

**THE PRACTICE OF VIRGINITY TESTING IN SOUTH AFRICA: A  
CONSTITUTIONAL AND COMPARATIVE ANALYSIS**

**BY**

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## **DECLARATION BY STUDENT**

I, Motlalepula D. Rakubu, declare that the dissertation “The practice of virginity testing in South Africa: a constitutional and comparative analysis”, hereby submitted to the University of Limpopo for the Masters of Laws degree, has not previously been submitted by me for a degree at this or any other university, that this is my own work in design and execution, and that all the sources that I have used or referred to have been designated, acknowledged and fully cited.

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## **ABSTRACT**

In South Africa, the concept of virginity testing has been under the spotlight because of the Children's Act 38 of 2005 partially legalising it. Section 12 thereof, provides for the testing to be performed on both male and female children over the age of sixteen with their informed consent. It has also been revived as a Zulu custom which gained momentum in response to the HIV/AIDS pandemic. This custom is, however, in contrast to the approach highlighted in the Act, since it targets only the girl child and mostly without her informed consent. Although a girl's virginity is said to bring honour to her family, it also comes with inherent risks, since, in African societies, the myth that sex with a virgin, or a girl-child can cure AIDS, is prevalent. This dissertation examines, from a human rights perspective, the concept of virginity testing and related procedures/ provisions, the role and function of the virginity testers, as well as expectations/experience of the participants (the girls tested). The study asserts that the practice of virginity testing is a violation of human rights, strips the girl of her dignity, represents an invasion of bodily privacy and leads to degradation and humiliation. Virginity testing, according to this study, leads to limitation of rights and unfairly discriminates against the girls tested and cannot be justified in terms of the limitation clause, as provided by section 36 of the Constitution of the Republic of South Africa, 1996. As part of the comparative study, the analysis of the position in Senegal, regarding the successful abolishment of a similar discriminatory cultural practice, provides lessons on how both the South African government and NGO's can work towards law reform in order to address the problem of virginity testing.

## **DEDICATION**

I dedicate this dissertation to all the women in my life. They have been a source of inspiration and gave me the passion to carry on even when I thought this was just too much at times.

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## ABBREVIATIONS

ACHPR	: African Charter on Human and People's Rights
ACRWC	: African Charter on the Rights and Welfare of the Child
CAT	: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	: Convention on the Elimination of all Forms of Discrimination against Women
CRC	: Convention on the Rights of the Child
DVA	: Domestic Violence Act
FGM	: Female Genital Mutilation
ICESCR	: International Covenant on Economic, Social and Cultural Rights
ICCPR	: International Covenant on Civil and Political Rights
NGO	: Non-governmental organisation
OHCHR	: Office of the United Nations High Commissioner
PEPUDA	: Promotion of Equality and the Prevention on Unfair Discrimination Act
SOA	: Sexual Offences and Related Matters Amendment Act
WHO	: World Health Organisation
UDHR	: Universal Declaration of Human Rights
UNICEF	: United Nations International Children's Fund
UN	: United Nations
UNTC	: United Nations Treaty Collection International Covenant on Civil and Political Rights
VAPP	: Violence against Prohibition Act

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## CHAPTER 1

### INTRODUCTION AND BACKGROUND

#### 1.1. Introduction

Addison observes that “virginity testing is a concept fogged and obscured by superstition, folklore, false science and fear induced by repressive honour societies”.<sup>1</sup> It involves younger females in a particular community undergoing physical examination of their sexual organs by women who are older with the purpose of finding out whether they can be considered virgins.<sup>2</sup> They can only be declared virgins when their hymens are found to be intact.

South Africa has many diverse ethnic groups, but virginity testing is predominantly embraced by the Zulus, who live mainly in the province of KwaZulu-Natal.<sup>3</sup> After falling into relative disuse in the Zulu community, the practice of virginity testing made a comeback some 25 years ago around the time of the country’s first democratic elections. It coincided with the period when the HIV/AIDS pandemic began to take hold, and its revival as a custom gained momentum in response to this pandemic, especially in KwaZulu-Natal.<sup>4</sup> The practice has further been under the spotlight because of the Children’s Act,<sup>5</sup> which made its performance on both male and female children over the age of sixteen (16) years legal, albeit with their informed consent.<sup>6</sup> The practice of this custom in context of the HIV/AIDS pandemic and otherwise, however, targets only the girl child mostly without her informed consent, in contrast to the approach mentioned in the Children’s Act.

The cultural practice of virginity testing is widely criticised as a violation of the rights of girls subjected to it.<sup>7</sup> The practice violates several basic human rights, such as the

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<sup>1</sup> Addison 2010 *JHSS* 71.

<sup>2</sup> Behrens 2014 *SAJP* 177.

<sup>3</sup> See Addison fn 1.

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

<sup>5</sup> Children’s Act 38 of 2005 (hereafter the Children’s Act).

<sup>6</sup> Section 12 of the Children’s Act.

<sup>7</sup> Behrens fn 2; Durojaye 2016 *IJD* 233; United Nations: Committee on the Elimination of Discrimination against Women 2011 Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, Session Forty-eight, 5.

right to equality,<sup>8</sup> the right to dignity,<sup>9</sup> the right to privacy,<sup>10</sup> and the right to bodily integrity.<sup>11</sup> In addition, virginity testing still poses more harm than good, regardless of whether the girls or young women pass or fail the test.<sup>12</sup> Having to participate in this practice causes emotional distress, and generally girls are psychologically affected. Failing a virginity test leads to enhanced stigmatisation, as those who fail are mocked and subjected to humiliation by other participants, as well as the community where it is practiced.

The Children's Act attempts to safeguard the rights of the children involved in the testing; for example, by providing that the results of the test may not be disclosed without the consent of the child concerned.<sup>13</sup> In addition, the Children's Act prohibits putting a mark on the body of a child who has been tested.<sup>14</sup> Notwithstanding these safeguards:

Some of the traditional leaders and women who are responsible for virginity testing, attested publicly that they would not comply with the requirements in the said Children's Act, and they would continue with the practice as it is part of their tradition and culture.<sup>15</sup>

The practice of virginity testing poses a particular dilemma and tension within South Africa's progressive democracy. On the one hand, South Africa has a long history of marginalising indigenous cultural practices. As a result, the challenge within this context is to find the appropriate balance between recognising diverse cultural practises and:

respecting the constitutional framework which promotes the values of... human dignity, the achievement of equality and the advancement of human rights and freedoms...<sup>16</sup>

This dilemma is exacerbated by the premise of this study, namely, that virginity testing is inherently unjust and is an assault not only upon the bodies of the girls involved, but

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<sup>8</sup> Section 9 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>9</sup> Section 10 of the Constitution.

<sup>10</sup> Section 14 of the Constitution.

<sup>11</sup> Section 12(2) of the Constitution.

<sup>12</sup> Ross 2010 *SAJBL* 68.

<sup>13</sup> Section 12(6) of the Children's Act.

<sup>14</sup> Section 12(7) of the Children's Act.

<sup>15</sup> Le Roux *Harmful Traditional Practices (Male Circumcision and Virginity Testing of Girls) and the Legal Rights of Children* 13.

<sup>16</sup> Section 1 of the Constitution.

also an infringement on the Bill of Rights in the Constitution of South Africa, 1996 (hereafter the Constitution).

### **1.2. Problem statement**

Addison states that female virginity has been a crucial commodity in many cultures and is intricately linked with the value of individual girls and women in those cultures.<sup>17</sup> It becomes increasingly complex when, after a period of dormancy, such a cultural practice has been re-energised to not only maintain and control the chastity of girls and women, but also in an attempt to solve the HIV/AIDS epidemic. Yet, it appears that clarity on what it means to be in a state of virginity and the reliability of the methodology involved are contestable. The problem arising relates not only to the meaning of this vague concept of “being a virgin” and the practice of virginity testing, but also to the custom’s infringement on constitutionally protected rights, for example the rights to dignity, equality and privacy.

### **1.3. Hypothesis**

Although virginity testing is part of tradition and culture practiced mostly by the Zulu nation, it remains a highly controversial concept and practice. It is humiliating to girls who are tested and it is therefore not only an affront to their right to dignity, but also to several other rights in the South African Bill of Rights, as discussed in detail in this study. The testing further infringes a number of international treaties aimed at protecting children and women against harmful cultural practices, such as the United Nations Convention on the Rights of the Child (hereafter UNCRC), the African Charter on the Rights and Welfare on the Child (hereafter ACRWC), and the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW).<sup>18</sup> The practice of virginity testing should be declared unconstitutional and therefore abolished.

### **1.4. Problem questions**

- 1) Can the historical roots of virginity testing be traced in the Zulu culture and what is a proper definition of this concept?

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<sup>17</sup> See Addison fn 1 73.

<sup>18</sup> UNCRC 20 November 1989; ACRWC 11 July 1990 and CEDAW 18 December 1979.

- 2) Is there a current international, constitutional, and legislative framework authorising the customary practice of virginity testing? Further, is there any constitutional jurisprudence either justifying or prohibiting the practice?
- 3) What rights, if any, are infringed by the cultural practice of virginity testing?
- 4) Does a comparative legal framework exist to take guidance from for the way forward in dealing with virginity testing?

### **1.5. Objectives of the study**

- a) The study investigates whether virginity testing is part of Zulu culture, and further explores the constituent elements and features of virginity testing that could be useful in providing a comprehensive definition of the concept.
- b) The research examines the provisions of the current international, constitutional, and legislative framework relating to the customary practice of virginity testing, and determines if there is any constitutional jurisprudence which justifies or prohibits the practice.
- c) The study assesses the impact of the cultural practice of virginity testing on human rights, and further determines the position of the law on unlawful virginity testing.
- d) The research conducts a comparative examination of legal frameworks on the matter of unlawful virginity testing and determines how they might provide guidance for legal reform where necessary.

### **1.6. Brief literature review**

#### ***1.6.1. Justifying virginity testing***

Proponents of testing believe preserving virginity is the “country’s greatest defence against the spread of HIV/AIDS”.<sup>19</sup> This is believed since a disproportionate share of those infected and affected in South Africa are female. South African females aged fifteen (15) to twenty-four (24) are reportedly “four times more likely” to be infected with HIV/AIDS than males in the same age group.

Traditionalists, regardless of the guidelines provided by the Children’s Act, as highlighted above, have already declared that they do not intend to abandon the

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<sup>19</sup> George 2008 *CLR* 1447.

testing nor follow the requirements put forth in the legislation for lawful virginity testing. This “dispute has settled into (the) familiar trench warfare of cultural relativism versus human rights universalism”.<sup>20</sup> Research reveals that there are currently two schools of thought justifying virginity testing in the debate about whether it is an affront to the rights contained in the Bill of Rights. The first concept that traditionalists mobilise in favour of virginity testing, is to treat culture as a discrete system of practices, beliefs, and norms that preceded and determined the physical world. The second, is to explain cultural practices in terms of functionalism, which assumes that each element of culture contributes to the well-being of the overall society.<sup>21</sup> This functionalist approach stipulates that social practices, patterns, culture, and institutions contribute to the overall functionality of social order and stability in a society.<sup>22</sup> In the context of this study, the functionalists believe that virginity testing serves as a protection against the dysfunction of HIV/AIDS in a society ravaged by this disease.<sup>23</sup> This approach was, however, refuted by the Constitutional Court in the case of *Pillay*.<sup>24</sup> The Court held that culture serves to give meaning to the lives of individuals, thereby helping to fulfil the over-all goals of human dignity and “unity and solidarity amongst all who live in our diverse society”.

The current understanding of culture is to distinguish it from past conceptions and attach two elements to it, namely, human action and choice. Tradition is, therefore:

A social phenomenon, requiring the participation of a given community. Unlike a habit, or even a custom, it cannot be tied to the behaviour of a particular group or individual. Hence, although an individual may begin a practice, the question whether it takes root can be decided only after a period of time, and only if it passes the test of community acceptance.<sup>25</sup>

This study, however, argues strongly that the testing is not about culture or religion, but that it is about inequality against girls and women and often they do not have a

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Nnazor & Robinson 2016 *MJSS* 157.

<sup>23</sup> *Ibid.*

<sup>24</sup> *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 107.

<sup>25</sup> *Ibid.*

choice, because if they do not participate in the testing, they may be ostracised by their communities.<sup>26</sup>

### **1.6.2. Human rights instruments**

Virginity testing is perceived as not simply an African issue, but a component of a group of harmful practices aimed at subjugating the bodily integrity of women.<sup>27</sup> It complements other harmful practices, such as female genital mutilation, which regulates females to engage in sex only with their husbands and for the purposes of procreation and not for any kind of pleasure.

In addition to the South African Constitution and related laws, there are international instruments to which South Africa is a party, which also encourage countries to prohibit harmful practices impacting on the lives of women and girls. In reaction to the continued practice of virginity testing of children under the age of sixteen,<sup>28</sup> and the disregard of the requirements in the Children's Act,<sup>29</sup> the United Nations Committee on the Elimination of Discrimination against Women<sup>30</sup> has called upon the South African government to amend the Children's Act and to abolish virginity testing regardless of age.

The Protocol to the African Charter on the Rights of Women (hereafter the African Women Protocol), imposes obligations on the South African government to respect, protect and fulfil women's rights.<sup>31</sup> This must include steps and measures to address cultural practices that may be inimical to the physical and mental well-being of girls and women.<sup>32</sup> Virginity testing is further incompatible with the International Covenant on Civil and Political Rights (hereafter ICCPR).<sup>33</sup> This Covenant imposes obligations on states to refrain from any actions that may amount to an invasion of an individual's

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<sup>26</sup> Mbanje *News Day* 2.

<sup>27</sup> Bennett *et al* 2010 *TSAR* 254.

<sup>28</sup> Mubangizi 2012 *JWS* 39.

<sup>29</sup> Section 12(4) of the Children's Act.

<sup>30</sup> See United Nations: Committee on the Elimination of Discrimination against Women fn 7.

<sup>31</sup> The Protocol to the African Charter on the Rights of Women Adopted by the 2<sup>nd</sup> Ordinary Session of the African Union General Assembly in Maputo 2003.

<sup>32</sup> Durojaye fn 7.

<sup>33</sup> Article 17 of International Covenant on Civil and Political Rights came into force on 23 March 1976.



body. This resonates with section 12(2) of the South African Constitution, which provides that everyone's right to his or her bodily integrity is guaranteed.

The United Nations Committee on the Convention on the Rights of the Child<sup>34</sup> has expressed concern that virginity testing threatens the health, self-esteem, and privacy of girls. The committee recommends that the South African government embarks on public awareness and sensitisation programmes to discourage the practice of virginity testing. Finally, at the regional level, Article 5 of the Africa Charter on Human and People's Rights (ACHPR) guarantees the right to dignity, which the test in question violates.<sup>35</sup>

From the above it is clear that girls are entitled to total control over their bodies. Any form of testing will then, in addition to contravening those rights mentioned earlier, amount to a violation of the right to reproductive autonomy.<sup>36</sup> Virginity testing, as practiced, restricts the free exercise of the right to sexual autonomy and bodily integrity.

### **1.6.3. Rights universality**

Donnelly advocates that all individuals, regardless of their geography, are born with certain human rights which must be understood as universal, fundamental, inalienable, and never to be infringed upon by the state or overridden by cultural or religious traditions.<sup>37</sup> Rights universality as a concept has, however, proven to be contentious in practice. Competing claims for legitimacy, recognition, and autonomy from subcultures within multicultural and multi-ethnic states are increasingly challenging the ideal of any universal rights.<sup>38</sup>

The South African Constitution is the supreme law of the country and any law or conduct inconsistent with it is invalid.<sup>39</sup> It declares that "the Bill of rights is a cornerstone of democracy in South Africa".<sup>40</sup> It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. It

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<sup>34</sup> Article 16 of the Convention (UN Committee on the Rights of the Child (2000)).

<sup>35</sup> Entered into force on 21 October 1986.

<sup>36</sup> See Durojaye fn 7 237.

<sup>37</sup> Donnelly 2013 <http://www.worldcat.org/title/universal-human-rights-in-theory-and-practice>.

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

<sup>39</sup> Section 2 of the Constitution.

<sup>40</sup> Section 7(1) of the Constitution.

further provides for the importance of compliance with principles of international law by providing that any of the country's domestic laws must be interpreted in a manner consistent with international law.<sup>41</sup>

International human rights law and the South African Constitution both prohibit discrimination based on sex and recognise equality of the sexes. The International Covenant on Civil and Political Rights, which South Africa has ratified, requires respect for equal rights.<sup>42</sup>

Equality is the foundation of South Africa's constitutional democracy and is understood to bring about "the full and equal enjoyment of all rights and freedoms".<sup>43</sup> The Constitution requires Parliament to enact national legislation consistent with the prohibition against unfair discrimination.<sup>44</sup> The equality clause, by providing that no person may unfairly discriminate directly or indirectly against another on several grounds mentioned, thus reaches the conduct of private actors and, in the context of this study, virginity testers.

The right to privacy and the right to bodily and psychological integrity, which are both relevant to this study, are closely linked to the right to dignity. The importance of the right to dignity cannot be overemphasised. In *S v Makwanyane and Another*, the court stated that "the importance of dignity as a founding value of the new Constitution cannot be overemphasised".<sup>45</sup> Recognising that:

A right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of other rights that are specifically entrenched. In the context of virginity testing, several aspects amount to a violation of the right to dignity and virginity testing has to be abolished, regardless of age.<sup>46</sup>

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<sup>41</sup> Section 39 of the Constitution.

<sup>42</sup> Article 17 of the International Covenant on Civil and Political Rights entered into force on 23 March 1976.

<sup>43</sup> Section 9(2) of the Constitution.

<sup>44</sup> Section 9(2) of the Constitution.

<sup>45</sup> *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 329.

<sup>46</sup> *Ibid.*

These aspects include the coercive and physically invasive nature of the practice, the way in which private and personal matters are attended to in public, as submitted above, and the possible consequences of a “failed” test.

### **1.7. Aim of the study**

The aim of the study is to investigate and evaluate the cultural practice of virginity testing and determine whether it conforms to the Bill of Rights and other human rights instruments. In fulfilling this aim, a comparative analysis with reference to the laws of Zimbabwe, Nigeria, and Senegal is undertaken. The aim is to investigate the attitudes in these countries towards possible human right violations caused by the practice of virginity testing. This comparison may provide insight on the situation should the practice be left unattended without any critical re-evaluation and action, or otherwise, it may provide guidance for future legal reform.

### **1.8. Research methodology**

In this study the research methodology is qualitative in nature and is conducted through the analysis of desktop literature. In other words, the traditional doctrinal method applicable to legal studies is followed, where international and regional instruments, statutes, case law, scholarly legal research articles, and internet sources are described and evaluated. There is no collection of raw data and questionnaires in this dissertation. References to all sources appear in both the footnotes and bibliography in accordance with the University of Limpopo Research Development and Administration Manual for Postgraduate Students. This study is, however, not only an exposition of the law but also a critique, and ultimately suggests legal reform.

In addition to the doctrinal approach, a comparative analysis of other jurisdictions is conducted in this study. It refers to Zimbabwe and Nigeria to show the widespread prevalence of the practice in Africa and how this practice violates constitutionally and internationally protected human rights. The comparison also includes Senegal, which shows a significant departure from the approach to the practice of virginity testing in South Africa, Zimbabwe, and Nigeria.

## **1.9. Chapters of the study**

Chapter 1 introduces the dissertation and provides the background of the study. Chapter 2 explores concepts of importance to the study, such as virginity, virgin, chastity, and culture to clarify and understand their meanings. In addition, the historical and cultural background of virginity testing, as well as its reliability, as practiced within the areas where the custom applies, are examined.

Chapter 3 discusses the various international and regional human rights instruments that explicitly deal with the practice of virginity testing. In addition, the South African Bill of Rights, which contains several rights that have a direct influence on the constitutionality of virginity testing, is described and explored. The chapter is particularly concerned with the right to privacy, the right to bodily and psychological integrity, the right to dignity, the right to equality, and the extent to which these rights are infringed upon by the practice of virginity testing. An emphasis is put on the right to dignity, which is described as a fundamental core right from which other rights discussed in this study originate.

Chapter 4 describes the current South African legislative framework regulating virginity testing, namely the Children's Act, and further evaluates its constitutionality against the human rights standards set out in chapter 3. Section 12(4) of the Children's Act prohibits virginity testing of children under the age of sixteen, but provides for certain conditions in terms of which virginity testing may be performed on children above sixteen. The practice of virginity testing has continued as if the Children's Act does not contain any safeguard. The exercise of cultural rights should not be practices without due regard to any safeguards, the interests of members of the society, and the countervailing claims of other constitutional values. This study suggests legal reform in the form of total abolishment of the practice of virginity testing.

Chapter 5 evaluates virginity testing as a cultural practice commonly practiced in selected sub-Saharan countries, namely: Zimbabwe, Nigeria, and Senegal. It highlights the widespread prevalence of the practice in Zimbabwe and Nigeria, and how it violates constitutionally and internationally protected human rights in those jurisdictions. On the other hand, Senegal shows a commendable departure from the

approach to the traditional practice of virginity testing in South Africa and the other two selected comparator countries.

Chapter 6 concludes and summarises the chapters and the findings made by the study and further provides recommendations.

#### **1.10. Significance of the study**

The significance of the study is the following:

- i. It raises general awareness about the dangers of virginity testing, and highlights the widespread nature of the practice in selected African countries and their failure to respect and abide by the international human rights and constitutional standards.
- ii. It contributes to the theme of eradicating patriarchal practices in the form of oppressive acts and discriminatory perceptions against girl children and women, as evidenced in the comparative discussion on Senegal.
- iii. It contributes to the development of a non-sexist progressive society.
- iv. It educates girls and women about the freedoms enshrined in the Bill of Rights.
- v. Finally, it advocates for girls and women to be able to exercise these freedoms without fear of becoming social outcasts.



## CHAPTER 2

### THE NATURE, ORIGIN AND PRACTICE OF VIRGINITY TESTING

#### 2.1. Introduction

It has been argued that it is time Africans define and practice their cultural rites and, perhaps, that is why there has been an urgent need to resuscitate and reinvent traditional practices, like virginity testing.<sup>47</sup> Advocates of the resuscitation of virginity testing, amongst other cultural practices, believe that these practices have suffered disdain, condescension, and oppression. They especially refer to African governments, scholars, elites, and leaders, who mistakenly associate development and modernisation as simply benefitting Western cultures at the expense of African cultures.<sup>48</sup> It is thus important to this study to investigate the meaning of relevant concepts, *inter alia*, the meaning of culture and being in a state of virginity in order to aid a better understanding of the particular aspect of African culture. Though it has been highlighted by the same scholars that it has been re-energised to solve the HIV/AIDS epidemic, it should be noted that the Zulus have conducted, and still conduct this practice not solely for this reason.<sup>49</sup>

This chapter explores concepts of importance for this study to clarify and understand their meanings. The most prominent concepts are investigated and critically discussed below, namely: virginity, virgin, chastity, and culture. In addition, the historical and cultural background of virginity testing, as well as its reliability, as practiced within the areas where the custom applies, are examined.

#### 2.2. Exploring key concepts

##### 2.2.1. *Virginity, virgin and chastity*

Virginity is a noun defined as “the condition or fact of being a virgin”.<sup>50</sup> Virgin, also a noun, is defined as “a person, especially a girl or woman, who has never had sexual

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<sup>47</sup> Kangethe 2014 *MJSS* 1337.

<sup>48</sup> *Ibid* 1335.

<sup>49</sup> *Ibid*.

<sup>50</sup> Sinclair *Collins Concise Dictionary* 1683.

intercourse”.<sup>51</sup> Blank explains that it is challenging to define the term virgin, and highlights that such an attempt would be “an exercise in controlling how a person behaves, feels and thinks, and in some cases, whether they live and die”.<sup>52</sup>

It should be noted that virginity is defined due to social factors, for example, a father may use his daughter’s virginity as a bargaining tool in matrimonial negotiations.<sup>53</sup> This becomes evident when the Zulu tradition of virginity testing asserts that it was originally intended to assure the purity of young brides who were required to prove their chastity before their parents and future in-laws.<sup>54</sup> The tradition was a tool used to settle the amount to be transferred by the groom’s family to the bride’s family. The amount is famously referred to as *ilobolo* (bride wealth).<sup>55</sup> For the purpose of this study, virginity is more about the chastity of a girl, which is policed by society and reinforces patriarchal history.<sup>56</sup>

Different jurisdictions have different perspectives of virginity. For example, in Vietnamese, virginity is referred to as *trinhtiet*, which is a combination of two words.<sup>57</sup> *Trinh* means the hymen, the membrane that partially or completely covers the vaginal opening. *Tiet* carries more than one meaning, including pureness, chastity, and moral integrity.<sup>58</sup> The word virginity in Vietnamese is thus commonly understood to contain two components: “the biological part of a girl and a woman’s body, and her moral attributes, which are socially constructed”.<sup>59</sup> The Vietnamese definition, being more holistic, is preferred here as it is wide enough to show both the biological and moral meaning of virginity.

### **2.2.2. Culture**

Culture is a noun and is defined as the total of the “inherited ideas, beliefs, values, and knowledge which constitute the shared bases of social action”.<sup>60</sup> A more modern

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<sup>51</sup> *Ibid.*

<sup>52</sup> Blank *Virgin: The untouched history 2.*

<sup>53</sup> See Addison fn 1 73.

<sup>54</sup> See George fn 19 8.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Addison fn 1 75.

<sup>57</sup> *La How virginity enhances masculinity: an explanatory study in Hanoi, Vietnam 4.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> See Sinclair fn 50 356.



definition of culture, emphasising the acceptance of it by later generations, is explained as follows:

The integrated pattern of human knowledge, beliefs and behaviour that depends upon a man's capacity for learning and transmitting knowledge to succeeding generations.<sup>61</sup>

Rumsey explains that since the year 1994, South Africa saw a flood of assertions about the right to claim one as being bound to a particular culture.<sup>62</sup> Culture plays an integral part in how people define themselves and is perceived to be intrinsic to the construction of human dignity and therefore the construction of human identity.<sup>63</sup> Culture in the context of this study focuses on the cultural value of virginity testing.<sup>64</sup>

The rights to one's culture and the practice of one's religion has been included in the Constitution in sections 30 and 31, which will be discussed in detail in chapter 3. This originates from the broken history of South African society, in which African cultures and the general cultural diversity of the majority of the population were ignored until 1994.<sup>65</sup> Section 31(2) however, expressly qualifies the rights to practice one's culture. It provides that in so doing, one must not do it in a manner which is inconsistent with other rights entrenched in the Bill of Rights.

Although culture has been defined, the question remains whether children can give informed consent to virginity testing under the pretext of culture.<sup>66</sup> The reality is that children are subjected to virginity testing under the guise of practising their culture, whereas culture, in this context, is exercised as a form of coercion, parental compulsion, duress, and social pressure, as shall be explained below. In the Constitutional era, the assertion against virginity testing is not whether it is effective to bring about the community's understanding of their cultural practices, but whether it is an affront to the rights belonging to a human being and, in this context, girls and women.<sup>67</sup>

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<sup>61</sup> Webster Dictionary 2006.

<sup>62</sup> Rumsey *Culture, abstinence, and human rights: Zulu use of virginity testing in South Africa* 9.

<sup>63</sup> Ross 2010 *SAJBL* 69.

<sup>64</sup> *Ibid.*

<sup>65</sup> See Mubangizi fn 27 and the full discussion of Section 30 in chapter 3.

<sup>66</sup> See Behrens fn 2.

<sup>67</sup> Rafudeen & Mkasi 2016 *J. Study Religion* 2.

### 2.3. Origins and historical background of virginity testing

It has been observed that practices on the body of a girl and a young woman, such as female circumcision and virginity testing, are not African cultural practices, but are recorded, to have been performed also elsewhere, outside Africa.<sup>68</sup> These practices, have apparently been performed in Europe as early as 642 BCE.<sup>69</sup> It has even been speculated, within the context of assessing global harmful practices, that virginity testing may not be an African cultural practice.<sup>70</sup> Notwithstanding, female virginity testing is prevalent all over the African continent (as is evident from chapter 5 below).

The historical investigation in this chapter focusses on the South African roots of virginity testing, predominantly in Natal and Zululand. It dates back to the early twentieth century, when all girls of a specific area would be tested as a result of an order by the area's chief.<sup>71</sup> The local chief would then appoint the area's elderly women to come to his homestead and perform virginity testing on girls in his jurisdiction.<sup>72</sup> However, the literature alludes to the fact that individual mothers and grandmothers would also test daughters and granddaughters their own homes.<sup>73</sup> The reason being that, during the nineteenth and twentieth century, not only among the IsiZulu but also the IsiXhosa speaking populations, a girl's virginity enabled her family to demand a large bride wealth at marriage.<sup>74</sup> This approach appears to continue in many parts of rural KwaZulu-Natal today.<sup>75</sup> Virginity testing, therefore, originated among the isiZulu population from the idea of confirming the chastity of young brides before marriage.<sup>76</sup> Other theorists support the rationale that the testing was done in order to regulate fertility so that children were born within the boundaries of the patrilineal.<sup>77</sup> It appears that sexual relations between girls and boys were, however, encouraged, as long as the girl would not fall pregnant prior to marriage. These relations thus excluded penetrative sexual encounters.<sup>78</sup>

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<sup>68</sup> See Kangethe fn 45.

<sup>69</sup> *Ibid.*

<sup>70</sup> Dlamini 2016 <http://www.iol.co.za/dailynews/folly-of-forced-vriginity-testing-is1980033>.

<sup>71</sup> Kaarsholm 2005 *KZN Development and Change* 139; Kohler 1933 *GP* 4.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Hunter 1933 *Africa* 259.

<sup>75</sup> See Behrens fn 2 178.

<sup>76</sup> See George fn 19 1454.

<sup>77</sup> Vilakazi 1962 *ASDSC* 10.

<sup>78</sup> *Ibid.*

The above testing disappeared in the twentieth century under industrialisation and urbanisation.<sup>79</sup> Behrens notes that virginity testing as a custom “had died completely by the twentieth century”.<sup>80</sup> According to May, this testing as “a ritual died out years ago, and it became abrogated by disuse”.<sup>81</sup> However the objective of using the girl’s virginity to enable her family to demand a larger bride wealth at marriage, appears to continue in many parts of rural KwaZulu–Natal till today.<sup>82</sup>

In the KwaZulu-Natal province, similar to Swaziland, hundreds of girls are examined communally in the Zulu Kingdom at an annual Royal Reed Dance, held publicly.<sup>83</sup> The dance is an annual festival where these “virgins dance and celebrate their chastity before the king, who is then free to choose a bride from amongst the girls”.<sup>84</sup> In contrast, the *Xhosa*-speaking population in some parts of the Eastern Cape mostly conduct the testing of the girls in private by elderly women in the family.<sup>85</sup>

In addition to the cultural argument, activists in KwaZulu-Natal reinvented testing under the anxiety of a specific vulnerability of younger girls to the “new disease” of HIV/AIDS, and going back to historical sexual morality of girls and women. The same testing was resuscitated and has been justified, as alluded to above, as an opportunity to act against the scourge of HIV/AIDS.<sup>86</sup> Contrary to the past, virginity testing today is conducted as part of public annual celebration(s). The celebrations are conducted in different public venues and not only in the central common space of a village chief.

In reaction, the Children’s Act (as discussed in chapter 4 below), formulated an age yardstick regarding participants, as well as requiring that it should always be consensual, but it would appear that most girls being tested are under-aged, so their consent is of doubtful validity.<sup>87</sup>

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<sup>79</sup> Varga 1997 *HTR* 45; Kaarsholm fn 71.

<sup>80</sup> See Behrens fn 75.

<sup>81</sup> May *Virginity testing: towards outlawing the cultural practice that violate our daughters* 2.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* See also Bennett *et al* fn 26.

<sup>84</sup> *Ibid.*

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

<sup>86</sup> Charnock *Culture and Human Rights Orientalising, Occidentalising and Authenticity* 16.

<sup>87</sup> Bennett *et al* fn 26.

The revival of the practice in the 1990's was due to an increase in HIV/AIDS-related deaths in South Africa.<sup>88</sup> Those who advocate for the practice believe that it is necessary because of the prevalence of HIV/AIDS amongst adolescent girls.<sup>89</sup> As a result of the increased number of persons living with HIV/AIDS, especially adolescent girls, a virgin is seen as a small victory of a battle won against the HIV/AIDS virus in KwaZulu-Natal, especially.<sup>90</sup> Accordingly, through yearly testing participants will be encouraged to abstain from having sex and therefore not be infected with HIV/AIDS. Though some proponents, such as Behrens,<sup>91</sup> perceive virginity testing in the context of a cultural practice re-energised to solve the HIV/AIDS epidemic, others, like Kaarsholm,<sup>92</sup> appreciate that the Zulus have conducted, and still conduct, this practice not solely for this reason.

Kendall offers another explanation for the re-emergence of virginity testing linked to a certain Zulu woman, namely Patience Gugu Ngobese's dream about *Nomkhubulwane* in 1994.<sup>93</sup> *Nomkhubulwane* is attributed to a Zulu goddess, an immortal divine *intombi*, loosely translated to be a girl virgin.<sup>94</sup> The celebration of the above goddess starts on a Friday with song, dance, prayer, the burning of ritual herbs, animal sacrifice, the brewing and consumption of traditional beer, and speeches, mostly by traditional healers.<sup>95</sup> This goes on to a Saturday morning where Zulu girls are checked by older women to verify their virginity.<sup>96</sup> Those who have been verified to be virgins are then allowed to take part as honoured participants in the remaining Saturday and Sunday events.<sup>97</sup> The participation comprises public dancing and the planting of a field reserved for *Nomkhubulwane*, the goddess. Sunday is dedicated to planting done only by virgins, and non-virgins (or those who failed the verification) are physically marginalised.<sup>98</sup>

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<sup>88</sup> Scorgie 2002 AS 55; Chanock *Culture and human rights orientalisng, occidentalising and authenticity* 16.

<sup>89</sup> Mokoboto-Zwane 2016 SAJFS 32.

<sup>90</sup> *Ibid.*

<sup>91</sup> See Behrens fn 2.

<sup>92</sup> See Kaarsholm fn 71 134.

<sup>93</sup> Kendall 1998 *The Zulu goddess and her virgin daughters. Millennium girls: today's girls around the world.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

The point of this research is to show that virginity is much more than the so-called HIV/AIDS intervention. This study investigates the assumption of virginity testing that to effectively alter patterns of sexual behaviour only girls must be targeted.<sup>99</sup> The prospect of encouraging boys to practice sexual abstinence remains unlikely, and is criticised in this research. Girls passing the test are, ironically, the ones who would then suffer the scourge caused by the myth that prevails of a “virgin cure”.<sup>100</sup> This so-called “virgin cure” is based on the current belief that sex with a virgin may cure HIV/Aids.<sup>101</sup>

It is impossible to ignore the sexual double standard that appears to be reinforced by the practice of virginity testing.<sup>102</sup> This perpetuates the history of blame and accusation which has been so powerful in shaping social responses to HIV/AIDS globally. This is:

Fixed along the fault lines of local comprehension of sexuality, gender and morality. Responsibility for sexual abstinence because of virginity is placed on the shoulders of young girls, and therefore the implication is that they are responsible for the spread of HIV/AIDS.<sup>103</sup>

This double standard is illustrated by an ethnographic study done in the province of KwaZulu-Natal where a survey was conducted amongst the “Zulu-speaking people living at St. Wendolin’s Mission”.<sup>104</sup> It was found in this community that, firstly, girls and women are seen as “the source of HIV/AIDS infection and the disseminators of HIV/AIDS illness and death”.<sup>105</sup> Secondly, people in this community understand HIV/AIDS as “something in the blood and women’s blood harboured this ‘germ’ and passed it onto others”.<sup>106</sup> Thirdly, the Zulu sexual culture is characterised by silence and male dominance:

Gender inequity, transactional sex, and the socio-cultural *isoka* (young man) ideal of multiple sexual partnerships, lack of discussion on matters of sexuality in the home and between sexual

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<sup>99</sup> Smith 2002 GS 64.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Leclerc-Madlala 1997 MA 361.

<sup>103</sup> Stander 2016 STJ 435.

<sup>104</sup> Leclerc-Madlala 2001 <http://www.researchgate.net/profile/Suzanne-Leclerc-Madlala/publication/23988605-Demonising-women-in-the-era-of-AIDS-on-the-relationship-between-cultural-constructions-of-both-HIV-AIDS-and-femininity.pdf>.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

partners, the conditioning of both men and women to believe it is the right of men to have control over sexual encounters.<sup>107</sup>

The resuscitation of this historic testing as an intervention, *inter alia*, to fight the scourge of HIV/AIDS is criticised by this study based on the following. Firstly, while it advocates that girls actively choose to protect themselves from infection by opting to abstain and thereby asserting self-affirmation and dignity, it avoids the realities of early teenage sexual experimentation which was held to be normal and healthy by the Constitutional Court in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Other*.<sup>108</sup> The Court decided that:

It is about time that we understand adolescent sexuality and not treat teenagers as a sexual group that should be protected from all forms of sexual behaviour, whether positive or negative, until they are adults or married.<sup>109</sup>

Another concern is the fact that the sexual debut may be a matter of coercion rather than choice, especially considering the statistics of rape of children and women in our country.<sup>110</sup>

Secondly, what is deliberately disregarded, is that virginity testing is associated with the “silences” created by its renewed use.<sup>111</sup> The silence ignores matters of sexuality of boys and young men, as well as the construction of marriage both as inevitable and a period relatively safe as far as HIV/AIDS risk is concerned.<sup>112</sup> This is not true, as it must be recognised that there may be vulnerabilities to infection within a marriage and homosexual relations as well. Thirdly, the use of condoms is discouraged by the testers, as quoted by Scorgie:

...the Department of Health must help, by means of finance to support *Nomkhumbulwane*, rather than to bring condoms and AIDS booklets – yes, that the booklets may be important, but condoms...I don't see – what for? Because here we are speaking about virgins.<sup>113</sup>

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Other* 2013 (12) BCLR 1429 (CC).

<sup>109</sup> Para 27.

<sup>110</sup> See Varga fn 79 47.

<sup>111</sup> See Leclerc-Madlala fn 102.

<sup>112</sup> *Ibid.*

<sup>113</sup> See Scorgie fn 88.

This study supports the view that virginity testing, which is categorised as a custom unique to the African culture, is in reality a practice which is prejudicial to girls and young women and cannot be justified.<sup>114</sup> Virginity testing is controversial, especially considering the method, and reliability of the method used, in the discussion below.

#### **2.4. Hymen testing in determining virginity and its reliability**

The determination of virginity requires the presence of an intact hymen, which can only be established by physical examination of the genitalia.<sup>115</sup> This is done since there is a false assumption that the hymen can only be torn as a result of sexual intercourse.<sup>116</sup> Factually, however, the hymen is a small, wrinkle-like membrane which stretches across the opening of the vagina, and does not automatically look like a veil or covering.<sup>117</sup> It is a more elusive membrane than is commonly assumed, and its status as a sure sign of virginity is in fact doubtful.<sup>118</sup> Further, in the case of sexual intercourse, any tear or rupture to the hymen is not always of a long-term nature, as it has been established that the hymen heals rapidly. This was proved by the results of the examination of the majority of victims of sexual assault which indicated that no one had any hymeneal tears.<sup>119</sup> Besides, in order to avoid rupture of the hymen, girls sometimes get involved in anal intercourse, which equally exposes them to the risk of getting HIV/AIDS.<sup>120</sup>

Despite the virginity testers' belief in their methods and practice, "there is no factual, scientific, or medical basis for using hymen size, morphology, or integrity to determine the state of a woman or girl's virginity".<sup>121</sup> The erroneous assumption of the tests was aptly illustrated by a study that was conducted in comparing hymeneal morphology in adolescent girls with and without a history of consensual sexual intercourse.<sup>122</sup> This Saudi Arabian study found "those who admitted to have prior intercourse, had non-

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<sup>114</sup> Simokovic *International strategies in the human rights movement against female genital cutting* 37.

<sup>115</sup> *Ibid.*

<sup>116</sup> Fejza 2013 *Virginity-Features and concepts in Kosovo society* 6.

<sup>117</sup> See George fn 19 11.

<sup>118</sup> Bernau *Virgins: a cultural history* 18.

<sup>119</sup> Christianson and Eriksson 2013 *BJM* 21.

<sup>120</sup> Singhal 2015 *MICA* 21.

<sup>121</sup> Hegazy & Al Rukban 2012 *The Health* 110.

<sup>122</sup> Adams *et al* 2004 *APAM* 281

disrupted, intact hymens in 52% of the cases".<sup>123</sup> Another study, which investigated facts and concepts regarding the hymen amongst sexual assault survivors, illustrated that the hymen may not incur noticeable damage as a result of forced penetration.<sup>124</sup> In addition, a study done in European countries found that, in the instance of the hymen being damaged, it is inclined to heal naturally, without subsequent evidence of injury, in a matter of days.<sup>125</sup> This finding is corroborated by another study that focussed on examining 213 girls in the United States, who reported vaginal penetration from sexual abuse. It was found that:

There was a normal genital exam in 59 cases (28%), non-specific findings in 104 cases (49%), and suspicious findings in 20 cases (9%). Size of hymeneal opening was also measured on the study group (7.7 +\_ 2.6 mm) and compared to published data on non-abused children of the same age (6.9 +\_ 2.2 mm), and no significant difference was found in hymeneal size.<sup>126</sup>

What further complicates the matter of virginity testing, is research indicating that a considerable number of girls are born without a hymen, and further, that a hymen can easily tear due to reasons not involving penetrative vaginal sexual intercourse.<sup>127</sup> These include sporting activities, the use of tampons for the menstrual cycle, and diseases.<sup>128</sup>

The implication of the research findings above is alarming and far-reaching for virginity testing. It means that a girl who has engaged in sexual penetration could pass the test and a girl who has not engaged at all in sexual penetration could, in fact, fail the test.

George agrees with the above criticism regarding virginity testing and highlights that the its validity and the outcome are controversial for several reasons.<sup>129</sup> Firstly, some women are born without a hymen. Secondly, the hymen can be ruptured in ways other than engaging in penetrative vaginal sexual intercourse. These ways may include injury caused by various possible sporting activities, disease and the use of tampons. Thirdly, the hymen is a small membrane across the opening of the vagina with remarkable stretching ability. Those who have been tested and their hymens found to

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<sup>123</sup> *Ibid.*

<sup>124</sup> See Hegazy & Al Rukban fn 121.

<sup>125</sup> Amy 2008 *EJCRH* 111.

<sup>126</sup> Olson & Garcia-Mareno *RH* 62.

<sup>127</sup> Le Roux fn 15 13.

<sup>128</sup> *Ibid.*

<sup>129</sup> See George fn 19 1517.



be intact are simply considered to be virgins. The hymen is more like a wrinkle than a veil, which means that it also does not automatically look like a covering. Fourthly, the hymen heals rapidly, a medical fact which is confirmed by the observation that the majority of victims of sexual assault have no hymeneal tears. Fifthly, it may be emphasised, that many first sexual encounters, in the South African context, are not intended and hymens are ruptured due to girls being sexually assaulted.<sup>130</sup> Despite these facts, there is a huge stigma attached to girls who “fail” this unreliable method of virginity testing. It is simply inadequate to equate virginity with the presence of a hymen.

## 2.5. Virginity testing and reed dancing ceremonies

As highlighted above the concept of worshiping the Zulu goddess (girl virgin) is an integral ceremony of virginity testing held annually in KwaZulu-Natal and Swaziland. At these reed dance ceremonies girls queue in order to be tested publicly.<sup>131</sup> An elderly woman would instruct a girl to remove her underpants, lie down face up and spread her legs, when it is the girl’s turn in line.<sup>132</sup> If she passes the examination, white clay is placed on her forehead and a certificate is presented to her, indicating that she has passed and is still a virgin.<sup>133</sup>

The Zulu King Goodwill Zwelithini has become the guardian of the reed dance and addresses girls and young women who have been tested every year as part of the ceremony.<sup>134</sup> The former President Jacob Zuma has similarly attended and addressed the young women who took part in the virginity testing during the reed ceremony.<sup>135</sup> It is also emphasised in the reed ceremonies that the Zulu young women have a responsibility to subject themselves to virginity testing so as to protect the nation against the ills of HIV/AIDS.<sup>136</sup>

Recently, a young woman, who is seemingly an activist for virginity testing and reportedly a frequent participant in the reed dance, gave birth and became the fiancée

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<sup>130</sup> *Ibid.*

<sup>131</sup> Mbulu *Exploring the experience of virginity testing by female adolescents in the Uthungulu district of KwaZulu-Natal* 25; See Kendall fn 93, the text explains the ceremony in detail.

<sup>132</sup> *Ibid.*

<sup>133</sup> See Le Roux fn 15 17.

<sup>134</sup> Khumalo 2012 <https://www.iol.co.za/zulu-king-flays-critics-of-reed-dance-virginity-tests-1334774>.

<sup>135</sup> Tyali 2004 <https://www.mg.co.za/2004-09-23-zuma-takes-a-stand-on-virginity-testing>.

<sup>136</sup> See Khumalo fn 134.

of the former President.<sup>137</sup> She has allegedly been a guest of her fiancée since she was 19 and her falling pregnant has been criticised as shameful.<sup>138</sup> In addition, this young woman was working as a director at *Nomkhubulwane* Culture and Youth Development Organisation, whose founder, Nomagugu Ngobese (discussed earlier), has been credited with re-energising virginity testing and reed dancing.<sup>139</sup> This shows that reed dancing is a perpetuation of patriarchy and double standards, and cannot be defended as a cultural practice that supposedly preserves young women to enter their marriage as pure.

## 2.6. Harmful consequences of virginity testing

The South Africa's Commission for Gender Equality submitted that girls who did pass the test faced the cruel prospect of being raped in a culture in which some men believe that intercourse with a virgin can cure Aids.<sup>140</sup> The awarding of certificates to virgins discriminates against girls, as their male counterparts are free to do as they please.<sup>141</sup> This publication of virginity results is either by marking the girls, celebrations and/or certificates given, and leads to the direct stigmatisation and ostracising of girls and their families. The testing and results may not only lead to virgins being predisposed to dangerous situations of being rape, as highlighted above, but also, to becoming a commodity in the trade of child trafficking.<sup>142</sup> Accordingly, virginity testing goes against the messages promoted by organisations who work with sexually abused children who are learning to assert themselves against adults and strangers touching their private parts.<sup>143</sup> This sends contradictory messages to children about their right to privacy, especially in the context of the scale of domestic and sexual violence in South Africa.<sup>144</sup>

In addition to the above harmful consequence resulting from the practice of virginity testing, research reveals a large number of fearful consequences for both the girls and their families. Firstly, girls and young women who are not deemed virgins may be

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<sup>137</sup> Manayetso 2018 <https://www.sowetonlive.co.za/2018-04-22-zuma-wife-to-be-was-a-bubly-intern>.

<sup>138</sup> *Ibid.*

<sup>139</sup> Mthethwa 2018 <https://www.timeslive.co.za/new.southafrica/2018-04-24-zumas-bride-to-be-has-brought-shame-to-our-custom-says-virginity-testing-activist/>.

<sup>140</sup> See Rumsey fn 62 16.

<sup>141</sup> See Le Roux fn 14 17.

<sup>142</sup> See Radufeen & Mkansi fn 67.

<sup>143</sup> *Ibid.*

<sup>144</sup> Stander 2016 *STJ* 435.

labelled as prostitutes by people in their community.<sup>145</sup> Secondly, the family of a girl who fails her virginity test may be fined.<sup>146</sup> It is thus evident from this tradition that policing virginity has always been a form of familial control of girls' sexuality.<sup>147</sup> Accordingly, where a girl was found not to be a virgin, this was seen as "seduction of virgins and generally got one of the heaviest fines inflicted over all other crimes".<sup>148</sup> The family's fine for having a non-virgin daughter is implicit when such a family receives "smaller *lobolo*, bride wealth, payment when she marries" which is, in turn, considered a disgrace.<sup>149</sup>

Thirdly, girls found to have lost their virginity are often rejected socially and sometimes treated as a "contagion" capable of corrupting girls who are virgins.<sup>150</sup> Fourthly, those who fail the test are reported to community leaders,<sup>151</sup> and the families of those girls involved, over and above of being fined, as mentioned above, are branded as being guilty of having tarnished the community.<sup>152</sup> Fifthly, the girls are outcast socially as unmarriageable, and some of these young women are forced into prostitution, which places them at a greater risk of contracting sexually transmitted infections.<sup>153</sup>

Another consequence often faced by girls who fail virginity tests, is their parents demanding an explanation from them. In some instances, it may be an aggressive interrogation were they may be beaten to obtain information.<sup>154</sup> In one particular case, the girl's relatives went as far as breaking both of her arms after she had failed her virginity test.<sup>155</sup> Further, those who are identified as non-virgins, may, in some parts of the world, become victims of so-called honour killings.<sup>156</sup> Lastly, research also reports an increase in reported cases of physical trauma as a result of anal sex in areas where virginity testing is practised regularly.<sup>157</sup>

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<sup>145</sup> See George fn19 1459.

<sup>146</sup> See Leclerc-Madlala fn 102.

<sup>147</sup> Thornberry 2015 ASR 132.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> See Leclerc-Madlala fn 104.

<sup>151</sup> *Ibid.*

<sup>152</sup> See Behrens fn 2 178.

<sup>153</sup> Maharaj 1999 *Agenda* 96.

<sup>154</sup> Bishop *The nature of medicine in South Africa: the intersection of indigenous and biomedicine* 95.

<sup>155</sup> See George fn 19 16.

<sup>156</sup> See Behrens fn 2 178.

<sup>157</sup> *Ibid.*

## **2.7. Conclusion**

Virginity testing has been revived predominantly as a Zulu articulation of a custom and identity, and is practiced annually at ceremonies where girls and young women are physically examined to monitor whether they are sexually active. However, given the above discussion, virginity testing has no diagnostic, forensic, or legal value, is accordingly unnecessary and should not be allowed. The use of this testing within the context of a historically observed tradition and a cure for social ills, *inter alia* HIV/AIDS, not only violates basic medical standards but also violates the human rights instruments that are discussed in the following chapter.

## CHAPTER 3

### HUMAN RIGHTS INSTRUMENTS AND VIRGINITY TESTING

#### 3.1. Introduction

There is a plethora of international and regional human rights instruments that explicitly deal with the practice of virginity testing. South Africa is signatory to a number of these instruments and the courts are constitutionally mandated to take into consideration international instruments in the interpretation of rights.<sup>158</sup> In addition, the South African Bill of Rights contains several rights that may have a direct influence on the constitutionality of virginity testing. The relevant sections of these instruments are described and explored below.

#### 3.2. International frameworks and virginity testing

Discussions and awareness of harmful cultural practices against girls and young women, including virginity testing, came out on the international platform in the early 1950s.<sup>159</sup> However, the United Nations (hereafter UN) agencies asserted a non-interferential attitude towards such practices, and it is reported that the World Health Organisation (hereafter WHO) in 1951 and 1956 declared that practices such as female genital cutting are social and cultural practices which are beyond its competency.<sup>160</sup> The United Nations International Children's Emergency Fund (hereafter UNICEF) defended its inaction against such practices by stating its need to be sensitive about other nations' cultures, and its respect of the national sovereignty of African nations.<sup>161</sup>

It was only in 1981 that the UN took an official stand against harmful practices perpetuated on girls and young women.<sup>162</sup> This was a result of Non-governmental Organisations (hereafter NGOs) and minority rights groups who presented a report on female circumcision, excision, and infibulation, which called for eradication of these

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<sup>158</sup> Section 39 (Interpretation to the Bill of Rights) and s 231 of the Constitution (Application of international law).

<sup>159</sup> See Simokivic fn 114.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> Brennan 1989 *Law & Ineq* 379.

harmful practices.<sup>163</sup> The current position set out in the relevant international instruments is explored below.

### **3.2.1. Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (hereafter UDHR)<sup>164</sup> is based on the notion that human rights are basic moral rights that are not only universally valid, but also independent of legal recognition by any nation-state.<sup>165</sup> Human rights are therefore inborn, unalterable, and inalienable, and their purpose is to protect the basic values of human beings.<sup>166</sup> Examples of some of the values protected by human rights are equality, freedom, political participation, safety, and social security.<sup>167</sup> Although the UDHR is not binding *per se*, the study agrees with the assertion that all provisions of the UDHR are regarded as customary international law and is binding on all nations.<sup>168</sup>

Further, the UDHR is universal and provides that the accident of birth into a particular social group, society, or culture is irrelevant, as human rights are viewed as an individual's basic intrinsic worth and her entitlement to be treated with dignity.<sup>169</sup> Accordingly, article 2 provides that everyone, including girls and young women who are subjected to virginity testing, are entitled to all rights and freedoms set forth in the UDHR without distinction of any kind such as race, sex, language, or religion. These rights are also not affected by the jurisdiction or country to which they belong.

The UDHR has legal significance, as the South African Constitution states that “when a court, tribunal or forum interprets any right contained in the Bill of Rights, it must consider international law”.<sup>170</sup> Article 1 of the UDHR directs that “all human beings are born free and equal in dignity and rights”. In interpreting Article 1, Langa DCJ, referring to children's rights, emphasised that children as a vulnerable group “merit special

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<sup>163</sup> *Ibid.*

<sup>164</sup> Entered into force on 10 December 1948.

<sup>165</sup> Gordon 2015 *BJLP* 114.

<sup>166</sup> *Ibid* 115.

<sup>167</sup> *Ibid.*

<sup>168</sup> Goldstone 2016 <http://www.dx.doi.org/10.1037/00332909.116.2.293.9>. This was said by Judge Goldstone in his representation to show that although the UDHR is not binding it has achieved customary international law status.

<sup>169</sup> George 2008 <http://www.digitalcommons.law.umaryland.edu>.

<sup>170</sup> Section 39(1) of the Constitution, which, *inter alia*, instructs the court, tribunal or forum to consider international law when interpreting the Bill of Rights.

protection by the state and must be protected by legislation which guards and enforces their rights and liberties".<sup>171</sup> Children's dignity rights are of special importance, as entrenched in section 28 of the Constitution.<sup>172</sup>

Article 12 of the UDHR, furthermore, provides that no one shall be subjected to arbitrary interference with, *inter alia*, her privacy or to attacks upon her honour and reputation. Girls and young women have the right to the protection of the law against such interference or attacks.<sup>173</sup>

### **3.2.2. International Covenant on Economic, Social and Cultural Rights**

South Africa became a signatory to the International Covenant on Economic, Social and Cultural rights (hereafter ICESCR)<sup>174</sup> in 1994 when the former president Nelson Mandela, visited the UN in New York and it was ratified in 2015.<sup>175</sup> Article 5 of the ICESCR directs that there should not be any undue limitation of any basic human rights or misinterpretation of human rights and fundamental freedoms of this Covenant using culture and cultural practices as a justifiable infringement. Virginity testing cannot be used as a part of culture to infringe the fundamental freedoms of the girls tested.

### **3.2.3. International Covenant on Civil and Political Rights**

Although South Africa has been a signatory to the International Covenant on Civil and Political Rights (hereafter ICCPR)<sup>176</sup> since 1994, it is yet to be ratified.<sup>177</sup> Article 7 of

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<sup>171</sup> *De Reuck v DPP and others* 2003 (12) BCLR (CC) para 63.

<sup>172</sup> Section 28(1) (d) provides that "every child has the right to be protected from maltreatment, neglect, abuse or degradation". See Le Roux fn 15, girls' rights to human dignity are violated when after the testing girls who have passed are marked on their forehead with white clay and those who have failed are marked with red clay. This is a sign of degradation especially for those marked as "failed" as this come with the stigma amongst the girl's peers, family and community.

<sup>173</sup> Mhlongo *Reasons for undergoing virginity testing: a study of young people in rural KwaZulu-Natal, South Africa* 28-29, the study interviewed young girls who are participants in virginity testing and annual reed dance. The girls recommended that virginity testing should be supported financially as they are not comfortable with sports ground that are presently used to test them. They would prefer private and safe places. They went further to highlight that girls are raped after the reed dance because of the publication of the results of the test, done in a form of marking and certificates given. They would prefer a situation where the practice and the participants are offered protection, although, it is not clear what kind of security would suffice.

<sup>174</sup> Entered into force on 3 January 1976.

<sup>175</sup> ESCR-Net 2015 <https://www.escr-net.org/news/2015/goerment-south-africa-ratifies-icescr>.

<sup>176</sup> Entered into force 23 March 1976.

<sup>177</sup> UNTC <https://www.treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtsdg-no=iv-3&src=treaty#bottom>.

the ICCPR, *inter alia*, provides that no one shall be subjected to inhuman or degrading treatment. In particular, no one shall be subjected, without her free consent, to medical or scientific experimentation. The purpose of this article is therefore to protect the dignity, and the physical and mental integrity of the girls that are subjected to harmful cultural practices.<sup>178</sup>

### **3.2.4. Convention on the Elimination of all Forms of Discrimination against Women**

The Convention on the Elimination of all forms of Discrimination against Women (hereafter CEDAW)<sup>179</sup> was adopted by the United Nations General Assembly in 1979, notably as the “first rights treaty on women”.<sup>180</sup> It is famously referred to as the International Bill of Women’s Rights.<sup>181</sup> Most African countries, including South Africa have ratified this treaty.<sup>182</sup> Article 1 widely defines discrimination against women and provides that it:

Shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.<sup>183</sup>

CEDAW does not expressly address virginity testing but its Committee has singled out virginity testing as one of the traditional practices that discriminates against women.<sup>184</sup> It expressed serious concern about the existence of entrenched harmful cultural norms and practices based on patriarchal attitudes and stereotypes, resulting in the perpetuation of girls and women’ subordination within the family and society. It has noted that such discriminatory attitudes and stereotypes constitute serious obstacles to women’s enjoyment of their human rights and the fulfilment of the rights enshrined in the Convention. The Committee is thus concerned about the inadequate

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<sup>178</sup> Lasco 2002 HRB 11.

<sup>179</sup> Entered into force 18 December 1979.

<sup>180</sup> See Durojaye fn 7 316.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> Article 1 of CEDAW.

<sup>184</sup> CEDAW/C/ZAF/2-4/ 96<sup>th</sup> meeting in South Africa 21 January 2011.



implementation of comprehensive measures to modify or eliminate stereotypes and negative traditional values and practices in South Africa.<sup>185</sup>

The Committee emphasised the importance of working with religious and community leaders, politicians and professionals to address issues like harmful cultural practices.<sup>186</sup> It further lamented the provision in the Children's Act that legalised virginity testing of girls above 16 years old, where they gave consent.<sup>187</sup>

### ***3.2.5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

South Africa became a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (hereafter CAT)<sup>188</sup> in 1993 and ratified the same in 1998. It has an obligation in terms of Article 16 to prevent acts of cruel, inhuman or degrading treatment which do not amount to torture and make sure that its girls and young women are not subjected to inhuman or degrading treatment, which is similar to the ICCPR provision above. Thus, South Africa has a duty to protect girls against degrading treatment which is intricately linked to being tested publicly as explained in chapter 2.<sup>189</sup>

### ***3.2.6 Convention on the Rights of the Child***

South Africa ratified the Convention on the Rights of the Child (hereafter CRC)<sup>190</sup> in 1995. Article 1 thereof defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". The CRC focuses on four aspects of the rights of children.<sup>191</sup> Amongst other rights that are protected by the CRC, it basically provides four pillars of rights and protection that children are entitled to. Article 4 directs the government to protect the children and make sure that it takes all necessary steps to ensure that the minimum standards set by the convention are met. Article 8 preserves the identity of every child and provides that the government should respect children's right to a name, a nationality, and family

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<sup>185</sup> Para 20.

<sup>186</sup> Para 21.

<sup>187</sup> Section 12(2) of the Children's Act.

<sup>188</sup> Entered into force 10 December 1984.

<sup>189</sup> See Mhlongo fn 173.

<sup>190</sup> Entered into force 20 November 1989.

<sup>191</sup> Van Beuren 1995 *ISHR* 16.

ties. Article 18 entrenches parental responsibilities, in that both parents share responsibilities to bring up their children. Finally, Article 19 obliges the government to protect children against any form of violence, abuse and neglect.

The above aspects are referred to as the four P's and summarised as:

Participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and the provision of assistance to children for their basic needs.<sup>192</sup>

This instrument is relevant to this study, since virginity testing is mostly conducted on girls who are below 16 years of age, despite legislation only allowing it on girls over the age of 16 years of age. Besides, in terms of the CRC, as mentioned in Article 1 above, girls over the age of 16 but below the age 18 are still children and should be protected against virginity testing.

The CRC recognises the child as an individual human being who has entrenched rights in terms of both international law and national law.<sup>193</sup> It also emphasises the basic principle that children need special protection because of their vulnerability in terms of age and immaturity.<sup>194</sup> Article 12 therefore provides that South Africa shall ensure that the child who is capable of forming her own views, has the right to express those views freely in all matters affecting her, the views of the child being given due weight in accordance with their age and maturity.

Other rights relevant to this study, which are pertinently stated, include the right not to be discriminated against;<sup>195</sup> and the right of children to have their best interest be a primary consideration in all matters concerning them.<sup>196</sup>

Although the CRC, does not specifically refer to virginity testing, it clearly prohibits traditional practices that are prejudicial to the health and life of the child and the prohibition focuses on eliminating the negative elements of a tradition.<sup>197</sup> Evidently,

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<sup>192</sup> *Ibid.*

<sup>193</sup> Maimela *Combating traditional practices harmful to girls: a consideration of legal and community based approaches* 3.

<sup>194</sup> *Ibid.*

<sup>195</sup> Article 2 of the CRC.

<sup>196</sup> Article 3 of the CRC.

<sup>197</sup> See Le Roux fn 15 15, Virginity testing is relevant as it does not only violate the right to physical integrity but also harmful to the girls tested. 600 girls are tested at a time, using the same gloves. This may lead to sexually transmitted disease which are harmful to the participants. Girls also insert

article 24(3) provides that South Africa shall take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.

The Committee on the Rights of the Child expressed concern that harmful cultural practices, such as virginity testing, are still practiced by its proponents in South Africa. This practice has continued regardless of its recommendations prohibiting it. It has further recommended that awareness campaigns and impact studies of virginity tests should be conducted, to guarantee that the provisions in the Convention are widely known and understood by adults and children alike, in both rural and urban areas. In this regard, it encourages South Africa to reinforce its efforts to make the Convention available in local languages and to promote and disseminate its principles and provisions through, *inter alia*, traditional methods of communication. The Committee further concluded that an impact study should be undertaken regarding virginity testing and that discouragement of the practice should receive attention:

The state party undertakes a study on virginity testing to assess its physical and psychological impact on girls. The committee recommends that the State party introduce sensitisation and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing.<sup>198</sup>

The above observation is an acknowledgement by the Committee that the harmful effects of virginity testing far exceed the right to culture, as the latter right is an affront to the human dignity and equality rights of the girls.<sup>199</sup>

### **3.3. Regional frameworks and virginity testing**

Durojaye and Oluduro contend that “African women have remained subject to cultural practices that are discriminatory against them”.<sup>200</sup> Despite legislative attempts to

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toothpaste and meat inside their vaginas to mimic the hymen so that they can pass the test, this is directly linked to the rights of health of girls amongst other rights of children that are protected by the CRC and the Bill of rights.

<sup>198</sup> Observations on the Committee on the Rights of the child: South Africa CRC/C/15/Add 122 22 February 2000 para 33.

<sup>199</sup> See Bennett *et al* fn 26 258. Virginity testing as a practice serves the interests of a limited group of consensual and not harmful cannot be true. The participants whether younger or older than 16 years traditionalist as is presently practiced in the KwaZulu-Natal province as is not applicable to everyone, even though Zulu speaking in the same province. The rationale used that the practice is voluntary, of age do not do it voluntarily and their so called consent is nullified by fear or traditional authority and social stigma of not abstaining as is evident from attitudes of testers and the community that practices it.

<sup>200</sup> Durojaye & Oluduro 2016 *Fem Leg Stu* 334.

address discriminatory practices against girls and young women, cultural practices like virginity testing have persisted to infringe upon African girls and young women's basic rights and freedoms.<sup>201</sup> This section explores some regional frameworks that prohibit harmful cultural practices and their significance in prohibiting virginity testing.

### **3.3.1. African Charter on Human and People's Rights**

Despite most African Countries having progressive Constitutions which protect, amongst others, the right to equality, girls and young women are still subjected to patriarchal traditions like virginity testing and female genital mutilation.<sup>202</sup> The reason is probably because article 17 of the African Charter on Human and People's Rights (hereafter ACHPR)<sup>203</sup> provides broadly that all people can take part in the cultural life of their communities.<sup>204</sup> The right gives an entitlement to the right holders (traditionalists) to practice their cultural rights without interference from the state, and also gives the same traditionalists a right to order the state not to interfere in their practice of cultural rituals. However, since South Africa has signed and ratified the ACHPR in 1992, it has a duty in terms of Article 17(3) to actively promote the conservation, preservation, strengthening and development of only positive African cultural practices, values and customs. It is submitted that that virginity testing is not a positive African cultural practice.

### **3.3.2. African Charter on the Rights and Welfare of the Child**

This is the first regional treaty which was specific about protecting the human rights of the child and was adopted by the Organisation of African Unity in 1990 and entered

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<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> Entered into force 21 October 1986.

<sup>204</sup> Martin 2011 <http://www.childlinesa.org.za/wp/customary-law-study-south-africa-report-no-2011-pdf>. According to Vincent 2006 *CHS* 17-20, male circumcision is used to show that it's a practice that is brought back as part of an African culture, and has been acknowledged to curb and limit the spread of sexually transmitted diseases and HIV. Male circumcision which is acknowledged as part of the African cultural solution is compared with virginity testing. The comparison is based on the fact that the former is far more dangerous and participants have died as a consequence of it. It is however not frowned upon like virginity testing which is accordingly harmless and therefore the ban against it is not fair. The study acknowledges male circumcision as an African culture, positively accepted. However the study only focusses on virginity testing as a practice solely done on girls and which has shown not to be justifiable in terms of the Constitution. Mkasi and Radufeen 2016 *J. Study Religion* 130, are of the conviction that virginity testing cannot just be imposed as an African tradition. Whether one is for the practice or against solely depends on whether one is in tune with her Zulu cosmology. Accordingly the authors believe that it should be placed in a different approach where the concept of secular body and theology should be intensively investigated.

into force in 1999.<sup>205</sup> South Africa became a signatory in 1997 and ratified it in 2000. The perpetuation of certain harmful practices to the child continues, as a result of the provisions of Article 24 of the African Charter on the Rights and Welfare of the Child (hereafter ACRWC).<sup>206</sup> It provides that a parent can take his/her child for virginity testing or female genital mutilation just because he/she believes it to be culturally in the best interest of the child.

Although customary and cultural practices are protected by international and regional instruments, such protection will depend on the extent to which the practices promote the rights of children.<sup>207</sup> Advocates of these practices should always take cognisance that all children have the right to equality regardless of the child's, or their parents' or legal guardian's, race, ethnic group, colour, sex or language, religion, political or other opinion, national and social origin, fortune, birth, or other status.<sup>208</sup> Further, only practices that are in the best interest of the child can be promoted in terms of article 4(1). The protection of the child's rights is evident from article 21, which obliges South Africa to discourage any custom, tradition, cultural or religious practice that is inconsistent with the Charter.

Article 35 protects children from all forms of physical or mental violence, injury or abuse (including sexual abuse), neglect or negligent treatment or exploitation (including sexual and economic exploitation). This article may speak to the fact that identified virgins may be exposed to sexual abuse because of the myth that sleeping with them can cure HIV/AIDS.<sup>209</sup> The ACRWC asserts its supremacy over any practice, whether traditional, cultural, or religious that is inconsistent with the rights (mentioned above) and obligations guaranteed under it.<sup>210</sup>

### **3.3.3. Protocol to the African Charter on the Rights of Women**

The Protocol to the African Charter on the Rights of Women (hereafter the African Women's Protocol)<sup>211</sup> was adopted by the African Union in 2003 and contains

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<sup>205</sup> Ekundayo 2015 *IJHSS* 144.

<sup>206</sup> Entered into force 29 November 1999.

<sup>207</sup> See Martin fn 200.

<sup>208</sup> Article 3 the ACRWC.

<sup>209</sup> See chapter 2 para 2.3.

<sup>210</sup> Article 21.

<sup>211</sup> Entered into force 11 July 2003.

progressive provisions which should protect girls and young women in Africa.<sup>212</sup> South Africa ratified the Protocol in 2004.<sup>213</sup> Article 1 of the African Women's Protocol prohibits discrimination against women and defines it as:

Any distinction, exclusion or restriction or any different treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women of their rights, regardless of their human rights and fundamental freedoms in all spheres of life.

The above definition makes it clear that discrimination based on sex such as in virginity testing is prohibited. In addition, article 2(2) obliges South Africa to commit themselves in modifying the social and cultural patterns of conduct of women and men with a view to achieving the elimination of harmful and cultural practices and all practices which are based on the idea of the inferiority or the superiority of either sexes on the stereotyped roles of women and men.

### **3.3.4. The Constitution and virginity testing**

The challenge to South African democracy in the context of virginity testing is the country's history wherein cultural practices were condoned during the pre-constitutional era.<sup>214</sup> The challenge now is to seek a balance between recognising cultural practices and respecting the constitutional framework which promotes the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms".<sup>215</sup> The Constitution is the supreme law of South African and it is premised on the above basic principles.<sup>216</sup> It is evident that the rights relevant to a constitutional challenge of virginity testing discussed below echo similar rights as in the international instruments above.

#### 3.3.4.1. The right to equality

Section 9 of the Constitution outlines the freedoms that every individual should enjoy and not to be treated differently, and provides as follows:

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<sup>212</sup> See Durojaye & Oluduro fn196 317.

<sup>213</sup> ACHPR 2018 <http://www.achrp.org/instruments/achpr/ratification/>.

<sup>214</sup> See George fn 19 1450.

<sup>215</sup> As provided by section 1(a) of the Constitution.

<sup>216</sup> Chapter 2 of the Constitution.

(1) Everyone is equal before the law and has the right before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly and indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless is established that the discrimination is fair.

Substantive equality underpins the core values of the South African Constitution. Section 9(3) above sets out various grounds of relevance to this study on which one may not be unfairly discriminated against, including sex and gender. This section has been given further effect by the Promotion of Equality and the Prevention on Unfair Discrimination Act (hereafter PEPUDA),<sup>217</sup> as section 8 similarly prohibits discrimination and further explicitly include demeaning cultural practices aimed at girls:

No person may unfairly discriminate against any person on the ground of gender... (d) including any practice, including traditional customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including undermining the dignity and well-being of the girl child.

#### 3.3.4.2. The right to human dignity

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. Dignity is a central value of the Constitution.<sup>218</sup> Section 1(a) of the Constitution states that human dignity is one of its

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<sup>217</sup> Act 4 of 2000

<sup>218</sup> De Vos *et al* South African law in context 418.

founding provisions. Accordingly, the right to dignity is a value that is essential in the interpretation of all the rights contained in the Bill of Rights.<sup>219</sup>

Mdledle defines dignity as a concept that is connected to humanity, freedom, and equality.<sup>220</sup> This is supported by the fact that all human beings are born with dignity, and that it is not a status that one has to deserve or may lose.<sup>221</sup> Every human being, by reason of being born, is entitled to be treated with dignity, or with a minimum of respect and decency.<sup>222</sup> The right to dignity is described as a “mother right”, in that a majority of rights can be derived from it; and other rights not emphasised in the Constitution can be drawn from this right.<sup>223</sup> The Constitutional Court outlines this right by highlighting the importance of dignity as a founding value of the new Constitution. Further the court recognises that the right to dignity is an acknowledgement that human beings are to be treated with an intrinsic worth of respect and concern.<sup>224</sup>

#### 3.3.4.3. The right to freedom and security of the person

Section 12 of the Constitution provides for control of one’s own body as follows:

- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
  - (b) To security in and control over reproduction;
  - (c) Not to be subjected to medical or scientific experiments without their informed consent.

Security in terms of section 2(b) implies one’s safeguard of the body against physical attack by another person, whereas control over refers to the concept of bodily self-government (autonomy) and self-determination with regard to the person’s body.<sup>225</sup> The High Court, in the case of *S v Xaba*, determined how the right to bodily integrity is infringed by saying that “the removal of a cartridge from the suspect’s body for the reason of a police enquiry was a restriction of the suspect’s right to bodily integrity”.<sup>226</sup>

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<sup>219</sup> *Ibid.*

<sup>220</sup> Mdledle 2014 <http://www.news24.com/MyNews24/Virginity-testing-and-dignity-20140909>.

<sup>221</sup> *Ibid.*

<sup>222</sup> See Durojaye fn 7.

<sup>223</sup> *Ibid.*

<sup>224</sup> *S v Makwanyane and Another* 1995 (6) BCLR (CC) para 329.

<sup>225</sup> *S v Xaba* 2003 (2) SA 708 para H.

<sup>226</sup> *Ibid.*



Control over one's body, according to the court, presupposes that persons are competent to make choices that are in their personal interest, and this right can only be limited if there is a legitimate purpose. Virginity testing does not serve any legitimate purpose and is an affront to girls' control of their own bodies as shall be demonstrated in the next chapter.

#### 3.3.4.4. The best interest of the child

Section 28(2) of the Constitution provides that a child's best interests have paramount importance in every matter that concerns a child. Section 28 thus provides for the child's general wellbeing, in that children should be protected. Skelton highlights that there is a need to realise that children have rights that are independent of their parents' and community's rights.<sup>227</sup> This study has already explained that a child is any person who is below the age of 18.

Although the principle of the paramount best interests of the child has been expressed in South African law since the 1940s, it is also well-pronounced in international instruments.<sup>228</sup> Article 3 of the CRC provides that in all decisions that may affect a child, the best interests of such child must be of primary concern. All adults should do what is best for children as enabled by law. Article 4 of the ACRWC emphasises that the opinions of children should be taken into consideration during matters that concern them.

The child's interest therefore are more important than anything else, taking into consideration the interests of society.<sup>229</sup> Any practice is invalid as far as it unjustifiably limits the rights of the child.

#### 3.3.4.5. Language, culture and religious rights

Section 30 of the Constitution allows for the freedom of everyone to choose their own cultural practice and provides as follows:

Everyone has the right to participate in the cultural life of their choice, but no one exercising this right may do so in a manner inconsistent with any provision of the Bill of Rights.

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<sup>227</sup> Skelton 2017 *Protection of children's rights* 341.

<sup>228</sup> *Ibid* 345.

<sup>229</sup> *Ibid*.

In addition, Section 31 provides for the protection of the exercise of cultural rights in communities, and that members of a cultural, religious or linguistic community may not be denied the right to enjoy their culture. Section 31(2) however limits these cultural rights and in that those cultural rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Culture has already been defined above as the total of the inherited ideas, beliefs, values, and knowledge which constitute the shared basis of social action.<sup>230</sup> In the African context, culture has been perceived as the basis of humanity and a tool providing the yardstick for morality.<sup>231</sup> In addition, culture plays an integral part in how people define themselves and is intrinsic to the construction of human identity.<sup>232</sup> Virginity testing is an event which takes place annually in a public place, such as a stadium, in KwaZulu-Natal and it is seen and practiced as a way to reclaim an element of culture, of which the right to has been stipulated above.<sup>233</sup>

Mbulu has no qualms with the Constitutional rights entrenched in section 30 and 31 *per se*, however, it emphasises the inherent qualification: that the freedom to exercise cultural practices can only be exercised within the constitutional principle of equality as a cornerstone of the South African democracy.<sup>234</sup> The extreme significance in these sections is the built-in limitations clause stating that these rights may not infringe any other fundamental rights in the Bill of Rights.<sup>235</sup>

Both sections have been interpreted by the Constitutional Court and an inference was drawn in the case of *Mabuza v Mbatha* where the court said that “any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny”.<sup>236</sup> In the case of *Christian Education South Africa v Minister of Education*, the Court had to apply its mind to two conflicting rights.<sup>237</sup> The rights to religion and culture were in conflict with the legislative provision prohibiting corporal punishment.<sup>238</sup> This Act was challenged by the applicant in that it violated their rights to culture and religion in terms

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<sup>230</sup> See Sinclair fn 48 356.

<sup>231</sup> Ncube 2005 *SAJBL* 69.

<sup>232</sup> Ross 2008 *ISW* 385.

<sup>233</sup> See Mbulu fn 129 28.

<sup>234</sup> *Ibid.*

<sup>235</sup> See Le Roux fn 15 46.

<sup>236</sup> 2003 (7) BCLR 743 (CC) para 30.

<sup>237</sup> 2000 (5) BCLR 491 (CC) para 15.

<sup>238</sup> South African Schools Act 84 of 1996.

of sections 30 and 31(1), and as such the relevant section should be declared unconstitutional.<sup>239</sup> The Constitutional Court conceded that section 10 limited the parents' religious rights to chastise their children.

The Court mentioned that the above issues raised the dignity of both the parent and the child, whose rights are in conflict. The court then looked at the extent to which the parents' exercise of their right limited the child's right to dignity. The court remarked that tradition is an integral part of dignity and if the right is being limited then the dignity is also infringed upon. On the one hand, the dignity of the parents may be negatively affected when the State tells them how to bring up and discipline their children and limit their exercise of religious beliefs. On the other hand, the child is being subjected to an infringement of dignity deliberately inflicted by a parent or association.

The Court held that the State was under a duty to uphold children's rights. The rationale used by the court was that the rights to religion and culture were justifiably limited, since corporal punishment was a more invasive infringement on the dignity of a child.<sup>240</sup>

The Constitutional Court, in interpreting the balance between the rights of the parents to culture and religion in exercising parental discipline and the rights of children that may be limited by the exercise of their parents' rights, concluded that:

The state is further under a constitutional duty to take steps to help diminish the amount of private violence in society generally and to protect all people and especially children from maltreatment; degradation and abuse.<sup>241</sup>

This finding clearly provides that the right of the child not to be subjected to maltreatment supersedes the right of the parents to discipline the child in terms of their right to culture and religion.

#### 3.3.4.6. Limitation of rights

Section 36(1) provides for the limitation of rights, provided that it is a reasonable and justifiable limitation informed by the stipulated guiding factors:

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<sup>239</sup> Section 10 of the South African Schools Act.

<sup>240</sup> See *Christian Education South African* fn 233.

<sup>241</sup> Para 40.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors, including-

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) The less restrictive means to achieve the purpose.

Section 36 (2) further provides that:

Except as provided in subsection (1) above or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

This determination of the reasonableness and justifiability of any limitation must be a two-stage approach where the limiting of the rights must be differentiated from the interpretation of rights.<sup>242</sup> The approach was eloquently summarised by the Constitutional court in the case of *The National Coalition for Gay and Lesbian Equality* as follows:

Firstly does the differentiation amount to 'discrimination'? If it is on a specified ground then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly in the differentiation amounts to 'unfair discrimination'? If it has been found to have been on a specified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in her situation.<sup>243</sup>

The end result of the two-stage analysis should be the balancing of rights, which was notably explained in the case of *S v Manamela*, which emphasised the impact on a particular right and the values involved as follows:

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<sup>242</sup> Currie & De Waal *The Bill of Rights Handbook* 153.

<sup>243</sup> *The National Coalition for Gay and Lesbian Equality v the South African Human Rights Commission and Others* 1999 (1) SA 6 (CC) para 17.

In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting on the measure paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.<sup>244</sup>

No right can ever be absolute and the right must be exercised in a manner that takes into consideration the rights of other members of the community and society.<sup>245</sup> In the context of this study, the Constitutional Court has determined, how cultural and religious rights have to be balanced against other rights enshrined in the Bill of Rights and held as follows:<sup>246</sup>

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious and other cultural and linguistic communities to define for themselves which laws they will obey and which not.

Virginity testing cannot be justified as a cultural practice in terms of the limitation clause (section 36) as shall be evaluated and discussed in chapter 4.

### **3.4. Conclusion**

Participants in virginity testing should be adequately informed of their rights as provided by international, regional, and national human rights instruments. Instruments that seek to protect children and women from harmful cultural practices have been laid out and briefly explained in this chapter. The application and the evaluation these instruments, all seeking to regulate the cultural practice of virginity testing, shall be discussed in chapter 4. The discussion thus far finds that the practice of virginity testing limits various rights (explained above) of participants and such limitation shall be tested in the following chapter.

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<sup>244</sup> 2000 (1) SACR 414 (CC) para 49.

<sup>245</sup> Chaskalson 2000 *SAJHR* 195.

<sup>246</sup> See *Christian Education South Africa* fn 233 para 40.

## CHAPTER 4

### CONSTITUTIONAL AND HUMAN RIGHTS EVALUATION OF THE PRACTICE OF VIRGINITY TESTING AS REGULATED BY THE CHILDREN'S ACT 38 OF 2005

#### 4.1. Introduction

Notwithstanding cultural practices in South Africa having been marginalised for a long time,<sup>247</sup> and only being properly recognised since 1994, they should be approached in a balanced manner. Thus, while practicing cultural traditions there, at the same time, should be respect for Constitutional values, including “human dignity, the achievement of equality and the advancement of human rights and freedoms”.<sup>248</sup> However, as said earlier, the re-emergence of virginity testing as a cultural practice has raised questions about it being an infringement of guaranteed constitutional rights of girls and young

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<sup>247</sup>SAHRC2003<https://www.sahrc.org.za/home/21/files/30%20SAHRC%20Submis4.2.1sion%20on%200%20Childrens%20Bill%20-%20Virginity%20Testing%20%28Parl.%29%20Oct%202005.pdf> 2.

<sup>248</sup> This is entrenched in Section 1 of the Constitution.

women.<sup>249</sup> The discussion below determines whether virginity testing, as it is currently practiced, promotes the values of dignity, equality, and privacy. This chapter criticises the legislative compromise in the Children's Act, as the practice contravenes several individual rights in the Bill of Rights.

## **4.2. The Children's Act 38 of 2005: background & contents**

### **4.2.1. Background**

It has been shown earlier that virginity testing is unreliable and that it places the burden of sexual responsibility on the shoulders of girls to the exclusion of boys. It is questionable whether boys can be practically subjected to virginity testing. However, this is beyond the scope of this study. Despite these assertions, as discussed in chapter 2, section 12(5) of the Children's Act conditionally provides for virginity testing of children (boys and girls) who are over sixteen.

This practice was seemingly allowed by legislation only as a compromise between the two schools of thought involved. They were those who wanted a complete ban on virginity testing and, on the other hand, traditionalists who sought freedom to practice this custom without any interference from the State.<sup>250</sup> The parties involved were the African National Congress Women's League, who were for the total ban on virginity testing, and the Zulu Royal house, who threatened to withdraw from the country to form their own Federal State rather than give up on virginity testing.<sup>251</sup> Accordingly, particularly section 12 of the Children's Act reflects the negotiated position after the drawn out public participation during the process of drafting the Children's Bill.<sup>252</sup> The section, discussed below, is therefore a compromise, not to ban virginity testing completely but to allow it, and that it should be regulated by introducing the age threshold.<sup>253</sup>

### **4.2.2. The Children's Act**

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<sup>249</sup> See SAHRC fn 243.

<sup>250</sup> See Behrens fn 2 178.

<sup>251</sup> *Ibid.*

<sup>252</sup> See George fn19.

<sup>253</sup> See George fn19.

South African law allows the operation of statutory law alongside customary law.<sup>254</sup> Virginity testing, as a cultural tradition, emphasises the plural nature of the South African society.<sup>255</sup> The Children's Act gives effect to the rights of children that are contained in the Constitution.<sup>256</sup> The Children's Act thus incorporates the principles of the Constitution and responds to the socio-cultural challenges facing South Africa's children today.<sup>257</sup> Section 12(1) provides that every child has the right not be subjected to social, cultural and religious practices which are detrimental to his/her wellbeing. Pertinent to this research, are sections 12(4) to 12(7) of the Children's Act, regulating virginity testing. They provide as follows regarding age, requirements for valid testing, and dealing with the outcome of the test:

- (4) Virginity testing of children under the age of 16 is prohibited.
- (5) Virginity testing of children older than 16 may only be performed:
  - (a) If the child has given consent to the testing in the prescribed manner;
  - (b) After proper counselling;
  - (c) In the manner prescribed.
- (6) The results of a virginity test may not be disclosed without the consent of the child.
- (7) The body of a child who has undergone virginity testing may not be marked.

It is clear from the above that a girl may be tested only if she is over the age of 16 and gives her consent in the prescribed manner.<sup>258</sup> The Act however is silent as to what comprises the prescribed manner.<sup>259</sup> Since the Act is silent on this matter, it is crucial to also look at the general regulations prescribed regarding section 12.

#### 4.2.2.1. General regulations regarding section 12

General regulations were published during 2010 to further guide the practice of virginity testing as legalised in the Children's Act.<sup>260</sup> They are discussed in the following section.

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<sup>254</sup> See Durojaye fn 7 232.

<sup>255</sup> *Ibid.*

<sup>256</sup> The long title of the Children's Act.

<sup>257</sup> The preamble of the Children's Act.

<sup>258</sup> See Bennett *et al* fn 26 256.

<sup>259</sup> *Ibid.*

<sup>260</sup> Part 1 in Notice R261 in GG 33076 of 8 December 2010.



#### 4.2.2.2. Consent to undergo virginity testing

In addition to the age limit, the girl must consent to the testing and the consent is valid if it is contained in the following prescribed form:

- (a) Completed in writing and signed by the child;
- (b) Signed by the person conducting the virginity test;
- (c) Accompanied by proof of age of the child as established in terms  
Regulation 4(3) (b); and

(8) Commissioned by a Commissioner of Oaths.

#### 4.2.2.3. Manner of conducting virginity test

The tester who conducts the testing must follow and ensure that the following guidelines in terms of regulation 4(1) are followed:

- (a) Each child is tested individually and in private;
- (b) The test is conducted in a hygienic manner, which at all times  
Includes-
  - (i) The use of a separate pair of sterile surgical gloves for each test in the case of a virginity test involving the inspection of any bodily orifice of the child being tested;
  - (ii) Disposal of such surgical gloves after each virginity test in accordance with medical standards for the disposal of surgical gloves;
  - (iii) Sterilisation of any instrument used in the performance of any virginity test in accordance with medical standards for the sterilisation of instruments; and
  - (iv) The avoidance of direct blood contact with any bodily fluid between the child undergoing the virginity test and the person performing the virginity test; and
- (c) The least invasive means of testing for virginity is used with due regard to the child's right to bodily integrity.

Regulation 4(2) prescribes that a virginity test may be performed on a girl child only by a female person and on a boy child only by a male person. Whereas regulation 4(3) insists that there must be proof of age, which must be established by having read an

identity document or birth certificate of the child. If there is no such proof, an affidavit furnished by the child's parent or care-giver confirming the age of the child by estimating the age in terms of section 48(2) of the Children's Act shall suffice.

In addition to not complying with the requirement of testing an individual privately as illustrated, there is also evidence that testing does not comply with other requirements, such as that the participant must be over the age of 16. A study in the Eastern Cape shows that participants who were orally interviewed said that they start participating from the age of six years.<sup>261</sup> Behrens also points out regarding the requirement of consent, that whatever consent the girls or young women give cannot be seen as true informed consent as regulated by legislation.<sup>262</sup> That is because social pressure on the girls and young women "to be tested almost certainly entails some coercion, which calls the voluntariness of consent to these tests into question".<sup>263</sup>

Although, in terms of the regulations, males over 16 years are to be tested, this does not happen and there is no known method that can be used to test males. The practice focusses on girls and young women, which amounts to discrimination against them and reinforces the negative view that girls and women are solely responsible for sexual misconduct, as discussed earlier.<sup>264</sup>

In terms of the Children's Act, virginity testing, as a form of vaginal inspection, can attract criminal liability and penalties. The vaginal inspection of a girl below the age of 16, in violation of section 12(4) of the Children's Act, carries a penalty of a fine or imprisonment for a period not exceeding ten years, or both.<sup>265</sup> A second-time offender may face a fine or imprisonment of up to twenty years.<sup>266</sup> Virginity testers may also be guilty of an offence if they contravene section 12(5), 12(6) or 12(7) highlighted above, risking the same punishment as for illegally testing girls younger than 16.<sup>267</sup> These punishments indicate that the legislature views a contravention of any of the

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<sup>261</sup> Swartbooi-Xabadiya 2014 *NWP* 26.

<sup>262</sup> Behrens 2015 *JME* 691.

<sup>263</sup> *Ibid.*

<sup>264</sup> See Behrens fn 259 693.

<sup>265</sup> See section 305(1), read with s 305(6).

<sup>266</sup> Section 305(7).

<sup>267</sup> Section 305(1)(a)&(c) read with s 305(6) and 305(7). See also Bennett *et al* fn 26 258 who argues that the testing can also attract civil liability in the form of a delict.

prohibitions or guidelines regarding virginity testing in a very serious light. However, the author is not aware of any criminal prosecution or punishment in this regard.

### **4.3. Evaluating the constitutional validity of virginity testing in South Africa**

#### ***4.3.1. Virginity test vis-a-vis international law***

The Children's Act, and specifically section 12, which allows virginity testing is controversial and erodes international instruments. According to the Universal Declaration of Human Rights, in particular Article 1, all human beings are born free and equal in dignity and rights.<sup>268</sup> South Africa has also ratified the Convention on the Elimination of all Forms of Discrimination against Women (the first treaty on women, which is referred to as the International Bill of Women's Rights).<sup>269</sup> Article 1 of the Convention requires South Africa to pursue policy that seeks to eliminate discrimination in order to condemn discrimination against women in all its forms. It follows that the social and cultural patterns of conduct of both men and women must be modified to achieve the elimination of customary and other practices based on the notion of the inferiority and superiority of either gender, or stereotyped roles for men and women. Equality is the foundation of South Africa's constitutional democracy, and since men and boys are, for the most, part not subjected to virginity testing which falls predominantly on girl children and women, its existence is discriminatory. This double standard was explained in detail in chapter 2, regarding a study in KwaZulu-Natal as the province which predominantly practises virginity testing.<sup>270</sup>

In the international human rights context, an act similar to virginity testing, namely vaginal finger inspection, was equated to rape and torture more than a decade ago. In the case of *Miguel Castro Prison v Peru*,<sup>271</sup> the court held that:

The act of submitting a female detainee to a vaginal finger 'inspection' carried out by a number of individuals at a police hospital, constituted sexual rape and due to its effects also constituted torture. This practice was further held to be in violation of the right to

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<sup>268</sup> See the discussion of the UDHR in chapter 3 para 3.2.1.

<sup>269</sup> See the discussion of CEDAW in chapter 3 para 3.2.4.

<sup>270</sup> See Leclerc-Madlala fn 102.

<sup>271</sup> No. 160, Inter American Court of Human rights, November 25, 2006.

humane treatment provided in the American Convention of Human Rights<sup>272</sup> and of the Inter-American Convention to Prevent Torture to Detainees.<sup>273</sup>

South African courts have an obligation to take into consideration international law when interpreting rights contained in the Bill of Rights.<sup>274</sup> With the scourge of sexual abuse cases which have become an indictment on society and South Africa's judicial system, virginity testing could thus also be condemned as an act constituting a criminal sexual offence,<sup>275</sup> as well as torture.

#### **4.3.2. Virginity test vis-a-vis national law**

The provisions of the Children's Act regulating the practice of virginity testing to be in line with constitutional values are currently not adhered to. The practice of virginity testing at the moment is performed on girls younger than the requisite age.<sup>276</sup> It would appear that most girls being tested are under-age, so their consent is of doubtful nature.<sup>277</sup> In some instances, it is further reported that girls as young as five are being tested.<sup>278</sup> There is often an element of coercion on account of pressure from either the family or other authority figures. Involuntary testing is corroborated where girls announce that they are sent by their mothers.<sup>279</sup> The presumption is also drawn that if one refuses to undergo the test it simply confirms that she is not a virgin.<sup>280</sup>

Under-age virginity testing can only persist because it has been defended as a cultural practice serving a functionalism theory, which however was refuted by the Constitutional Court, as illustrated in Chapter 1.<sup>281</sup> Some questions arise from the continued virginity

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<sup>272</sup> OAS- Organisation of American States 1969 <http://www.refworld.org/docid/3ae6b36510.html>.

<sup>273</sup> OAS-Organisation of American States 1985 <http://www.refworld.org/docid/3ae6b3620.html>.

<sup>274</sup> Section 39(1) (b) of the Constitution provides that, when interpreting the Bill of Rights, a court must consider international law.

<sup>275</sup> In terms of section 3 of Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, hereinafter referred to as the Sexual Offences Act, virginity testing may qualify as a form of rape, since the definition of sexual penetration is very wide and includes "any act which causes penetration to any extent whatsoever by ... any other part of the body of one person or, any object, ... into or beyond the genital organs of another person" (s 1).

<sup>276</sup> See Durojaye fn 7 316.

<sup>277</sup> See Bennett *et al* fn 26.

<sup>278</sup> See Leclerc-Madlala fn 102 314.

<sup>279</sup> See George fn 19.

<sup>280</sup> *Ibid.*

<sup>281</sup> Nnazor & Robinson 2016 *MJSS* 156; the approach discussed in chapter 1 with reference to the case of *MEC for Education, KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) para 107, where the court found that: "Culture serves to give meaning to the lives of individuals, thereby helping to fulfil the overall goals of human dignity and the 'unity and solidarity amongst all who live in our diverse society. The jurisprudence of this Court makes it clear that in advancing the equality right, it must be determined by

testing that take place annually and includes, *inter alia*, whether virginity testing should be protected under the constitutionally protected cultural tradition, given its demise in the last century.<sup>282</sup> Further, it can be asked whether it would not be “closer to the truth to say that it is simply proclaiming a cultural identity and reassuring security of returning to the past”.<sup>283</sup>

The answers to these questions are that, since there is no factual, historical, and legal value added to the participants’ lives, it cannot enjoy constitutional protection as a cultural and religious tradition protected by national law, namely the Children’s Act. This calls for the amendment of section 12 of the Children’s Act, with the aim of prohibiting virginity tests for girl children. This prohibition should be aided by productive education campaigns to fight traditional and family demands on girls and young women supporting this practice.<sup>284</sup> By doing so, South Africa would comply not only with its own constitutional values but also with its international obligation in this regard.<sup>285</sup>

According to the Children’s Act, virginity tests are to be carried out on children over the age of sixteen, and children, in contrast with section 12(8), include both male and female children.<sup>286</sup> Undeterred by the section including both genders, typically the testing targets girl children whilst boys are largely excluded. The girls’ rights to equality are violated by this practice being often applicable to girls and young women only.<sup>287</sup> The perception then becomes that virginity testing perpetuates sexual double standards, where boys experiment with multiple sexual partners to show virility and the same perception expects girls to be sexually passive and be virgins.<sup>288</sup> The fact that boys and young men are not subjected to virginity testing raises the issue of differentiation and gender inequality.<sup>289</sup> Similarly, this leads to policing of girls and women bodies which is a manifestation of patriarchy, and places girls and women as second-class citizens and

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reference to our history and the underlying values of the *Constitution*. It emphasised that the main objective of the *Constitution* is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law and a democratic ethos and human rights.”

<sup>282</sup> See Behrens fn 2 178.

<sup>283</sup> See Mbugangizi fn 27 173.

<sup>284</sup> See CEDAW fn 189 para 21.

<sup>285</sup> Para 21.

<sup>286</sup> Section 12(8) of the Constitution is very specific when it refers to the cultural practice of circumcision and it provides for circumcision of male children in contrast to virginity testing on children in section 12(5).

<sup>287</sup> Van der Zalm 2008 *Emory Int’l L. Rev* 892.

<sup>288</sup> See Durojaye fn 7.

<sup>289</sup> See Durojaye fn 7 238.

this undermines the inherent dignity that they, as human beings, are born with.<sup>290</sup> This is not in accordance with the equality clause, section 9 of the Bill of Rights, and is sexist.

Despite the Children's Act, results of the test are publicly made known without the consent of the child affected.<sup>291</sup> In addition, despite this prohibition, some of the advocates of virginity testing have vowed publicly that they would, as this is part of tradition, continue to mark the body to show whether the child has passed or failed the test.<sup>292</sup> A white clay spot symbolised those who have passed the test whilst a red clay dot symbolised that one is a non-virgin.<sup>293</sup> The so-called failed result would bring shame and rejection to the recipient and this undermines their right to dignity.<sup>294</sup> As mentioned earlier in chapter 2, the testing takes place in an annual reed dance which is held publicly and the public display of the results has never been frowned upon perhaps because this is seen as part of the cultural celebrations.

Virginity testing does not only discriminate between girls and boys, but discriminates in terms of the societal stigma between the girls – those who have passed the test and those who have failed the test.<sup>295</sup> This was illustrated recently when the passing of virginity testing was used as a condition for young women in the UThukela District Municipality in KwaZulu-Natal, to receive a tertiary bursary.<sup>296</sup> The above condition attached to the bursary is twofold. Other than the requirement that the recipient must first be a virgin to receive the bursary; for the bursary to continue to be in place for the duration of the studies; the girls or young women shall be subjected to virginity testing every holiday (University recess); to ensure that they had not engaging in any sexual activity in the intervening time.<sup>297</sup> This would be traumatising, as the testing itself, which is dependent on the presence of the hymen, has already been declared to be flawed.<sup>298</sup>

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<sup>290</sup> See Mdledle fn 214.

<sup>291</sup> Section 12(3) refers to results not to be made public, whereas section 12(4) says the body of the girls tested should not be marked to reflect the results of the tests.

<sup>292</sup> See Le Roux fn 15 17 & section 12(6) of the Children's Act.

<sup>293</sup> *Ibid.*

<sup>294</sup> See Durojaye fn 7 241.

<sup>295</sup> Ramnath *Are traditional African practices relating to child marriages in the face of HIV/AIDS in violation to the South African legal framework?* 31.

<sup>296</sup> Doodnath 2016 <http://www.politicsweb.co.za/opinion/keeping-of-virginity-in-exchange-for-higher-education>.

<sup>297</sup> See Radufeen fn 67.

<sup>298</sup> See George fn 19.

The condition is not only a limitation on non-virgins' right to education, but seems to suggest that only Zulu girls and young women in that municipality are eligible for the bursary to the exclusion of all others.<sup>299</sup> This is an illustration that virginity testing encroaches upon the equality clause unjustifiably. As a result, the Commission for Gender Equality has recently made a determination rejecting the use of virginity testing as a criteria to award girls bursaries in KwaZulu-Natal.<sup>300</sup> Its findings include:

- While it welcomes and appreciates the initiative to encourage the girls to pursue their education, and the effort to dissuade them from engaging prematurely in sexual activities that could expose them to health risks such as HIV/AIDS infections and prevent them from pursuing their education, the Commission finds that the decision to issue study bursaries to female students based on their virginity is a discriminatory practice. It violates their Constitutional right to equality, dignity and privacy.
- Culture and practice should not be used as a factor to exclude those who do not belong or subscribe to such practices from receiving or benefiting from services provided by the government.
- The "Maiden Bursary" Scheme amounts to gender discriminatory practice against the girls as it creates an additional burden on them to shoulder the responsibility of refraining from sexual activity, without imposing the same burden of responsibility on boys through a similar Bursary Scheme.
- Finally, the Commission for Gender Equality finds that the UThukela District Municipality has failed its Constitutional obligation in terms of section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights set out in the Bill of Rights.<sup>301</sup>

#### ***4.3.3. Virginity test vis-a-vis the limitation clause***

Virginity testing, as a custom protected by the right to culture, can only survive constitutional scrutiny if it is proven to be of significance to the community that practices it and does not infringe upon other rights in the Bill of Rights.<sup>302</sup> In KwaZulu-Natal, virginity testers find their vindication for the practice in the section that provides for the right to of a group to enjoy their culture. However, there must be a balancing of

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<sup>299</sup> Doodnath A 2016 <http://www.hsf.org.za/publications/hsf-briefs/maidens-bursary-scheme-policy-ruled-unconstitutional-by-the-commission-for-gender-and-equality>.

<sup>300</sup> Commission for Gender Equality 2016 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/161025cge/pdf>.

<sup>301</sup> See Commission for Gender Equality above & section 7(2) of the Constitution, which provides that "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

<sup>302</sup> See Le Roux fn 15 19.

rights in accordance with the provisions listed in the limitations clause of the Constitution (chapter 3).<sup>303</sup> Virginity testing a cultural practice is differentiation that amounts to discrimination. The discrimination further amounts to unfair discrimination because it impacts on several constitutionally protected rights of the girls tested, illuminated below. The unfairness of the limitation is demonstrated below in terms of the two-stage analysis laid down above in terms of the *National Coalition for Gay and Lesbian Equality* case.<sup>304</sup>

#### 4.3.3.1. Virginity testing as a form of discrimination

The nature of virginity testing as a cultural right provided for in the Children's Act, *inter alia*, limits the rights to equality, dignity and security (discussed in chapter 3) in the Constitution, and therefore demands that we ask ourselves the following questions. Firstly, whether testing has a purpose and perhaps provides girls and women with some form of respect? Secondly, if virginity test upholds any values and if it, amongst other things, preserves girls and young women for marriage, is the same also expected of the boys and men who will marry them? The answers to both questions are clearly in the negative. Virginity testing is therefore discrimination based on specified grounds provided for in section 9(3) of the Constitution, namely, gender, sex, and culture.

The duty to preserve, promote, and protect equality is entrenched in the Constitution, therefore certain practices and social norms established in civil society must be subject to gender equality. Virginity testing poses a limitation on the rights to bodily integrity, dignity, and equality of girls and young women, and there is no relation between the limitation and its purpose. Children are a valuable part of the community and society and deserve special protection in the form of less restrictive means to achieve the purpose of the limitation. However, the coercive and physically invasive nature of the practice, the way in which private and personal matters are attended to in public as submitted in chapter 2, and the possible consequences of a "failed" test, all amount to an impairment of the right to dignity of these vulnerable girls. Virginity testing does not protect the rights of children and therefore does not serve any purpose.<sup>305</sup> To the

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<sup>303</sup> See chapter 3 para 3.4.2.7.

<sup>304</sup> See the analysis as summarised in chapter 3 para 3.4.2.7.

<sup>305</sup> *Ibid* 349.



contrary, children are burdened by a cultural practice, the benefits of which, if any, are outweighed by the harmful consequences already discussed in chapter 2.<sup>306</sup>

Opting to practice virginity testing as a tradition, belief, and custom should not be difficult to decline as the testing limits the rights to equality, dignity, privacy and freedom and security of the girls tested (discussed in chapter 3). The testers, further, cannot demonstrate that it is in the best interest of the girl children tested, as they are then predisposed to some forms of abuse whether they pass or fail the test.<sup>307</sup> Accordingly, the best interest of the child, as provided for in section 28, protects the human rights of the child that supersede that of the cultural and religious groups. Furthermore, there is no evidence that the purpose of the practice, which is to prevent HIV/AIDS and pregnancy and promote sexual morals in girls and young women, has been achieved.<sup>308</sup>

#### 4.3.3.2. Virginity testing amounts to unfair discrimination

Virginity testing does not only differentiate between genders but also between the girls who are tested. South Africa is a key proponent on the elimination of all harmful practices to girls and women, with specific reference to female circumcision, and early and forced marriages.<sup>309</sup> Girls as virgins are treated as property that can be exchanged to further another family name and their humanity cannot be expressed as heterosexual people whose duty is to reproduce another family line as the patriarchal history of this practice suggest.<sup>310</sup> This is disturbingly unfair on the female children and women and does not only infringe on the right to equality, but also the dignity of girls and young women tested. The right to dignity has been explained (in chapter 3) not only as inherent in every being born, but as a mother-right from which the right to equality and other rights are derived.<sup>311</sup> Dignity was also emphasised in an earlier

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<sup>306</sup> See harmful consequences of virginity testing in chapter 2 para 2.6.

<sup>307</sup> See Le Roux fn 15 and Durojaye fn 7.

<sup>308</sup> See Durojaye fn 7 242.

<sup>309</sup> See Le Roux fn 15 68.

<sup>310</sup> Fuller 2008 *African women's unique vulnerabilities to HIV/AIDS: communication perspectives and promises* 61.

<sup>311</sup> See chapter 3 para 3.4.2.2.

case of the Constitutional Court, in *S v Makwanyane and Another*, where the Court stated that:

The importance of dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of other rights that are specifically entrenched.<sup>312</sup>

In using the rationale in *Makwanyane*, justifying virginity testing on the ground that it is an established cultural practice, cannot then be said to be a worthwhile and important tradition in a Constitutional democracy.<sup>313</sup>

The limitation on the rights to equality and dignity of girls cannot be justifiable noting the judgment in *Mabuza v Mbatha*,<sup>314</sup> as highlighted in chapter 3, where the court said: "...any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny". The courts have a constitutional obligation to develop African Customary law, particularly given the historical background referred to in chapter 2. The fact that the constitutional rights of girls and young women to dignity and equality are infringed by virginity testing places justification even further beyond the bounds of possibility.<sup>315</sup>

Given the importance of the rights that are infringed by virginity testing, it is justifiable that section 36 limits the testing (right to culture) and should not be allowed to continue as far as this practice is concerned. The balancing all the above factors, and considering that the practice does more harm than good, it is evident that there is no justification for the infringement of the girls' rights and perpetuation of virginity testing.

#### **4.4. Conclusion**

The practice of virginity testing as a part of tradition, culture, and custom, which is regulated by Children's Act, has been evaluated against the Constitutional and human rights standards. More importantly virginity testing *vis-à-vis* both the national and international law standards has been shown to be a form of differentiation as it is practiced on females and female children. It thus amounts to unfair discrimination and

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<sup>312</sup> 1995 (6) BCLR (CC) para 185 & another discussion of *Makwanyane* in chapter 1 para 1.6.

<sup>313</sup> Para 185.

<sup>314</sup> 2003 (7) BCLR 743 (CC) para 30 & a discussion of *Mabuza* in chapter 3 para 3.4.2.5.

<sup>315</sup> See The National Coalition for Gay and Lesbian Equality fn 240 para 57.

cannot be justified as a reasonable limitation in terms of the limitation clause. Virginity testing erodes fundamental rights of girls and could not be justified under the two-stage approach. It is a gross limitation of these rights and cannot continue and thus its regulation under the Children's Act calls for law reform.

Comparative analysis in chapter 5 includes Senegal, which shows a significant departure from the approach in Zimbabwe and Nigeria, where virginity testing is still prevalently practiced. South Africa can seek guidance from Senegal in terms of legal reform and the involvement of NGOs in abolishing and eradicating virginity testing.

## CHAPTER 5

### A COMPARATIVE PERSPECTIVE OF VIRGINITY TESTING IN SELECTED AFRICAN COUNTRIES

#### 5.1. Introduction

Virginity testing is a cultural practice which is common and prevalent in some sub-Saharan countries, specifically Zimbabwe and Nigeria.<sup>316</sup> As noted in the previous chapter, the study has highlighted the harmful and unconstitutional nature of the practice of virginity testing. Despite Zimbabwe and Nigeria signing international instruments that prohibit virginity testing, the practice is still prevalent in those countries. However, it is commendable that countries such as Senegal have abolished the practice of virginity testing in light of it being deemed to be harmful and a violation of international law. The purpose of this chapter is to carry out a comparative analysis using Zimbabwe and Nigeria to show how prevalent the culture of virginity testing is in Africa and to use Senegal as the best practice to inform South Africa to abolish the practice of virginity testing.

#### 5.2. Zimbabwe

##### 5.2.1. *The prevalence of virginity testing*

Virginity testing is based on tradition, culture, religion, and superstition and is often perpetrated against very young children or infants in Zimbabwe.<sup>317</sup> It is clear that children and infants lack the capacity to consent or refuse consent to harmful practices like virginity testing.<sup>318</sup> Accordingly, parental powers or rights over children in this country allow for the perpetuation of virginity testing, as they directly consent to girl children being tested for reasons that will be discussed in this chapter. This is in contravention of Article 14 of the CRC, which provides that only the child's own independent right to religious freedom, and not the right of the parents' beliefs, can justify the perpetuation of virginity testing on a child.<sup>319</sup>

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<sup>316</sup> Kandala and Komba 2015 *Am.J.Trop.Med.Hyg.* 838; Odeku *et al* 2009 *JPA* 55.

<sup>317</sup> Karombo 2004 <http://www.ipsnews.net/2004/rights-zimbabswe-virginity-testing-srips-girls-of-their-dignity-groups>.

<sup>318</sup> Sarraouh 2012 [http://www.crin.org/en/docs/InCo\\_Report\\_15Oct.pdf](http://www.crin.org/en/docs/InCo_Report_15Oct.pdf).

<sup>319</sup> Article 14 Convention of the Rights of Child.

The Girl Child Network Organisation in Zimbabwe has identified virginity testing as a significant problem, where girls as young as 5 years old are tested.<sup>320</sup> There is no reported case, however, where a girl of 5 years has been found to have failed the test.<sup>321</sup> The significance being that, should a teenage girl fail the test, she may not be married and if she is fortunate enough to get married, the payment of her *lobola* as a bride will be lower.<sup>322</sup> This obviously brings shame and ridicule to the family of the girl. The double standard here is that those involved in the breaking of the virginity (boys) are never identified and can go and marry other virgins in future.<sup>323</sup> Accordingly, virginity testing is fuelled by the power that is associated with the cultural connotations of virgin purity and is reported that some Zimbabwean men become excited to acquire young virgin girls, and are willing to pay a very high price for these young girls.<sup>324</sup>

Consequently, this is promoted in apostolic sectors (a group of a Christian churches who practice virginity testing as part of a church belief/religion), where girls have their virginity tested almost every month and sometimes as frequently as every week.<sup>325</sup> This has become an everyday phenomenon where mothers, who are members of these sectors are so obsessed that they will inspect their girl-children any time that such a child arrives even five minutes late at her home.<sup>326</sup> This fixation of checking that girls remain virgins, is often fuelled by “the perceived financial gains to be reaped from payment of *lobola* which also encourages these parents to marry off their children at a very early age”.<sup>327</sup> Being a virgin has become an essential part of a girls’ identity and families and communities place a great value and monetary price on being a virgin.<sup>328</sup> As a result, in 2005 traditional leaders reportedly issued directives in their respective jurisdictions for Zimbabweans to resume virginity ceremonies, which are normally held around a damn.<sup>329</sup>

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<sup>320</sup> Kibaru-Mbae 2016 <http://www.svri.org/sites/default/files/attachements/2016-07-16/Draft/Sub-Sharan-Africa/Literature.pdf>; See also Karombo fn 312.

<sup>321</sup> *Ibid.*

<sup>322</sup> See Karombo fn 312; *Lobola* is defined as payment in money by a son in law or his family representative to the father or father’s representative of a girl to be given off as a bride.

<sup>323</sup> *Ibid.*

<sup>324</sup> Hodzi *Paedophilia not ‘child marriage’: a critical analysis of ‘child marriage’ in the apostolic sects in Zimbabwe* 30.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> Sibanda 2011 <http://www.researchandadvocacyunit.org/system/files/Married-too-soon/Zimbabwe.pdf>.

<sup>328</sup> Hanzi *Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: a human rights perspective* 37.

<sup>329</sup> *Ibid.*

### 5.2.2. Legal frameworks

Refuge should be sought in the law, as the family as an establishment is responsible for the continuation of child abuse and exploitation of the girl child in Zimbabwe, using cultural practices and African religion as a survival tactic.<sup>330</sup> A compelling force behind the perpetuation of virginity testing, is older men who have some form of status in tribal and local communities.<sup>331</sup> These men are the primary beneficiaries of the practice of virgin marriages; and these virgins are seen as assets symbolising accomplishment, success, and masculinity.<sup>332</sup> This is happening, notwithstanding that Zimbabwe has ratified international instruments that protect the girl child against sexual abuse.

Against this background, virgin marriages are tantamount to rape, as young girls cannot have the capacity to refuse sexual advances from their older husbands, especially since the latter are in control of familial resources.<sup>333</sup> It is about time that Zimbabwe shows a commitment to protect children against sexual abuse by enacting laws that criminalise this kind of abuse.

#### 5.2.2.1. Domestic Violence Act

In 2007, the promulgation of the Domestic Violence Act (hereafter DVA)<sup>334</sup> was the first legislation to make specific reference to cultural or customary rites or practices, like virginity testing, as being discriminatory or degrading to women.<sup>335</sup> Section 3 of the DVA criminalises forced virginity testing, but not much has been done in criminalising virginity testing, which is prevalently practised in rural parts of Zimbabwe on a wide scale.<sup>336</sup> This is so probably because this section only identifies forced virginity testing though generally virginity testing is allowed, and the element of consent can always be claimed by the advocates of virginity testing. It is difficult to conclude that children as young as 5 years old have the legal capacity to consent to virginity testing. This can therefore be understood as forced virginity testing in this context and should be criminalised. Perhaps girls and young women could then seek

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<sup>330</sup> *Ibid.*

<sup>331</sup> Avalos *et al* 2015 *FILJ* 647.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid* 648.

<sup>334</sup> Act 24 of 2006.

<sup>335</sup> Chirawu-Mugomba 2016 *ZELJ* 3.

<sup>336</sup> See Hanzi fn 325.

some form of solace from section 3 after all and virginity testing could implicitly be defined as an act of domestic violence since it provides that:

(1) For the purposes of this Act, domestic violence means any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes the following:-

(l) Abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women-

(i) Forced virginity testing.<sup>337</sup>

Gender-based violence is seen in acts of domestic violence where rights are violated because of physiological make-up and gender roles performed.<sup>338</sup> Cultural and traditional practices have continued to subject women to positions of subservience to their male counterparts and make them vulnerable.<sup>339</sup> Traditional practices which violate girls and women have been listed as: “forced virginity testing, pledging of girls or women for the purposes of appeasing spirits, and child marriages”.<sup>340</sup>

These practices, have been an excuse for violations, as in cases of sexual violence where virginity testing is performed.<sup>341</sup> Similarly, in these cases individual police officers seemingly do not take action towards the perpetrator of sexual violence, as they consider it as an issue that could be best resolved at home.<sup>342</sup> There is also pressure from relatives of the complainant for the latter to drop the case.<sup>343</sup> Therefore, there are challenges for women to exercise this right, as they have little or no confidence that their complaints will be taken seriously.<sup>344</sup>

Section 3 resonates with the General Recommendation of the Committee on the Elimination of All Forms of Discrimination against Women, which defines gender-based violence as violence that is directed against a woman because she is a woman or that affects women disproportionately.<sup>345</sup> Virginity testing is thus a form of gender-

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<sup>337</sup> Section 2 of the DVA.

<sup>338</sup> See Chirawu-Mugomba fn 332.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> Koi Hon Chu 2011 <http://www.osisa.org/buwa.women-rights/regional/women-and-law-missing-links>.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> General comment No 19 (1992) of the Committee on the Elimination of Discrimination against Women.

based violence which arises from social, cultural, and religious practices that subordinate girls and young women. In addition, Article 4 of the United Nations Declaration on the Elimination of Violence against Women, provides that states should not invoke any custom, tradition, or religious consideration to avoid their obligation to eliminate violence against women.<sup>346</sup> Although, section 3 is laudable and provides that a person who infringes its provisions will be found guilty of an offence, no perpetrator has ever been prosecuted to date.<sup>347</sup> This is inexcusable, as Zimbabwe has ratified, amongst others, the following treaties in the context of this discussion: Convention on the Rights of the Child (1989), ratified 1990; African Charter on the Rights and Welfare of the Child (1990), ratified 1995; Convention on the Elimination of all Forms of Discrimination against Women (1979), ratified 1991; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, known as the African Women's Protocol, ratified 2008.

Section 3 should be implemented, although there will be a need for training and gender-sensitisation programmes directed at the law enforcers and the community, so that obligations and rights may be understood by all parties involved. The training would follow the Protocol on the Rights of Women in Africa; which mandates that Zimbabwe must ensure, amongst others, that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.<sup>348</sup> In addition, religious and customary leaders who are called in customary courts to give evidence and adjudicate on legal disputes should be trained and sensitised regarding gender-equality rights.<sup>349</sup>

The above would be in line with the right that girls and young women have to a legal remedy for human rights violations in terms of Article 7 of the Protocol. It is time that girls and women are able to claim their rights, as the Protocol further directs Zimbabwe to take measures to ensure "effective access by women to judicial and legal services including legal aid," and recommends that they support "local, national, regional and

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<sup>346</sup> Coomarasway 1996 <http://hrl://www.library.umn.edu/commission/themtics2/s3-wom.htm>.

<sup>347</sup> Mukombachoko *The best interests of the child in cultural and religious practices in respect of child marriages* 19.

<sup>348</sup> Article 5 of the African Women's Protocol.

<sup>349</sup> Article 5.



continental initiatives directed at providing women access to legal services, including legal aid”.

The CEDAW committee:

Expressed its serious concern about the persistence of harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities and identities of women and men in all spheres of life, as well as the state parties’ limited efforts to address such discriminating practices.<sup>350</sup>

These practices include polygamy, bride price (lobola), virginity testing, and witch hunting. The committee recommended that Zimbabwe, in order to address these negative patriarchal and discriminatory practices, should embark on intensive education and awareness programmes and implement prohibition of the practice:

- (a) Put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, in conformity with the provisions of the Convention. Such measures should include efforts, in collaboration with civil society and community and religious leaders, to educate and raise awareness of this subject, targeting women and men at all levels of the society;
- (b) More vigorously address harmful practice by expanding public education programmes and by effectively enforcing the prohibition of such practice, in particular, in rural areas.<sup>351</sup>

CEDAW committee has further recommended the introduction of programmes on legal education, gender sensitisation, and human rights for judges.<sup>352</sup> This can be done in collaboration with relevant civil societies, non-governmental organisations, and religious leaders in order to create an enabling environment for legal reform, effective law enforcement and literacy.<sup>353</sup> Similarly, the CEDAW committee agrees with the Protocol, mentioned above, that Zimbabwe has to abolish the hindrances that women may be confronted with in accessing justice and in addition implement measures to guarantee women’s entry to civil courts, including raising awareness on available legal remedies and the provision of legal aid.

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<sup>350</sup>ZimbabweYouthCouncil2014[https://www.unicef.org/zimbabwe/Report\\_on\\_Harmful\\_Social\\_and\\_Practices.pdf](https://www.unicef.org/zimbabwe/Report_on_Harmful_Social_and_Practices.pdf)

<sup>351</sup> *Ibid.*

<sup>352</sup> CEDAW/C/NER/CO/2 38<sup>TH</sup> SESSION held on 11th June 2007, para 14.

<sup>353</sup> *Ibid.*

Despite progressive legal frameworks that may be available both nationally and internationally, they are not implemented. This could be because girls and women on the grassroots are not aware of them, or enforcement is inaccessible. Other countries can learn from Senegal, where reports show that public education campaigns have been instituted, and as a result there has been an acceptance of new laws, which promote the rights of girls and women.<sup>354</sup> Whilst these campaigns have been undertaken by NGOs and other community groups, governments as well, have a responsibility to implement public education programmes. Zimbabwe can work with, and provide support to NGOs and other community groups. The legal duty and responsibility to implement public education programmes is derived from the international instruments, ratified by it.<sup>355</sup>

#### 5.2.2.2. The Constitution

During the year 2013, Zimbabwe went through a constitutional reform process and, as signatory party to various international human rights treaties, this was its chance and opportunity to include women's rights.<sup>356</sup> This Constitution,<sup>357</sup> just like the South African Constitution,<sup>358</sup> gives its citizens the right to participate in their cultural practices. It favours a dualist approach in terms of customary law and international law.<sup>359</sup> International treaties can only be part of Zimbabwe's national legal framework if the treaty is not only ratified but incorporated into a domestic law. Consequently, this poses a disadvantage for girls and women in Zimbabwe, in that although the rights may exist on paper, they cannot be realised where they are not provided for.<sup>360</sup>

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<sup>354</sup> See Koi Hon Chu fn 339.

<sup>355</sup> Zimbabwe ratified several instruments as discussed earlier in this chapter.

<sup>356</sup> Constitution of Zimbabwe Act 20 of 2013.

<sup>357</sup> Section 63(b) of the Constitution of Zimbabwe states that "to participate in the cultural life of their choice" but no person exercising these rights may do so in a way that is inconsistent with chapter 2 (fundamental human rights and freedoms).

<sup>358</sup> Section 30 provides that "everyone has the right to use their language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights". The Constitution of Zimbabwe states with regard to culture in section 16(1): "The State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans".

<sup>359</sup> Chinomona *Analysing the right of women in the new Constitution of Zimbabwe with reference to International 2*.

<sup>360</sup> *Ibid* 14.

Although the new Constitution is underpinned by values and principles that promote gender equality, cultural practices like virginity testing continue to persist in Zimbabwe.<sup>361</sup> Legislation alone cannot change social behaviour that has seen the persistence of virginity testing and other practices.<sup>362</sup> Although section 80(3) provides that all laws, customs, traditions, and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement; harmful cultural practices, like virginity testing, continue unabated in Zimbabwe. This is so mainly because of the dualist approach of the Zimbabwean legal system.<sup>363</sup> This gives the government, the liberty to choose whether to transform international law into municipal law. Girls and women continue to live under customary law where the strong influence of families and communities make and enforce their own patriarchal law.

Section 47 on the Constitution provides that application of the declaration of rights entrenched by chapter 4 does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with the Constitution. This section can be used because there is no consent on the part of the young girls tested, and this should be interpreted as forced virginity testing, as provided by sections 3 of the DVA discussed above.

Zimbabwe, observing and respecting international law, should take heed of the African Women's Protocol that was discussed in developing grassroots strategies to end virginity testing. The guideline in the Protocol provides for four different strategies that include public awareness, legislative measures, victim support and protection:

Firstly, public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programs, must be created by state parties. Secondly, through legislative measures backed by sanctions, they must prohibit, all forms of female genital "mutilation" and all other practices in order to "eradicate" them. Thirdly, state parties should provide support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting. Fourthly and lastly, state parties should protect girls and young women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.<sup>364</sup>

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<sup>361</sup> See Chirawu-Mugomba fn 332.

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.*

<sup>364</sup> Article 5 of the African Women's Protocol.

## 5.3. Nigeria

### 5.3.1. *The prevalence of virginity testing*

Girls and women in Nigeria are culturally, economically, legally, and socially at a disadvantage because of the deeply entrenched patriarchal nature of the Nigerian society.<sup>365</sup> Patriarchy is the basis of cultural practices and traditions like virginity testing, which is a form of abuse of reproductive rights and other rights of girls and women.<sup>366</sup> Nigeria is regulated by a system of male authority which oppresses women throughout its social, political, and economic institutions.<sup>367</sup> Patriarchy derives power from men's greater access to, and mediation of, the resources and rewards of authority structures inside and outside home".<sup>368</sup>

Virginity testing is linked to the phenomenon of child brides since they occur in patriarchal societies where parents and elders play domineering roles in choosing spouses for their children.<sup>369</sup> Culture in these societies places significance on a girls' virginity, which determines family honour. Accordingly, parents marry off their daughters at a very tender age to ensure they marry as virgins for them to be able to hold on to the family honour.<sup>370</sup> This is practiced within the Islamic culture, where it is believed that a girl at that stage in her life has a maximum childbearing potential.<sup>371</sup> Being a virgin is one of the essentials of a girl's status at marriage.<sup>372</sup>

Nigeria is therefore steeped in the notion of virgin brides where a blood-spattered garment on the wedding day has to be handed in to serve as evidence.<sup>373</sup> Virginity testing here is the embodiment of both the rural traditional culture and also the urban educated members of the Nigerian community.<sup>374</sup> Although a girl's virginity is said to bring honour to her family, it comes with inherent risks in African societies, under the notion that sex with a virgin, or a girl-child, can cure HIV/AIDS.<sup>375</sup> Virgins are, sadly,

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<sup>365</sup> Anyogu & Okpalobi 2016 *IJIRD* 2.

<sup>366</sup> *Ibid.*

<sup>367</sup> Fayokun 2015 <http://www.davidpublisher.com/public/uploads/>.

<sup>368</sup> *Ibid.*

<sup>369</sup> See Fayokun fn 363.

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> Alewo & Olang 2012 *ILR* 134.

<sup>373</sup> See Fuller fn 306.

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

more exposed to rape and sexual exploitation and since they are given over by their parents as child brides, as perpetual minors who do not have a life of their own but are transferred from the ownership of their fathers to that of their husbands. Girls and women here do not seem to have their humanity as individuals with rights, like their male counterparts, but appear to be family property to be given away at an exchange for value in money and be under the ownership of another family.

### **5.3.2. Legal frameworks**

Although Nigeria is a signatory and has ratified international instruments which protect the rights of girls and women, section 12 of the Constitution provides that no international instruments shall have the force of law in Nigeria, unless enacted and made part of Nigerian legislation.<sup>376</sup> The latter requires a two thirds majority of all Houses of Assembly in Nigeria to ratify before the enactment can happen. However, this may not happen, considering the multi-ethnic and religious structure of Nigeria which is steeped in patriarchal philosophy.<sup>377</sup> Accordingly, harmful practices to girls and women continue to be perpetuated under the guise that they are based on customary and religious law. It, therefore, places the burden of the family honour on the shoulders of girls and women excluding boys and men who are also citizens of Nigeria. Although signing international agreements may not bring an end to the issue of virginity testing, such agreements serve as a premise for the call to bring an end to virginity testing.

#### **5.3.2.1. The Constitution**

Section 42(1) of the Constitution provides for equality of treatment of all its citizens and further provides for the protection of the right not to be discriminated against.<sup>378</sup> Domestic law and policy may attest to equal rights of women, but on the ground girls and women are still subjected to cultural practices like virginity testing, and not much

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<sup>376</sup> The Constitution of the Federal Republic of Nigeria, 1999. Section 12(1) provides that “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly”.

<sup>377</sup> See Anyogu & Okpalobi fn 362 96.

<sup>378</sup> Section 42(1) provides that “A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject..”

has changed to reduce that vulnerability.<sup>379</sup> Although the Constitution does not expressly prohibit the practice of virginity testing, it is a discriminatory practice on the basis of gender, and is in violation of section 42(1). Virginity testing would therefore not pass constitutional scrutiny.

Virginity testing is also in contravention of Article 21 of the African Charter on the Rights and Welfare of the Child. The ACRWC directs Nigeria to:

Take all appropriate measures to eliminate harmful and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular –

- (a) Those customs and practices prejudicial to the health or life of the child; and
- (b) Those customs and practices discriminatory to the child on the grounds of sex or other status.<sup>380</sup>

Another provision impacting on the legality of virginity testing is found in Article 1(3) of the ACRWC, which clearly states that children's rights must be protected first, and then participation in custom, tradition, and cultural practices may follow. The rights to practice cultural practices of a community or society or family must be balanced against the non-discrimination, equality, and human dignity of the participants (girl/women) when virginity testing is considered.<sup>381</sup>

The delay in Nigeria in incorporating international law against harmful practices like virginity testing in their domestic law, is highlighted by Nigeria's sixth report on the Committee on the Elimination of Discrimination against Women.<sup>382</sup> This is notwithstanding, notably, that Nigeria ratified the UN Convention on the Elimination of All forms of Discrimination against Women in 1995.<sup>383</sup> It also ratified the Optional Protocol to the Convention on the Elimination of all forms of discrimination against Women in 2004. Furthermore, Nigeria domesticated the African Charter on Human and People's Rights in 2008.<sup>384</sup>

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<sup>379</sup> Berg 2013 <http://www.ncbi.nlm.nih.gov/pmc/article/PMC3817579>.

<sup>380</sup> Article 21(1)(a) of the ACRWC.

<sup>381</sup> Boezart 2013 [https://www.depositary.up.ac.za/bitstream/handle/2263/3294/Boezart\\_Building\\_2013.pdf](https://www.depositary.up.ac.za/bitstream/handle/2263/3294/Boezart_Building_2013.pdf).

<sup>382</sup> 41<sup>st</sup> session Nigeria 6<sup>th</sup> report 3 July 2008 available at <http://www.ohchr.org>.

<sup>383</sup> BIB CORI Thematic report 2012 <http://www.refworld.org/docid/51480062.html>.

<sup>384</sup> *Ibid.*

The report acknowledged the slow progress and the difficulties in the domestication of the CEDAW and its full implementation given the tripartite and complex legal system. As discussed above, the Constitution in Nigeria requires a two thirds majority vote of Parliament for any treaty to be incorporated as part of the legal order. Virginity testing continues in Nigeria as part of discrimination against girls and women.

Nigeria signed the African Women's Protocol on 16 December 2003 and ratified it on 16 December 2004 and is therefore bound by the Protocol's obligations.<sup>385</sup> One of the obligation is to include in its Constitution and national pieces of legislation, substantive equality between women and men and abandon those harmful practices which endanger general well-being of women and the health of women.

#### 5.3.2.2. Violence against Persons (Prohibition) Act

The Violence against Persons Prohibition Act (hereafter VAPP),<sup>386</sup> enacted by the Nigerian parliament in 2015, appears to be an endeavour to eradicate the prevalence of harmful traditional practices from Nigeria. Section 20 of the VAPP includes harmful traditional practices as an offence which is punishable in terms of this Act.<sup>387</sup> This section echoes The African Women's Protocol, and it appears that there is some political will on the part of Nigeria to implement and incorporate regional and international instruments into its national law. It, however, remains to be seen whether this provision will benefit the grassroots communities who may not have access to the judiciary. As discussed above, section 12 of the Constitution leads to such instruments having no force and effect unless incorporated into Nigerian national law.

Section 20 of the VAPP can be interpreted progressively by the judiciary to include virginity as part of the harmful practices and make it a punishable offence.<sup>388</sup> This would be similar to the South African judiciary prior to democracy, where it used to apply customs in court cases when a particular custom could pass the repugnancy

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<sup>385</sup> African Union 2017 [https://www.au.int/sites/default/files/treaties/7783-51\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa.pdf](https://www.au.int/sites/default/files/treaties/7783-51_protocol_to_the_african_charter_on_human_peoples_rights_on_the_rights_of_women_in_africa.pdf).

<sup>386</sup> VAPP Act of 2015.

<sup>387</sup> Section 20(1) of the VAPP provides that "A person who carries out harmful traditional practices on another commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine not exceeding N200,00.00 or both".

<sup>388</sup> Osakinle 2009 *JEAP* 115.

test, to not be offensive to the community values.<sup>389</sup> The Nigerian judiciary could make a finding that virginity testing “meted out on girls and women has failed the repugnancy test and therefore rendered obsolete if not punishable”.<sup>390</sup>

Just like in Nigeria, the challenge in implementing these progressive provisions in order to eliminate these cultural patterns is because of the general view held that such matters are family issues and private.<sup>391</sup> Accordingly, they should be kept out of the public eye and outsiders in the form of involving neighbours or senior relatives of the family can be invited to assist in settling the matter.<sup>392</sup> African girls and young women are, despite their human rights, “caught up in a time warp” and “imprisoned in a system which subordinates them and in which they have no real status”.<sup>393</sup>

## **5.4. Senegal**

### **5.4.1. *The prevalence of virginity testing***

The prevailing customs and morality in Senegal are that of an Islamic society, with the majority of the population being Muslims and the minority being Christians.<sup>394</sup> Accordingly, both Islam and Christian practices have mixed with traditional practices, which have a long history in the country’s territory.<sup>395</sup> The virginity norm is therefore promoted in a mixture of traditional and religious beliefs, from Islamic and Christian. A young girl or woman has a duty to prove that she is a virgin and that she has not been penetrated before. Therefore, the blood that a young woman is supposed to lose on the wedding night after the first penetration, is conclusive evidence of her virginity.<sup>396</sup> The next morning the aunt or elderly relative of the bride, must do an inspection to witness the blood stains on the white sheet the bride slept on the previous night. When blood stains are found, she is declared a virgin and there is a celebration with drums played and loud singing to honour the bride and her family.<sup>397</sup> However, should the bride not be able to prove her virginity, the groom can use this reason as a ground for

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<sup>389</sup> Abioye *Rule of law in English speaking African countries: the case of Nigeria and South Africa* 146.

<sup>390</sup> *Ibid.*

<sup>391</sup> Prinsloo 1998 AC 76.

<sup>392</sup> *Ibid.*

<sup>393</sup> De Koker 1997 JJS 116.

<sup>394</sup> Van Eerdewijk 2009 *Cont. Islam* 7.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*



the dissolution of the marriage. The parents of the bride, just like in other African countries, stand to benefit materially and in status when virginity is proven. The husband, in the context of the Senegalese marriage, gives money to the wife's parents and aunts to show his appreciation of his bride being a virgin and chaste until the wedding night.

Traditional cultural practices, like virginity testing, mirror values and beliefs that members of a community hold, stretching for periods of generations. Communities globally have traditional cultural practices, which may be beneficial to all members of a community, whilst other practices are harmful to a specific group in a community, such as girls and women. Virginity testing is a violation of international human rights law, it however persists because in some parts of Senegal it takes an aura of morality in the eyes of the testers and traditionalists.<sup>398</sup> This morality, however, is evident of the unfair double standards between genders, as girls and women are expected to have and maintain a high level of morality by being pure before marriage.<sup>399</sup> These virgins are married off to men, who have deflowered and impregnated a string of girls and who could already be infected with HIV/AIDS.<sup>400</sup> In Senegal, like Zimbabwe and Nigeria, virginity testing is prevalent on minors who are reportedly very young, and accordingly do not have the capacity to consent to the practice.<sup>401</sup>

Women in Senegal are disadvantaged in both economic and societal terms as a result of their status and the prevailing social and cultural norms.<sup>402</sup> Practices like virginity testing, continue as a result of social convention and the social pressure from family and communities to conform to what others do and have been doing, which becomes a tough motivation to perpetuate such practices.<sup>403</sup>

#### **5.4.2. Legal frameworks**

Senegal is one of the African countries that has made strides, legally and socially, in eradicating Female Genital Mutilation (FGM), as is discussed in detail in this section.

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<sup>398</sup> See Van Eerdwijk fn 390.

<sup>399</sup> Mohlaka 2000 "Virginity Testing".

<sup>400</sup> *Ibid.*

<sup>401</sup> See Kandala & Komba fn 313.

<sup>402</sup> *Ibid.*

<sup>403</sup> Giuliani 2006 <http://www.doc.sciencespo-lyan.fr/Resources/Documents/...MFE2006giuliani-c/.../giuliane-c.pdf>.

This is relevant, as the purpose of FMG is to preserve the virginity until a girl is married.<sup>404</sup> Although the advocacy on abandoning FGM started in the 1990's, it was only in 1999 that Article 299 of an amendment to the Criminal Code criminalised FGM.<sup>405</sup> The 2001 Constitution entrenched its commitment to adhere to human rights instruments that protect children and women.<sup>406</sup> Article 7 provides for equality for all and recognise the existence of sacred and inalienable human rights where all human beings shall be equal before the law.

Although statutory bans may exist, they are not enforced for fear of alienating powerful traditionalists and increasing tensions between practicing and non-practicing members of the same community.<sup>407</sup> In urban areas, laws protecting women are generally respected, whereas in rural areas the implementation thereof becomes a challenge.<sup>408</sup> The reason could be that very few women know their legal rights and, even if they do know, the community way of life is dominated by customary and religious practices.<sup>409</sup> In addition, Article 24 of the Constitution provides the right for religious institutions and communities to develop without hindrance. This is notwithstanding that criminalising testers and practitioners, which may include members of families as accomplices, may only lead to the testing and practices to be performed illegally and underground.

Senegal did not only affirm the human rights instruments in its constitution, it also ratified several human rights conventions which provide for the eradication of FGM and all harmful cultural practices. It has a legal obligation to adhere to the provisions of the following conventions which were also discussed in chapter 3.

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<sup>404</sup> 28TOOMANY 2015

[https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Senegal/senegal\\_country\\_profile-v1c\\_\(june2015\).pdf](https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Senegal/senegal_country_profile-v1c_(june2015).pdf).

<sup>405</sup> Article 299 of the Criminal Penal Code no.15/1999/QH10. It provides the integrity of the genital organs of a female person shall not be violated and any person who attempts to violate or violates the prohibition can be imprisoned for six months to five years.

<sup>406</sup> The preamble of the Constitution of the Federal Republic of Senegal, 2001. It mentions adherence to the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child amongst others.

<sup>407</sup> *Ibid.*

<sup>408</sup> See 28TOOMANY fn 400.

<sup>409</sup> *Ibid.*

Senegal is one of the twenty countries that have ratified the African Women's Protocol.<sup>410</sup> Article 14 of the Protocol, provides, amongst others, that states must guarantee that the right to sexual and reproductive health is respected and promoted. There is a link between virginity testing and the participant's right to sexual and reproductive health. When girls and women are tested in a group, there is no surety that the testers are using or changing gloves.<sup>411</sup> This may lead to transmission of HIV where the hands of testers are not washed, and gloves not changed.<sup>412</sup>

Article 5 of the Protocol directs states parties abandon and condemn all forms of harmful practices which negatively affect the human rights of practices which negatively affect the human rights of women and which are contrary to recognised international standards. Article 5(a), further, imposes on the states parties that they shall take all necessary legislative and other measures to eliminate such practices, including: creating public awareness in all sectors of society regarding harmful practices through information, through legislative measures backed by sanctions. Article 5(c) prescribes that the states provide necessary support to victims of harmful practices through basic services, such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting. Article 5(d) provides for the protection of women who are at risk of being subjected to harmful practices from all other forms of violence, abuse and intolerance.

The danger of virgins contracting HIV is greater, because of the possible rape of girls and women who have been declared virgins by persons wanting to cleanse themselves from HIV/AIDS. In turn, it will increase sexual exploitation and violence.<sup>413</sup> There are increasing numbers of reports of sexual violence against girls and young women by older men in HIV incidence countries in sub-Saharan Africa.<sup>414</sup>

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<sup>410</sup> Protocol to the African Charter on the Rights of Women (the African Women's Protocol), discussed in chapter 3 at para 3.3.3.

<sup>411</sup> Amollo *A critical reflection on the African women in Protocol as a means to combat HIV/AIDS amongst women in Africa* 42.

<sup>412</sup> *Ibid.*

<sup>413</sup> See Mubangizi fn 27 173.

<sup>414</sup> *Ibid.*

In 2000, the Minister of Family and National Solidarity initiated the tracking of the implementation of laws decriminalising FGM.<sup>415</sup> Since Senegal has a strong network of NGOs, the following initiatives were developed to fully eradicate the practice. The introduction, implementation and success of the NGO are discussed below.

#### 5.4.2.1. Non-governmental initiative: success of Tostan

Despite legislation prohibiting harmful practices that girls and women are subjected to in Senegal, these practices continued.<sup>416</sup> As a result, in 1991 Senegal initiated and developed Tostan, a non-profit and NGO registered in the United States but based in Thies, Senegal.<sup>417</sup> Tostan, as an international NGO, has as its mission and vision “to empower African communities to bring about sustainable development and social transformation based on respect for human rights”.<sup>418</sup> In addition, the purpose is to restore dignity to the Senegalese in introducing and implementing a non-formal legal programme in the language(s) spoken by the communities in Senegal.<sup>419</sup>

The meaning of the name Tostan is ‘breakthrough’ in *Wolof* (one of the dominant languages in Senegal), and it has been significant in education programmes that seek to build agreement, in the mediatory African-style, about why it is necessary to stop such practices.<sup>420</sup> It has since the year 1999 engaged 3791 Senegalese communities in programs educating them about harmful cultural practices and virgin marriages.<sup>421</sup>

Tostan uses informal, participatory methodologies to support village-based social change, in the areas of human rights and girl’s and women’s health.<sup>422</sup> In addition, Tostan does not tell communities to abandon harmful cultural practices, like virginity testing, but rather opts to educate communities concerning democracy and human rights in order that those involved understand the evil of these practices and abandon them voluntarily.<sup>423</sup> Its success is premised on a multi-sectoral approach with the involvement of a diversity of social and religious organisations, community forums and

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<sup>415</sup> See 28TOOMANY fn 400.

<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.*

<sup>418</sup> WHO [http://www.apps.who.int/iris/bitstream/handle/10665/77428/WHO\\_RHR\\_12.41\\_eng\\_pdf](http://www.apps.who.int/iris/bitstream/handle/10665/77428/WHO_RHR_12.41_eng_pdf).

<sup>419</sup> *Ibid.*

<sup>420</sup> See 28TOOMANY fn 400.

<sup>421</sup> See Avalos *et al* fn 328.

<sup>422</sup> Easton *et al* 2003 DP 445.

<sup>423</sup> *Ibid.*

a strong central state leadership.<sup>424</sup> Furthermore, in addition to a holistic and respectful approach (based on human rights), Tostan uses an organised model where they start with a few villages, targeting both genders, and then spread to other villages.<sup>425</sup>

The Tostan methodology includes certain key elements, such as creating fun activities using the language of members of the community to create trust and empower ordinary persons on grassroots level. Trained facilitators, aided by detailed training guides, present these participatory programmes by using song, theatre, books, storytelling, games, poetry, creative-writing, and flip-charts. Tostan facilitators build trusting relationships with participants by not imposing their beliefs on participants, but simply presenting information and allowing participants to make informed choices. Villagers themselves identify their communities' priorities by themselves. All Tostan trainers, supervisors and facilitators are Senegalese and train, teach, and communicate with each other in their own national language. The fact that staff members are local, makes Tostan's effort truly grassroots level and therefore empowering. Many women participants, upon completing the program in their village, are then inspired to join the Tostan team and are trained to facilitate another round of classes in their own or a neighbouring village.<sup>426</sup>

The project is more of an educational programme influencing policy change in terms of harmful practices against girls and women.<sup>427</sup> Tostan, as a project, came with a strategy approach which was threefold and advocated for the following:<sup>428</sup> Firstly, the approach was collective. It realised that families cannot just abandon a deep-rooted cultural practice if there is no collective will to change the incentive structures. One of the incentive structures is that testers were paid for each test they performed, so this was a livelihood to them.<sup>429</sup> If the law then bans the testing, they will obviously resist the ban since they depend on the money they make from this "now prohibited" testing.<sup>430</sup>

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<sup>424</sup> Putzel 2004 <http://www.rds.refer.sn/IMG/pdf/16PUTZEL.pdf>.

<sup>425</sup> *Ibid.*

<sup>426</sup> Gillespie&Melching2010<https://www.educationinnovation.org/sites/default/files/The%20Transformative%20Tostan.pdf>.

<sup>427</sup> See Mubangizi fn 27 44.

<sup>428</sup> See Easton *et al* fn 419 132.

<sup>429</sup> *Ibid.*

<sup>430</sup> See Mubangizi fn 27 44.

Secondly, the strategy adopted was grounded in the local context and evoked some of the strongest values and practices of Senegalese culture, which emphasise parental love. For example, Koranic observance to challenge virginity testing and other harmful practices, came as a movement of internal consistency and freedom rather than just an external legal condemnation. An expert on Islamic religion was also invited to educate girls and women that virginity testing and harmful practices are not Islamic dictations.<sup>431</sup>

Thirdly, the strategy was empowering, in that girls and women came forward to give personal testimony and the action going forward was left to the community to decide. Testimonies emphasise the rights of women and their health against harmful cultural practices. The strategy also involved men and educated them that they have a role in empowering their own community. Another scholar suggests that to eradicate virginity testing and other harmful cultural practices, one should understand the socio-cultural context in Senegal.<sup>432</sup>

#### 5.4.2.2. The implementation of the Tostan program

During the 1990's a human rights movement started in Thies and with time spread to more than 200 communities nationwide.<sup>433</sup> In the beginning it comprised gatherings of women who would reveal their challenges relating to education, environment, family, health, and law.<sup>434</sup> Many of these women were illiterate and did not have access to knowledge regarding their rights, and the duties that the law would attach to such rights.<sup>435</sup> It was a natural development that with time the sessions moved to inform and equip the participants of their rights in a form of a human rights education.<sup>436</sup> The emphasis, however, was teaching them that female genital cutting and related harmful cultural practices are a violation to their rights as women.<sup>437</sup> The participants and their facilitators then concluded that knowing their rights and violations were not going to be enough to eradicate these harmful practices.

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<sup>431</sup> *Ibid.*

<sup>432</sup> Zwart 2012 *HRO* 558.

<sup>433</sup> See Giuliani fn 399.

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*

Villages were mobilised to start public declarations, and members of these villages publicly declared that they are abandoning female genital mutilation.<sup>438</sup> It is noteworthy that with time “few men in these villages took part in these declarations”.<sup>439</sup> It is reported that by December 2004, “Tostan program has led to 18 public declarations by 1527 communities and since 1997 20% of the population in Senegal had stopped female genital cutting”.<sup>440</sup>

#### 5.4.2.3. Lessons learned from Senegal

Senegal is a case study that demonstrates that the law may serve as a guideline to eradicate harmful cultural practices, in their case, female genital cutting, and in terms of this study, virginity testing. It is, however, only possible when a combination of stakeholders, such as “individuals, families, communities, governments and non-government bodies” are involved to implement and enforce such a law.<sup>441</sup> In tackling an anti-virginity testing strategy, a holistic approach by government and the involvement of NGOs, is advocated. The approach may include the institutionalisation of virginity testing abandonment programs, where government should:

Be active in both policy and implementation; ensure an efficient coordination of the activities with all the government bodies and NGOs involved in virginity testing abandonment programs; include NGOs in the design, implementation and evaluation of programs and tailor the various approaches to specific audiences; ensure access to basic education and to reproductive health services for all women; and enact a law banning the practice only if there is some support for it as a result of the grassroots virginity testing abandonment programs.<sup>442</sup>

The Senegal strategy includes the design of and implementation of basic education and training programmes for girls and women, with the objective to highlight the harmfulness and unreliability of virginity testing, as well as the nature, prevention and treatment of sexually transmitted diseases.<sup>443</sup> In addition, girls and women are economically empowered by using both government and NGOs to:

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<sup>438</sup> See Gillespie 422.

<sup>439</sup> *Ibid.*

<sup>440</sup> See Guliani fn 399.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*

Support and finance micro credit programs for girls and women; support and finance job training for girls and women; increase girls and women's participation in and access to decision-making in government institutions at local and national levels.<sup>444</sup>

Finally, positive community values must be identified by NGOs working at the community level and used in their education programmes, and the need for strategic communication is acknowledged where information campaigns include all stakeholders, are well-researched, and make use of media in the wider sense. For example, virginity testing abandonment programs target specific audiences via mass media, using particularly creative areas such as folk media and drama.<sup>445</sup> For all the above to be effective, there has to be a continuous evaluation of its implementation.

Senegal is still quoted as a success story in Africa, with the eradication of practices like virginity testing. To emphasise the multi-sectoral approach mentioned, community leaders, *imams* (leaders of congregational prayer in a mosque) and aid practitioners work together in villages to ask and get collective pledges against performing virginity testing and other practices on their daughters.<sup>446</sup> These pledges resulted due to appeals to the girls' mothers' sense of compassion and love for their girls, accordingly, emphasising that virginity should not have to be required to achieve marital status and livelihood.<sup>447</sup>

## **5.5. Comparative contributions arising from African jurisdictions**

### *5.5.1. Rationale used to defend the prevalence of virginity testing*

Virginity testing has remained a controversial and sensitive subject in Nigeria, Senegal, Zimbabwe and South Africa. It is mostly practiced by communities who place a high premium on virginity in order for the girls' family to get a high value bride price, and communities who are Islamic, or communities that insist on African culture or religion. Advocates for it insist that, as a cultural and religious practice, its objectives are to:

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<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

<sup>446</sup> Sagita 2011 <http://www.fgcdailynews.blogspot.co.za/2011/10/>.

<sup>447</sup> *Ibid.*



- Return to the African culture, religion and tradition and that it serves as a marker of cultural identity;
- Promote morality of girls and women;
- Prevent teenage pregnancy;
- To detect cases of child sexual abuse and incest;
- To preserve virginity before marriage;
- To make sure that girls and young women are the gate-keepers of family honour.

It has been mentioned, however, that girls who pass the test become targets of male members of the community given advice by a traditional leader that they will be cured of HIV/AIDS should they have sex with a virgin.<sup>448</sup> This is also evident in South Africa, Senegal, and Nigeria, where virgins are targeted and raped. Further, in some apostolic churches in Zimbabwe, senior male members will have divine revelations to marry these virgins.<sup>449</sup> Similarly, those who fail the test are also targeted by church elders, who argue that these girls have nothing to lose, since they do not have dignity and honour as they are not virgins.<sup>450</sup>

#### *5.5.2. Whether the rationale used is justifiable*

The above defeats the purpose, as virginity testing has been resurrected in these countries mainly to curb the scourge of HIV/AIDS, as discussed earlier in this study. In addition, virginity testing is performed by confirming the presence of an intact hymen. This is an unreliable measure of testing virginity, since a girl's hymen can break due to sports or the use of tampons, and some girls are even born without it.<sup>451</sup>

All comparator countries' constitutions protect cultural and religious rights because there has been a common systematic attack on indigenous African cultures and religions during colonisation.<sup>452</sup> It has, however, been emphasised that the constitutional protection of cultural and religious rights is not absolute and therefore cannot provide for exemption for the perpetuation of discriminatory practices that seek

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<sup>448</sup>See Mbanje fn 25.

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

<sup>451</sup> See Mbulu fn 129.

<sup>452</sup> See Dlamini fn 68.

to promote violence against girls and women.<sup>453</sup> It is also trite that everyone exercising their rights should not do so in a manner that is inconsistent with other provisions of these constitutions; or do so in a manner that encroaches on others' rights. These constitutions also give girls and young women rights, for example, dignity, equality, and privacy, amongst other rights, and subjecting them to virginity testing is an affront to these rights. There is no empirical data that justifies arguments offered by those who seek to defend the practice of virginity testing as a strategy to reduce HIV/AIDS and teenage pregnancy.<sup>454</sup>

From the manner in which the testing is done, which is common in all the countries under discussion, it is evident that rights of girls and women are not observed in these communities in the following ways:

- There are no criteria of electing the testers and no training or guidelines is available for these testers;
- The testing is done in public places, rivers, church halls, and stadiums, and this violates the dignity and privacy of the participants;
- Testers use fingers and no use of gloves means lack of hygiene during the testing, which increases the risk of transmission of diseases from one participant to another;
- The results are not confidential, as participants are either given certificates or tree leaves, or marked on their foreheads to show whether they have passed or failed the test;
- Only girls are tested, and this puts pressure only on girls for the curbing of HIV/AIDS and preserving the so-called family honour;
- Girls who fail the test are ostracised and humiliated and their families also suffer the same shame from their own communities;
- Girls who pass also are at a risk of being raped to cure the rapist of HIV/AIDS or married off at a very young age for her family to get a bigger bride price.

### *5.5.3. Laws regulating virginity testing not followed*

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<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.*

It is evident in these countries that they all have government regulations and laws, prohibiting virginity testing; that it does not stop the practice of virginity testing and all other harmful practices against girls and women.<sup>455</sup> Accordingly, for most African and Islamic communities, long-established traditional norms play a bigger role than national law.<sup>456</sup> An example can be found in the South African Children's Act, which prohibits virginity testing of children under the age 16 years.<sup>457</sup> It is clear that testers disregard the prohibition, where one tester was reported and quoted as saying:

We are an organisation which does virginity testing of girls from 6 years old up to marriage status. Initially we started from 12 years old but by doing so we found that half the girls tested had already lost their virginity.<sup>458</sup>

Although national legislation and international treaties are essential in the elimination of virginity testing, there is a need for programmes that address the cultural or religious environment from which the practice has emerged, in order to abolish the various justifications used to perpetuate the testing.<sup>459</sup> Accordingly, there is an obligation on the government to modify the social and cultural attitudes of both men and women by promulgating laws that prohibit ideas of the inferiority or superiority of either sex and stereotyped roles of gender.<sup>460</sup> Comprehensive programmes of formal and informal education, involving various community stakeholders, have worked in Senegal with Tostan NGO projects. The main focus was to educate communities of their human rights and highlight the risks of harmful practices like virginity testing, and the communities, without thinking of laws that prohibit these practices, volunteered to stop them on their own.<sup>461</sup> This happened as they then understood the harmfulness of the risks involved in these practices and began to appreciate that girls and women also have human rights; which these practices infringe and limit unfairly.

Advocates of the resuscitation of virginity testing in South Africa believe that African cultural practices have suffered disdain, condescension, and oppression, especially

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<sup>455</sup> Lee *Female genital mutilation: multiple-case studies of communication strategies against a taboo practice* 45.

<sup>456</sup> *Ibid.*

<sup>457</sup> Section 12(1) of the Children's Act.

<sup>458</sup> Raunch *Harmful sexual practices and gender conceptions in KwaZulu-Natal and their effects on the HIV/AIDS pandemic* 7.

<sup>459</sup> See Lee fn 451.

<sup>460</sup> *Ibid.*

<sup>461</sup> See Giuliani fn 399.

from Western nations and, worse, from the South African government, scholars, elites, and leaders who mistakenly associate development and modernisation as a disregard of African cultures.<sup>462</sup> However, virginity testing and female circumcision are, reportedly, not exclusively African cultural practices, but are recorded to have been performed in Europe as early as 642 BC.<sup>463</sup> This study, however, agrees that virginity testing:

As a home brewed solution, for, teenage pregnancy, sexual abuse, moral decay, chastity of females, reaffirmation of African culture and especially Zulu culture, has failed and there is no rationale for it to persist as the harm suffered by the participants in virginity testing, far exceed any benefit(s) so far.<sup>464</sup>

Recently in KwaZulu-Natal, a new rationale in testing for virginity, which resonates with the Zimbabwean apostolic sectors where girls have their virginity tested almost every month, has emerged.<sup>465</sup> In KwaZulu-Natal, girls have been subjected to virginity testing every school recess to prove that they are still virgins to qualify for the so-called Maiden Bursaries.<sup>466</sup> This phenomenon erodes the right to equality which is the core value of South Africa's constitutional democracy which guarantees everyone the full enjoyment of all rights and freedoms, including the right to education, enshrined in the Bill of Rights. Virginity testing, which is categorised as a custom and traditional practice unique to African culture, especially in these four jurisdictions, is in reality a practice which is prejudicial to girls and young women's rights and cannot be justified.

## **5.6. Conclusion**

Virginity testing and other practices leading to violations of girls and women's rights across Africa are not the result of religion or cultural identity *per se*. These practices are, rather, a combination of political, economic, and social inequalities through the ages and times.<sup>467</sup> Religion and traditional culture have often been abused as a primary source and a tool to control girls' and young women's sexuality. The validity of a girl and young woman's right to bodily integrity, dignity, equality, and privacy

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<sup>462</sup> Kangethe fn 45.

<sup>463</sup> *Ibid.*

<sup>464</sup> George fn 37 1451.

<sup>465</sup> See Hodzi fn 424.

<sup>466</sup> See Doodnath fn 293.

<sup>467</sup> Ilkharacan 2002 SR 754.

should not depend on customs and tradition, but on international human rights treaties, which have been adopted by these countries.<sup>468</sup> Senegal, which serves as a notable departure from a harmful cultural practice, has however illustrated that legislative prohibitions alone cannot change this firmly entrenched practice. With the commitment and advocacy of women and other relevant stakeholders in the community, Senegal has complemented its legal reform to eradicate virginity testing and harmful practices to girls and women.

Chapter 6 concludes this study by giving a summary of the chapters in order to illustrate the findings. The chapter explores recommendations and lessons learned from Senegal that can assist South Africa in the eradication of virginity testing.

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<sup>468</sup> Mullaly & Ni Mhuirthile 2010 *DULJ* 245.

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1. Introduction

Virginity testing is a cultural and social norm that is firmly fixed and prevalent in rural settings, in South Africa (prevalently in KwaZulu-Natal) and sub-Saharan Africa.<sup>469</sup> It is, however, an affront to the rights of the girls who are tested and amounts to unfair discrimination, as discussed earlier in this study. Although no right is absolute and can be limited, virginity testing cannot be defended in terms of the limitations clause and could not pass the two-stage analysis formulated by the Constitutional court in limiting one's rights. The responsibility to eradicate the practice of virginity testing could involve many role-players, however, the final accountability should lie with a country's government in terms of legal reforms.<sup>470</sup> Senegal, as the model country in this study, has also shown that, to be effectively implemented, such reforms need the participation of the community.

#### 6.2. Summary of the findings on chapters of the study

##### 6.2.1. *The nature, origin and practice of virginity testing*

Chapter 2 traced the origin and nature of virginity testing, which was historically linked with *ilobola* (bride price) and honour to the girl's family, predominantly in the KwaZulu-Natal province. The father used his daughter's virginity as a bargaining tool in matrimonial matters as part of the isiZulu culture.<sup>471</sup> It was, however, abrogated because of industrialisation and only resuscitated as part of the cultural rites that were reinvented at the advent of democracy in South Africa, for Africans to re-identify with their oppressed traditions. Virginity testing was also re-energised to curb the social ill of HIV/AIDS. This is so, since the province was described as "the epicentre of the global epidemic of HIV/AIDS".<sup>472</sup> It is estimated that almost 1.7 million persons are

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<sup>469</sup> See Kandala & Komba fn 313.

<sup>470</sup> See Odeku fn 313.

<sup>471</sup> See Addison fn 1.

<sup>472</sup> See Mokoboto-Zwane fn 89.

living with HIV/AIDS in the province.<sup>473</sup> Reportedly, 12% of teenagers and youth ranging from 15 to 24 years old, are infected.<sup>474</sup>

Virginity was found in this chapter to be an elusive concept, although concepts such as virginity, virgin, chastity and culture were critically discussed. This only confirms that virginity testing has no diagnostic, forensic, or legal value, which only subjected girls that are tested to a plethora of harmful consequences, which were frowned upon by the South Africa's Commission for Gender Equality.

This illusive concept has been made part of the cultural heritage in the Zulu Kingdom, where there is an annual reed dance celebrated publicly and virgins are given certificates. Both King Goodwill Zwelithini and the former President Jacob Zuma have attended and addressed participants about the importance of virginity testing as the girl's responsibility to protect the nation against HIV/AIDS. This, however, serves as a perpetuation of patriarchy, especially considering that a former frequent participant in the reed dance has given birth to a child allegedly fathered by the former President. This shows the double standard and perpetuation of patriarchy and cannot be defended as a cultural practice, which aims at preserving young women's virginity for marriage.

Virginity testing only serves to subordinate girls' gender position, which ironically contributes to the increase of pregnancy and greater risk of HIV/AIDS.<sup>475</sup> This is so, because virginity and honour is reinforced in girls, whereas courting girlfriends is key in being identified and recognised as a boy or a man.<sup>476</sup> This reintroduces historical ideals of male power and privilege, wherein high value or even one's family name is attributed to girls' chastity and virginity.<sup>477</sup> It is a sexual double standard in which male sexual activities are visible and somehow normal, whilst females' activities are cultural scrutinised. This cultural scrutiny accepts male infidelity and expects female monogamy. This leads to a fatal example of a cultural supposition that sex with a virgin is a cure for HIV/AIDS.<sup>478</sup> The irony of virginity testing as a cultural norm, is that girls

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<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*

<sup>475</sup> See Behrens fn 2.

<sup>476</sup> See Leclerc-Madlala fn 102.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

and women are sexually promiscuous and spread HIV/AIDS whilst a girl virgin is seen as a saviour because of her virginal purity.

### **6.2.2. Human rights instruments and virginity testing**

Chapter 3 identified and briefly outlined international and regional human rights instruments that deal with the practice of virginity testing. Rights in the Bill of Rights of the South African Constitution that deal with the cultural practice of virginity testing were also identified. In addition to South Africa being a signatory to a number of these international and regional instruments, it is also constitutionally obliged to consider international law when interpreting the rights that are contained in the Bill of rights.

The common thread in these instruments, is the fact that virginity testing has been singled out as part of the harmful cultural practices against girls and young women which have to be prohibited. The human rights and international law framework is traced as far back as 1950, when the United Nations believed that such cultural practices were beyond its competency. This stance has however changed over time, with the involvement of NGOs and minority groups who are adamant that these harmful practices must be eradicated.

The Committee on the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), as well as the International Bill of Women's Rights have clearly criticised the legalisation of virginity testing in terms of section 12 of the Children's Act. Its strongest recommendation is that virginity testing should not be allowed at all because it is a practice that differentiates girls based on sex and cannot be justified as culture. It is found to be an affront of several rights contained in both international and national law. It is, additionally, not in the best interest of children, as their consent is not really considered. Although it can be described as culture, which is a Constitutionally entrenched right in terms of sections 30 and 31, it cannot be practiced, as it infringes on other fundamental rights in the Bill of Rights.

The so-called cultural right to virginity testing is not absolute and should be subject to the limitation of rights clause to decide if it can be a justifiable limitation of the rights to equality, dignity, and bodily integrity of these girls.



### ***6.2.3. Constitutional and human rights evaluation of the practice of virginity testing***

Chapter 4 appreciated the fact that cultural practices were marginalised for a long time, this does not, however, open a flood gate for cultural practices to be practiced outside the Constitutional framework. Section 12 of the Children's Act was therefore a compromise between the traditionalists and the abolitionists, which allows virginity testing to be practiced, subject to certain requirements. The requirements include an age limit of 16 years, consent of the child, all children (boys and girls), and the fact that results should not be publicised.

Section 12 has been found wanting when evaluated against international law and national law. It erodes the rights of girls and young women, which are protected by the Universal Declaration of Human Rights (UDHR), amongst other international laws. It can also be referred to as sexual assault within the international human rights context, as decided by an American Court of Human Rights. The requirements in the section are also flagrantly disregarded, when only girls and sometimes girls as young as 5 years of age are tested. The right to equality was shown to be unashamedly infringed upon, when virginity testing was used as a prerequisite for young women in the UThukela District Municipality in KwaZulu-Natal, to receive a tertiary bursary. Their right to bodily freedom and security of the person was eroded repeatedly when the continuation of the bursary was conditional on the young women being tested every University recess to ensure that they were still virgins. Virginity testing is unfair discrimination based on several rights in the equality clause and failed the limitation test dismally.

### **6.3.A comparative perspective of virginity testing in selected African Countries**

Chapter 5 evaluated virginity testing as commonly practiced in Zimbabwe, Nigeria, and Senegal. It is still widespread and prevalent in Zimbabwe and Nigeria, whereas Senegal shows a commendable departure from the approach in South Africa, Zimbabwe, and Nigeria.

Although Zimbabwe is a signatory party to several international treaties, virginity testing is practised in direct contravention of the Convention on the Rights of the Child

(CRC). This has been illustrated where parents consent to their girl children being tested. Just like the Zulus, virginity testing is fuelled by the high demand for virgin brides in Zimbabwe, where the grooms are willing to pay a substantial amount. It is further promoted by apostolic sectors and churches where there is an obsession with perceived financial gains on parents who marry off their virgin daughters. Virginity testing comes with harmful consequences for the girls who are virgins, as they are raped with the belief that their pure blood can cure one who is already infected with HIV/AIDS. Although there is legislation, the Domestic Violence Act (DVA), which criminalises forced virginity testing, it is still prevalent, as the element of consent can always be claimed by the advocates of virginity testing.

Virginity testing in Nigeria is prevalent because of the entrenched patriarchal nature of Nigerian society. Men in this society are the dominant figures who have greater access to, and mediation of, the resources and rewards structures inside and outside their homes. Parents still choose spouses for their children, and daughters are married off at a tender age to ensure that they marry as virgins for them to be able to uphold the family honour. Even though Nigeria is a signatory and has also ratified international instruments prohibiting virginity testing, section 12 of its Constitution requires these instruments to be enacted and made part of Nigerian legislation for them to be enforceable.

It is commendable that the Violence against Persons Prohibition Act (VAPP), which is a very recent Act, includes harmful traditional practices as a punishable. There is hope that, if this could be interpreted progressively by the judiciary, virginity testing can be made a punishable offence in Nigeria.

In Senegal, virginity is a norm promoted by the fusion of traditional and religious beliefs, predominantly Islamic and Christian. This norm is seen as part of the marriage celebrations, where the bride's aunt must inspect the white sheets that the bride has slept on the morning after the wedding night. The inspection is to confirm the finding of blood stains, upon which she is declared a virgin, if not, the groom can always use this reason as a ground for dissolution of the marriage. If she is declared a virgin, this calls for a secondary celebration of the wedding.

In contrast to South Africa, Nigeria, and Zimbabwe, Senegal used Female Genital Mutilation (FGM) to impose virginity. Senegal has, however, made strides to legally eradicate Female Genital Mutilation (FGM), the objective of which was to make sure that girls stay virgins until their wedding night. In 1999, the Criminal Code criminalised FGM and the 2001 Constitution of the Republic of Senegal entrenched its commitment to protect children and women. Its Preamble further provided for adherence to the UDHR, CEDAW, and the CRC. In 2000, the Minister of Family and National Solidarity initiated the tracking of the implementation of laws decriminalising FGM.

The above led to a non-governmental initiative which assisted in modifying the social and cultural attitudes of women and men. Although government can promulgate laws that prohibit cultural practices, it would take educating communities of their human rights and highlighting the risks of harmful practices for the community to change their stereotypical attitudes informing gender roles in that community. Senegal, using this kind of initiative in the form of the Tostan program, resulted in the majority of Senegalese communities voluntarily no longer engaging in FGM.

#### **6.4. Recommendations**

Notwithstanding that section 12 of the Children 's Act prohibits virginity testing when a girl is under the age of 16 years, research reveals that girls of a younger age are still tested with no consequences for the testers. This study has established that even when it is done on girls who are 16 years and older (as allowed by the Children's Act), this practice infringes various fundamental rights, namely, those related to privacy, human dignity, and bodily and psychological integrity. It is therefore recommended that this Act must be amended accordingly.

##### **6.4.1. Law Reform**

Virginity testing against girls and young women can only be eradicated when there is a law that can interrupt gender relations and remove the "deep hierarchical structures through which masculine and feminine identities were defined for centuries".<sup>479</sup> Coetzee asserts that it is critical for the accomplishment of basic justice that girls and

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<sup>479</sup> Coetzee *Addressing the problem of sexual violence in South Africa: A philosophical analysis of equality and sexual difference in the Constitution and the New Sexual Offences Act* 94.

young women should be granted legal identities like men through “public means and channels, rather than being relegated only to the realm of the personal”.<sup>480</sup>

In view of the above, the Long title of the Children’s Act should be amended to specifically include as its goal, in addition to protecting and promoting children’s rights, that it intends to abandon the practice of virginity testing in line with the Constitution, the ACRWC, and CRC. It should further state clearly that, in abandoning the practice, it creates an offence for anyone who practices virginity testing on children and to provide for penalties connected therewith.

Section 12 of the Children’s Act should be amended, regarding sub-sections 12(5) to 12(7) that allow and regulate virginity testing. These sub-sections should be deleted, since the prevalence of virginity testing is a result of the claim that girls themselves voluntarily subject themselves to the practice. This study’s findings, however, is that such consent (said to be voluntary) is mainly because of societal pressure, coercion, and persuasion by parents and lack of access to knowledge about their rights.

Section 12(4) of the Children’s Act should be amended to the effect that it clearly and wholly prohibits virginity testing regardless of consent, age, sex, and whether it is done privately or publicly. It has been discussed that only girls are targeted and girl children as young as 5 years old are tested, both in South Africa and sub-Saharan countries.

Performing virginity testing in contravention of the newly envisaged section should remain an offence and be punishable, as per section 305(1) (a), 305(6) and 305(7) of the Children’s Act. Notwithstanding section 305, there is no reported case thus far, even when testers and advocates of virginity testing declare publicly that they will proceed to test young children regardless of what the Act or the Constitution says.

#### **6.4.2. The role of Non-Governmental Organisations (NGOs)**

As highlighted above, the so-called consent (voluntariness) of girls involved in virginity testing is mainly because of societal pressure, coercion, persuasion by parents, and lack of access to their rights. This study showed that NGOs can play an invaluable role in personal empowerment and implementation of law reform, as in the Senegalese

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<sup>480</sup> *Ibid.*

scenario explained earlier.<sup>481</sup> Such NGOs would function on grassroots level, where the cultural practice of virginity testing predominantly takes place. The role of NGOs in South Africa, similar to the Tostan program in Senegal, is envisaged in a two-stage phase, namely before and after the proposed law reform above, and it is highlighted below.

Since virginity testing implies that there is still an obvious lack of suitable implementation of human rights for children and women in most societies,<sup>482</sup> both girls and adult women should be targeted in educational programmes. Education should be aimed at raising awareness about their rights and at equipping them with the necessary skills to claim them. They should clearly be informed that the practice is a violation of human rights and therefore unconstitutional. Girls must thus, firstly, be empowered to refuse virginity testing. Secondly, when the testing is performed in violation of current the section 12(4), 12(5), 12(6) or 12(7) of the Children's Act, girls should be aware that these transgressions are punishable offences.<sup>483</sup>

Awareness-raising within broader communities is further crucial, as they should be lobbied and be prepared for possible future law reform regarding virginity testing. Since this practice is of a social and cultural nature, its review may only be possible if communities are allowed to participate. It is evident that the current inclusion of virginity testing in the Children's Act was a result of the community not being ready to let it go and, as indicated earlier, is seen as a compromise between traditionalists and human right activists. There should thus be sensitivity regarding the root causes behind the practice but raising awareness about gender-based discrimination should also continue.

Further, education and public awareness should be in line with Article 12.1 of the CRC, and Article 7 of the ACRWC, which both provide for the right of children to express their views. It is of importance to this study that parents and virginity testers should understand that the view of the child must always be measured against her age and maturity and, therefore, simply accepting the child's thoughts about being tested is not sufficient. Another aspect that should be addressed during education, is that the views

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<sup>481</sup> See chapter 5 para 5.4.2.2.

<sup>482</sup> *Ibid.*

<sup>483</sup> See section 305(1)(a), 305(6) and 305(7) of the Children's Act.

and welfare of the girl-child should be considered by taking into consideration her best interests. This should be pertinent where the decision to subject a girl to virginity testing is undertaken by the parents.

Once law reform has taken place, dialogue between children, women, men, parents, and NGOs should continue, to contribute to respecting the abolishment of virginity testing. NGOs must not stop raising public awareness by engaging both men and women in education about their rights and dispelling myths about the historic foundation of virginity testing. Rural and marginalised girls and young women will also benefit from ongoing training and advice provided to them.<sup>484</sup> The continued activities of Tostan, mentioned earlier, is proof of such positive intervention where the harmful cultural practice of female genital mutilation was successfully reduced in Senegal.<sup>485</sup>

In South Africa, there are NGOs who could fulfil a similar role to Tostan, for example the Child Law Centre, People against Women Abuse, Women's movements focusing on rural areas, and the Women's Legal Centre. These NGOs can all play a role in the education of girls and women about their rights.<sup>486</sup> For the law prohibiting virginity testing to be effectively implemented, these NGOs should continue to speak against virginity testing, which is practiced under the guise of a cultural identity and tradition of historical groups of the people. As highlighted above, not only girls and young women as individuals should be included, but also families, communities, and all levels of society.<sup>487</sup> It is necessitated by the fact that virginity testing and other practices are influenced by patriarchal structures and notions that shape young girls' and women's lives and experiences in the communities where they grow up.

NGOs in South Africa are known for using education, which is an important tool to empower girls and young women to not only claim their rights but live them. They often use non-formal education, which should encourage an environment where girls and young women can meet with peers, mentors, teachers, community leaders.<sup>488</sup> During these meetings the girls and young women should not only be addressed but be given

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<sup>484</sup> CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, 76.

<sup>485</sup> *Ibid.*

<sup>486</sup> Sibanda-Moyo *et al* 2017 <https://www.csvr.org.za/pdf/CSVr-Violence-Against-Women-in-SA.pdf>.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*

an opportunity to assert themselves, to enquire, and even share their ambitions in order to make decisions about their lives.

#### **6.4.3. Strengthening abolishment of virginity testing by implementation of existing laws**

In South Africa, legislation is in place that has been geared towards protecting the psychological and physiological body of children and women specifically, since these two groups were and still are the most marginalised and vulnerable in our society.<sup>489</sup> Existing pieces of legislation can be widely interpreted to contribute to the outlawing of virginity testing as a harmful cultural practice. Relevant legislation includes the Domestic Violence Act (DVA),<sup>490</sup> the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>491</sup> and the Criminal Law (Sexual Offences and Related Matters) Act (Sexual Offences Act).<sup>492</sup>

The South African DVA could, similar to the case in Zimbabwe, have the potential to be extended to involve cases of virginity testing.<sup>493</sup> This is implied from the preamble, which states that:

Domestic violence - which is a typical characteristic of harmful practices - is a serious evil that affects the most vulnerable members of South African society.

The preamble, in addition, affirms the Constitution of South Africa, specifically the rights to equality and freedom and security of person. It further affirms the commitments and obligations of South Africa to end violence against women and children, particularly the obligations it has under CEDAW and CRC. Bannister, however, criticises the DVA in that it does not identify obligations to be put on the Department of Health and of Social Development.<sup>494</sup> These departments would be

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<sup>489</sup> See Sibanda-Moyo fn 483. The Constitution, as discussed in chapter 3, illustrates the rights that are infringed by virginity testing. The case of *S v Xaba* (discussed in chapter 3 para 3.4.2.3), used impliedly, shows that virginity testing where children cannot be said to have consented, can be inferred as a criminal sexual assault. The SOA to be discussed later is thus relevant.

<sup>490</sup> Act 116 of 1998.

<sup>491</sup> Act 4 of 2000.

<sup>492</sup> Act 32 of 2007.

<sup>493</sup> During 2007, the Zimbabwe Domestic Violence Act (DVA) was enacted, and it made specific reference to cultural practices like virginity testing as being degrading to women. Section 3 of the Zimbabwean DVA also criminalised forced virginity testing (discussed in detail in chapter 5 para 5.2.2.1).

<sup>494</sup> Bannister *The right to have access to health care services for survivors of gender-based violence* 68.

better placed to respond to the needs of girls and young women in giving effect to “the broader constitutional rights of women.”<sup>495</sup> It would appear that for the DVA to be of use in the fight against virginity testing, these criticism must be taken into account.

Virginity testing, as this study has argued, is an act of unfair discrimination and should fall under section 8 of PEPUDA, which not only prohibits unfair discrimination against women, but also places a specific prohibition on gender-based violence. Since PEPUDA provides for prosecution of unfair discrimination actions in the Equality courts, virginity testers should be brought before these courts for prosecution.<sup>496</sup> In addition, those using virginity testing to benefit some young women should be dealt with in the same way. A case in point, is the UThukela District Municipality in KwaZulu-Natal, who used the passing of virginity testing as a pre-condition for awarding young women education bursaries (discussed in chapter 4).<sup>497</sup> This Municipality should be brought before the Equality Court, as the Commission for Gender Equality has made a determination that using the testing was an unfair criterion and an infringement of PEPUDA (discussed in chapter 4).

Lastly, the Sexual Offences Act may be implemented to contribute to outlawing virginity testing. Notably, the preamble of this Act also affirms the duties of South Africa under international legal instruments, like CEDAW and the CRC, to eradicate abuse and violence against children and women. In America, more than a decade ago, vaginal finger inspection of a female detainee (undoubtedly similar to virginity testing), was declared, to constitute sexual rape and torture in addition to infringing human rights standards.<sup>498</sup> In line with this earlier finding, virginity testing (by using fingers during the physical examination to trace the hymen of a girl) may currently constitute a sexual offence in terms of more than one section of the Sexual Offences Act. In terms of section 3, it qualifies as a form of rape, since the definition of sexual penetration, since the end of 2007, is very wide and includes:

Any act which causes penetration to any extent whatsoever by ... any other part of the body of one person or, any object ... into or beyond the genital organs of another person.<sup>499</sup>

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<sup>495</sup> See Mubangizi fn 27 167.

<sup>496</sup> See Mbangizi fn 27 168.

<sup>497</sup> See chapter 4 para 4.3.2.

<sup>498</sup> See discussion in chapter 4 para 4.3.1.

<sup>499</sup> Section 1 of the Sexual Offences Act.



Section 16 further prohibits acts of sexual violation with children and this behaviour refers to:

Any act which causes (a) direct or indirect contact between the (1) genital organs of one person... and any part of the body of another person, or any object...<sup>500</sup>

Section 16 criminalises the sexual violation of a child, despite the consent of the child to the commission of such an act. Such a person performing virginity testing may thus also be guilty of the offence of consensual sexual violation with a child (statutory sexual assault). The study has already established that virginity testing has been performed on children younger than 12 years and, even when children are older, their consent is often a result of some or other pressure. The Sexual Offences Act can be extended to the cultural practice of virginity testing for testers to be prosecuted under its provisions.

In an incident where a girl or young woman is suspected to be at the risk of virginity testing, protection systems with identification, reporting, referral, and support should work together to prevent the imminent testing. Protection orders can be issued in terms of the domestic legislation already in place. Where the testing has already taken place, it can be treated as an offence and be prosecuted in terms of the Children's Act or existing sexual assault legislation. New laws towards the eradication of virginity testing, as highlighted above, can thus be strengthened and implemented by role-players in and outside the legal system.

## 6.5. Conclusion

Undeterred by legislative attempts to regulate the practice of virginity testing as a cultural practice, virginity testing is still prevalent in KwaZulu-Natal and it is practised in contravention of the provisions of section 12 of the Children's Act. The practice is a violation, abuse, unfair discrimination, and limitation of girls' and young women's rights, which was found to be unjustifiable in terms of the limitation provision of the Constitution. *In lieu* of the banning of virginity testing, it is necessary to have an approach which is holistic and includes NGO involvement regarding advocacy, human rights education, and a commitment to change the society's patriarchal mind-set. Research talk by Chapter 9 institutions, such as the Commission for Gender Equality,

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<sup>500</sup> *Ibid.*

the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Human Rights Commission, with specific reference to those whose mandate includes gender, human rights, women and culture, should thus include how they can foster a policy and programme of eradicating, amongst other, harmful cultural practices against girls and women, such as virginity testing.

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