> Cobbah n 66 above at 320.

<sup>82</sup> Vinding Troels ‘Kamp mod AIDS er kamp mod kulturen’ *Politikken* 29 August 1993.

<sup>83</sup> Gausset n 7 above at 510.

<sup>84</sup> *Id* at 512.

<sup>85</sup> *Ibid.*

will be eradicated in the near future as polygamy is deeply ingrained in a number of African cultures, and also forms part of a complex set of social and economic relations.<sup>86</sup> The same applies to the inheritance of widows: the practice whereby a male family member inherits the widow and her child(ren) after the death of her husband is part of a set of socio-economic considerations primarily aimed at providing financial and familial support to those who need it the most.<sup>87</sup> However, while sub-Saharan Africa is culturally, linguistically, religiously and socially more diverse than many other geographical regions in the world, indigenous law and traditional African notions and values have not featured in mainstream African jurisprudence.<sup>88</sup>

Yet, the African notion of communality is not completely foreign to the dominant human rights discourse traditionally based on notions of individualism. Social, economic and cultural rights, including the right to health, are communal in their nature and application and form an integral part of the human rights discourse on the African continent today. However, while the natural rights tradition of individualism makes a contribution to the initial conceptualisation of fundamental human rights, an understanding of how the participation in the practice of individual rights enmeshes in a network of social relationships and social structures is necessary for a true realisation of fundamental human rights.<sup>89</sup> How different cultures satisfy those needs, that we have come to identify at an international/universal level as fundamental human rights, can be a mutually advantageous undertaking for all; as truly universal human rights norms can only be achieved if specific cultural behaviour patterns, values, and structural differences are examined so that the generalisations that are then made, are more convincing and valuable for correcting injustices.<sup>90</sup>

The African sense of community obligation that goes beyond charity is just what is needed to foster economic rights and push the idea of economic rights beyond the demands of human rights activists and human rights textbooks.<sup>91</sup>

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<sup>86</sup> Gausset n 7 above at 513.

<sup>87</sup> *Ibid.*

<sup>88</sup> MacDonald 'Notes on the socio-economic and cultural factors influencing the transmission of HIV in Botswana' (1996) 42/9 *Social Sciences Medicine* 1326–1327.

<sup>89</sup> Cobbah n 66 above at 318.

<sup>90</sup> *Id* at 327–329.

<sup>91</sup> Cobbah n 66 above at 311.

The notion of communitarianism is indeed a distinct feature of traditional African culture, and instead of focusing on civic education as a suitable response to alternative conceptions of human rights and dignity on the African continent, an informed and improved understanding of complexity is necessary.<sup>92</sup> The full realisation of the right to health will remain a distant ideal if the dynamic between an individual and her particular community is not incorporated in the rights-based framework.<sup>93</sup> It is, after all, impossible to ignore that the essence of a person's social and political relationships and a person's reality as a social and cultural being, influences her conception of rights and entitlements.<sup>94</sup> For example, an analysis of how HIV-stigmatisation in a particular community functions, how it enhances dominance and subordination in society, and most importantly, why it is that such a social scheme perversely flourishes in the first place, will ensure that community-driven HIV interventions and related programmes have a wider support base within the community itself and will consequently be more effective.<sup>95</sup>

## CONCLUSION

It is trite that health is far more than health care, and that the right to health should be understood in terms of the complex synergy of all human and socio-economic rights underlying true physical and mental well-being. The stigmatisation of particular diseases like HIV/AIDS, and the discrimination against minority groups (like the homosexual communities in Malawi and Uganda), as well as the adverse effects of power imbalances in relationships (like the traditional powerless role of women in Malawian society), also influence the health of people and the realisation of health rights in the broader sense of the term. The full realisation of the right to health is consequently significantly dependent on the capacity of the rights holders themselves – ordinary people – who stand to gain the most from a rights-based approach. It is for this reason that community participation and commitment to human rights and notions of human dignity is pivotal for the full realisation of health rights. However, rural Africans, particularly women, lack the material, social and educational resources to truly recognise their human rights and participate in their development and realisation.<sup>96</sup>

<sup>92</sup> Sloth-Nielsen & Mezmur 'A dutiful child: the implications of Article 31 of the African Children's Charter' (2008) 52/2 *Journal of African Law* 159–189, 164; Englund n 59 above at 601.

<sup>93</sup> Englund n 59 above at 601; Santos n 66 above at 44.

<sup>94</sup> Cobbah n 66 above at 317–318; Ibhawoh 'Evaluating the cultural legitimacy of human rights in the African State' (2000) 22 *Human Rights Quarterly* 840.

<sup>95</sup> Rankin *et al* n 51 above at 702–704.

<sup>96</sup> Van Niekerk n 27 above at 153.



This article has considered how social, material, organisation, religious and cultural conceptions, unique to and deeply imbedded in the social order of the Ugandan and Malawian societies, impact on the realisation of health rights in these countries. One of the obstacles identified was the lack of literacy and legal awareness (especially in rural areas) of health as a human right.<sup>97</sup> In Malawi, for example, research indicates that only some sixty per cent of the population had heard the term ‘human rights’ by 2006 and only twenty-eight per cent of these were able to identify two human rights.<sup>98</sup> With regard to the prevalence of HIV, it was found that it is especially women’s health that is threatened by inadequate social status.<sup>99</sup> A renewed understanding of the specific social, material, organisational, religious and cultural conventions of traditional African society may increase the emancipatory power of ‘human rights talk’ on the African continent. An overly legalistic approach to human rights, on the other hand, will hinder civil society mobilisation and participation for the realisation of human rights, including the right to health.<sup>100</sup>

For people to participate in the realisation of their health rights, they must first realise that they are entitled to health as a fundamental human right. And, for health rights to acquire a solid foundation, a ‘...conception of man in society rather than the Lockean abstraction of natural rights...’ is vital.<sup>101</sup>

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<sup>97</sup> Kamchedzera & Banda n 46 above at 97.

<sup>98</sup> UNOPS *Baseline survey for civic education in Malawi* (2006) 27; Kamchedzera & Banda n 46 above at 97.

<sup>99</sup> Van Niekerk n 27 above at 156.

<sup>100</sup> Englund n 59 above at 580.

<sup>101</sup> Cobbah n 66 above at 318.