

Thematic Paper: Harmful Cultural Practices
and Gender Based Violence



KEY ISSUES

- While some traditional practices may be viewed as harmful to women and girls in South Africa, they are still widely protected as preservation of culture and tradition, even by women.
- A 2019 Constitutional Court ruling gave spouses in both monogamous and polygamous customary marriages equal rights of ownership and control over matrimonial property.
- The minimum legal age of consent to marriage for women and men is 18 years.
- The percentage of young women married by age 18 is 6%.
- The percentage of young women married by age 15 is 1%.
- The Bill of Rights in the South African Constitution has several provisions that relate to the protection of sexual and reproductive rights of women, but the Constitution also provides for the right to culture, which allows for traditional and cultural practice.
- A much more holistic approach—including advocacy, human rights education, a change of patriarchal mind-sets, and political will—is urgently needed to eliminate harmful practices in South Africa.

SYNOPSIS

The term 'harmful practices' covers forms of violence or ritual discrimination, primarily committed against girls and women that have become culturally normalized. These include amongst others, female genital mutilation, child, early and forced marriage and bride kidnapping (*ukuthwala*) in its current practice. Harmful practices are defined in the Maputo Protocol as 'all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity' (Article 1)¹ among others.

Harmful practices disproportionately affect women and girls, and often amount to violence against women and girls (VAW). They are often based on cultural or socio-conventional norms, and deeply rooted in gender inequalities and discriminatory values. Harmful practices are those practices conducted for non-therapeutic purposes. Harmful cultural practices, which exist in different forms and variations “wear down the physical and psychological health and integrity of individuals, especially women and girls.” Some of them “cause excruciating pain while others subject women to humiliating and degrading treatment.” They also have the effect of subordinating women in society, legitimizing and perpetuating gender-based violence (GBV).

EXAMPLES OF COMMON HARMFUL PRACTICES

Ukuthwala - A harmful South African custom which refers to the practice of marriage by abduction. This involves the waylaying or capturing of a girl and taking her to a man's home in marriage. In its current form, the 'capturing' is usually done by a group of people, one of whom is the future husband.

Child Marriages - the equally abhorrent practice of early/child marriages involves the marrying-off (or giving away of girls for marriage) at an early age of sometimes 6, 11, 12 or 13 years; sometimes even as young as six years of age. Such child brides then become victims of domestic violence, premature and undesired pregnancies, and sexual health risks like exposure to sexually transmitted infections including HIV/AIDS. This practice is quite common in South Africa, particularly in poor rural communities.

¹ International Planned Parenthood Association (2021) Report Harmful Practices Report. Available at <https://www.ippfar.org/sites/ippfar/files/2018-09/SOAW-Report-Chapter-6-Harmful-Practices.pdf>. Accessed on 22 November 2021

Virginity testing - This involves the physical examination of a girl's genitalia; usually by older women in the community in order to determine whether the hymen is still intact. Girls whose hymens are found broken will have failed the test, and those whose hymens are still intact will be considered to be virgins. This practice, which is prevalent among the Zulu people (mainly found in the KwaZulu-Natal Province), had become less popular in the middle of the 20th century, but re-emerged in the last two decades as one of the defenses against the spread of HIV and AIDS. Indeed, this is one of the reasons given by those who support the practice. Other advantages are said to include identifying children who are sexually abused, and, also, preventing unwanted pregnancies.

LEGAL AND POLICY FRAMEWORK

Cultural rights are embedded in the South African Constitution. Section 30 provides for an individual right to culture and language, whereas Section 31 provides for the collective rights of cultural, religious and linguistic communities. These rights are given further impetus by Section 185, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. They are also recognized by section 211(3), which provides for the application of customary law by South African courts. It may well be argued that a balance has to be struck between the enjoyment of cultural rights and the protection of sexual and reproductive rights that are seen to be violated by cultural practices. The Bill of Rights includes the rights to equality, human dignity, privacy, bodily and psychological integrity, and health care, to name but a few. At the same time, however, the Constitution also provides for the right to culture, which allows for traditional and cultural practices—some of which clearly violate certain human rights norms including sexual and reproductive rights of women².

Secondly, Section 9 provides for the right to equality and prohibits discrimination based on gender, sex, pregnancy, marital status, sexual orientation and culture—among other things. Section 10 provides for the right to human dignity, and section 11 protects the right to life. Under section 12(1) everyone has the right to freedom and security of the person—including freedom from all forms of violence, and the right not to be treated in a cruel, inhuman and degrading way. Section 12(2) provides for the right to bodily and psychological integrity—including the right to make decisions concerning reproduction and the right to security in, and control over, one's body. Under section 15 the right to privacy is guaranteed.

The Promotion of Equality and Prevention of Unfair Discrimination Act 71 is another statute that impacts on women's sexual and reproductive rights in the context of harmful cultural practices. The Equality Act (as it is sometimes referred to) prohibits unfair discrimination against women, and places specific prohibition on gender-based violence, female genital mutilation, and any system that prevents women from inheriting family property.

Another statute that has a significant bearing on sexual and reproductive rights of women in South Africa is the Recognition of Customary Marriages Act. The Act regulates customary marriages and is seen as one of the vehicles through which the reform of customary law has taken place in South Africa since 1994.

² Mubangizi John Cantius (2015) An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa. *Journal of International Women's Studies*. Available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1820&context=jiws. Accessed on 03 October 2022.

The United Nations Economic and Social Council's Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children 51 requires states, including South Africa to draft legislation prohibiting such practices.

COVID 19 AND HARMFUL PRACTICES

On 19 May 2020, Angie Motshekga, South Africa's Minister of Basic Education, announced that the country's schools would re-open on 15 June 2020 after being closed for more than two months due to COVID-19. Motshekga cited the scourge of child marriages as one reason why children must get back to school. The announcement sparked a heated debate in the country, as many parents questioned whether governments and schools had prepared adequately to ensure children's safety from COVID-19 infection. Despite some reservations about the reopening of schools in South Africa, including key institutions like the South African Human Rights Commission, the decision by government has to be viewed in the context of the other dangers children face outside the school system. As long as harmful practices persist, the school system will continue to play an important role in protecting children from them³. The Government of South Africa declared the Commission for Gender Equality and other women's rights organisations to be essential service providers during its lockdown to ensure they could help those experiencing GBV.

CONCLUSION

Despite the legislative and judicial attempts discussed above, harmful cultural practices are still prevalent in South Africa, and violation and abuse of women's sexual and reproductive rights still abound. This is partly because many women in South Africa are unaware of their basic human rights. It is this lack of awareness coupled with their socio-economic circumstances that ensures women's acceptance of the cultural and traditional practices concerned thereby perpetuating violation of their rights. This is exacerbated by their powerlessness which is occasioned by centuries of subordination and discrimination.

Gender based violence is often perpetrated using practices disguised as culture and customs. There is a need for a more holistic approach that includes advocacy, human rights education, change of patriarchal mind-sets, and political will. The role of men in ending harmful cultural practices should not be underestimated. Most harmful cultural practices are perpetuated by and for men. The collective responsibility of traditional leaders, faith leaders, women, men, civil society, the judiciary, and government is essential in eliminating harmful traditional practices contributing to GBV.

³ Adapted from News24 website and South African Women in Dialogue conversations