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**TITLE:**

**DO THE CHILDREN'S ACT PROVISIONS WHICH LEGALIZE VIRGINITY TESTING  
VIOLATE ANY OF THE CONSTITUTIONAL RIGHTS OF GIRLS?**

*Submitted in fulfillment of the requirement for the Master of Laws Degree*

## **AUTHOR'S DECLARATION**

I Nobuhle Ndebele do hereby declare that I have originally researched this thesis in its entirety save for the portions wherein I have made acknowledgements to the contrary. I further declare that neither any portion hereof nor the thesis in its entirety has been or is intended for submission for another qualification at the University of Kwa-Zulu Natal or any other University.

Signed in Johannesburg on this 2<sup>nd</sup> day of November 2020.

A black rectangular box used to redact the author's signature.

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Nobuhle Ndebele

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## **Key Words**

child

confidentiality

cultural, religious and linguistic communities

evolving capacity

human rights

limitation of rights

Royal Reed Dance

"two-finger test"

virginity

virginity testing

voluntary informed consent

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 *Virginity testing – a global issue*

Virginity testing is a cultural practice that enjoys global documentation by virtue of being recorded as common practice right across at least five of the seven world continents. It is mainly documented in the African continent where it is practiced in amongst others, Egypt, Morocco, Libya, Malawi, South Africa, Swaziland and Zimbabwe.<sup>1</sup> Within the Asian continent, India, Indonesia, Sri Lanka, Afghanistan, Iran, Iraq and Jordan practice virginity testing.<sup>2</sup> Turkey, Northern Ireland and the United Kingdom in the European continent are also documented as practicing virginity testing.<sup>3</sup> In North and South America, Jamaica and Brazil respectively practice virginity testing.<sup>4</sup> Taking cognizance of the continents where virginity testing is active it is only in the Antarctica and Australian continent that the practice has not enjoyed any and/or much documentation. This opinion has been formulated on the basis that there, so far, is no literature that relates to virginity testing in the stated continents.

In Turkey virginity tests are known to be compulsory and they are not private tests, they are mainly tests for family honor since virginity is viewed as the most precious asset that one can ever take with them into their marriage.<sup>5</sup> The virginity tests are imperative in accordance to Turkish prescripts and they extend even to midwives, nursing students, aspirant women government employees as well as women political activists.<sup>6</sup> The above makes it evident that certain cultures esteem virginity quite highly, especially for marriage purposes. In some cultures,

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<sup>1</sup> Sirin Kale (6 Jan 2016). "Why is virginity testing still a thing in so many parts of the world?" available at <https://graziadaily.co.uk/life/real-life/virginity-testing-around-world/>. accessed on 17 Dec 2018.

<sup>2</sup> Ibid Note 1.

<sup>3</sup> Ibid Note 1.

<sup>4</sup> Ibid Note 1.

<sup>5</sup> Ibid Note 1.

<sup>6</sup> Mbulu J. F *Exploring the experience of virginity testing by female adolescents in the uThungulu District of KwaZulu-Natal* (LLM thesis, University of South Africa, 2016).



failing the virginity test could affect a marriage or the bride - price (*bohali or lobola*).<sup>7</sup> This is specifically observed within the Ndebele traditional society where the father of a non-virgin bride was obliged to pay a beast to make up for his daughter's loss of virginity. This payment served as the daughter's protection from the stigma and abuse associated with being a non-virgin.<sup>8</sup>

In Swaziland, (now called Eswatini) virginity is publicly celebrated annually by way of *Umhlanga* or the Royal Reed Dance ceremony.<sup>9</sup> The ceremony is historical, having been adapted from the *Umcwasho* ceremony which currently spans over half a decade post its development in the 1940s under the kingship of Sobhuza II. For purposes of the *Umcwasho* ceremony, young girls were grouped according to their ages, that is, "age regiments" in order to ensure their virginity.<sup>10</sup> In contemporary Eswatini society, the girls begin the rite by gathering at the Queen Mother's royal village, which is located in Ludzidzini. They are then expected to spend the night that follows their initial gathering in the surrounding areas where they would have to cut tall reeds some of which they would bundle together and take to the Queen Mother for use in repairing holes in the reed windscreen surrounding the royal village.<sup>11</sup>

## 1.2 The historical context

Culture, tradition, religion, beliefs and/or custom are somewhat intrinsic components of humanity. At times the culture of the people determines the choices they make and the manner in which they conduct themselves. Virginity testing is one such cultural, religious or social practice whose occurrence is common in some Southern African countries such as Eswatini, Lesotho and

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<sup>7</sup> South African Human Rights Commission: Harmful Social and Cultural Practices-Virginity Testing? Children's Bill [B70 - B2003] Submission to the Select Committee on Social Services (NCOP), available at <https://www.sahrc.org.za/home/21/files/30%/30%/20SAHRC%20Submission%20on%20Childrens%20Bill%20%20Virginity%20Testing%20%28Parl.%29%20Oct%202005.pdf>, accessed 22 Nov 2018.

<sup>8</sup> T Mangena, S Ndlovu: Implications and complications of Bride Price Payment among the Shona and Ndebele of Zimbabwe. *International Journal of Asian Social Science*, 2013, 3(2) 472- 481.

<sup>9</sup> *Umhlanga and Umkhosi woMhlanga* are the terms used for the Royal Reed Dance in Swaziland and KwaZulu-Natal respectively.

<sup>10</sup> "Umcwasho maidens 1895". *Swaziland Digital Archives*. Swaziland National Trust Commission available at [https://en.wikipedia.org/wiki/Umhlanga\\_\(ceremony\)#Swaziland](https://en.wikipedia.org/wiki/Umhlanga_(ceremony)#Swaziland), accessed 17 May 2019.

<sup>11</sup> See Note 10 above.

South Africa.<sup>12</sup> The term virginity is deduced from “virgin” which is derived from the Latin root *virgo*, whose meaning is “maiden” and which by definition, means a young woman whose vagina has never endured sexual penetration.<sup>13</sup> The practice of examining the genitalia of girls and/or women in order to ascertain whether they have ever had sexual intercourse or not is generally termed virginity testing and it has been used by various communities globally.<sup>14</sup> Even though the practice is somewhat global, virginity testing is believed to be neither a medical nor scientific concept but rather a social, cultural and religiously constructed one.<sup>15</sup>

It is noteworthy that different terms are used for the practice and these are, the hymen, two-finger or per vaginal examination.<sup>16</sup> In terms of the hymen test, it is believed that the hymen's appearance can be conclusively relied upon to indicate vaginal intercourse.<sup>17</sup> The "two-finger" test is performed by vaginal insertion of the index and middle finger to measure the size of the *introitus* or laxity of the vaginal wall, which laxity is a supposed marker of sexual habituation.<sup>18,19</sup> It is noteworthy that virginity testing is conducted quite differently from one culture to another. Like in the old days, the modern-day virginity test is mainly achieved through the inspection of the hymen, “per hymen test” and the "two-finger" test.<sup>20</sup> The testers range from medical doctors to police officers as is the case in Indonesia.<sup>21</sup> In most African countries it is mainly the community leaders or elderly women who conduct the virginity test.

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<sup>12</sup> Refer to Note 1.

<sup>13</sup> Charlton T, Lewis CS, Andrews EA. Harpers' Latin dictionary. Andrews EA, editor. New York: Harper and Brothers; 1879 available at ([https:// archive.org/details/harperslatindict00lewi](https://archive.org/details/harperslatindict00lewi), Date accessed 9 Jan 2019).

<sup>14</sup> Olson R, García-Moreno C. Virginity testing: a systematic review. *Reprod Health*. 2017; 14(1):61. doi:10.1186/s12978-017-0319-0 available at <https://www.ncbi.nlm.nih.gov/pubmed/28521813>, accessed 9 Jan 2019.

<sup>15</sup> <https://www.who.int/news-room/detail/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing>, accessed 9 Jan 2019.

<sup>16</sup> Olson R, García-Moreno C *op cit* (2017) at page 1.

<sup>17</sup> Ibid. Note 16.

<sup>18</sup> In anatomy, an *introitus* is an entrance, one that goes into a canal or hollow organ such as the vagina. available at <https://www.medicinenet.com/script/main/art.asp?articlekey=8840>, accessed 22 Nov 2018.

<sup>19</sup> Ibid Note 14.

<sup>20</sup> Refer to Note 15.

<sup>21</sup> <https://www.telegraph.co.uk/women/womens-health/11238784/Indonesias-female-police-officers-subjected-to-virginity-tests-html>. Date accessed 18 Oct 2019.

In classical Greek times it was a requirement for virgin girls to have small, pink, upward-pointing nipples.<sup>22</sup> The sexually experienced ones were expected to have large, dark, downward pointing nipples.<sup>23</sup> Classical Greece had a powerful influence on the Roman Empire such that much of modern western politics, artistic thought (architecture, sculpture), scientific thought, theatre, literature and philosophy derive from this period of Greek history, the Classical period. Additionally, medieval doctors sometimes determined virginity by comparing the girls' forehead circumference with that of their necks.<sup>24</sup> A urine test was believed to be a viable test, whereupon clear and sparkling urine would be attributed to virginity.<sup>25</sup>

### 1.3 *Motivation for the study*

There is ongoing debate globally around the appositeness of virginity testing with vast numbers of people in different countries calling for its ban. South Africa is no stranger to such debate with the practice being arguably more prevalent in the Southern African country where virginity testing is celebrated in numerous ways.

While it is true that we live in an era where respect for human rights and fundamental freedoms can not be over emphasized, it is also true that in the very same era, certain human rights continue to be overlooked and thus trampled upon. In my opinion, the virginity testing practice is there to serve as proof of the magnitude of the violation of certain rights of girls in the name of a practice which is arguably not only unconstitutional but is also the most inexcusable societal misfit of our time. This has aroused within me, the desire to highlight the ills of the oldage practice which can be viewed as primitive, contentious and an infringement of amongst other rights, human dignity and equality both of which are values that underlie an open and democratic society. It is also my opinion that the infringements render the practice of virginity testing unjust

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<sup>22</sup> T. R Martin 'The "Classical Age" is the modern designation of the period from about 500 B.C to the death of Alexander the Great in 323 B.C' Ancient Greece, Yale University Press, 1996, p. 94). available at [en.m.wikipedia.org](http://en.m.wikipedia.org), accessed 12 Nov 2018.

<sup>23</sup> Blank, Hanne (2008). *Virgin: The untouched History*. Bloomsbury USA.P.35 ISBN 978-1-59691-011-9 available at [https://books.google.co.za/books/about/Virgin.html?id=V6IPvgFKGFUC&redir\\_esc=y](https://books.google.co.za/books/about/Virgin.html?id=V6IPvgFKGFUC&redir_esc=y), accessed 12 Nov 2018.

<sup>24</sup> Francie Diep 'The ridiculous history of virginity tests' Pacific Standard online 14 June 2017, available at <https://psmag.com/social-justice/stupid-tests-for-stupid-people>, accessed 12 Nov 2018.

<sup>25</sup> [lynx.dac.neu.edu/k/kakelly/virgins/virgins.html](http://lynx.dac.neu.edu/k/kakelly/virgins/virgins.html), accessed 12 Nov 2018.

and therefore a constitutional anomaly in South Africa. Resultantly, I found it to be imperative that a possible resolve be explored.

#### *1.4 Statement of the problem*

Virginity testing is considered amongst harmful practices yet girls still endure exposure to it. It is indisputable that children are a generally vulnerable group whose rights are capable of violation without any notice whatsoever. Resultantly, the Universal Declaration of Human Rights' (UDHR)<sup>26</sup> proclaimed that all children are entitled to special care, assistance and the enjoyment of the same social protection. This standard has also been emphasised in amongst others, the Geneva Declaration on the Rights of the Child,<sup>27</sup> United Nations Convention on the Rights of Children (CRC)<sup>28</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>29</sup> In South Africa, section 28 of the Constitution meticulously lays out the rights of every child also with emphasis on the child's best interests being of paramount importance in every matter that concerns the child.<sup>30</sup> However, despite all the above precautions and more, children still seem to suffer vast injustices.

Even though virginity testing may appear to be an acceptable customary practice by virtue of being legislated, regulated and subsequently publicly practiced, it is still notably harmful to children, particularly girls. The practice tends to violate certain rights of girls despite the provision that the right to participate in social, cultural and religious practices may only be exercised to the extent that it is not contentious with any provision of the Bill of Rights. Exposing girls to such a practice can not, in my opinion be justifiable. The current South African legal position in relation to virginity testing ought to be explored at length.

#### *1.5 Research Questions*

It is the intention of this thesis to answer the following questions:-

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<sup>26</sup> Universal Declaration of Human Rights 1948. Article 25(2).

<sup>27</sup> Geneva Declaration on the Rights of a Child 1959. Principle 2.

<sup>28</sup> United Nations Convention on the Rights of Children, 1989. Article 1.

<sup>29</sup> African Charter on the Rights and Welfare of the Child. Article 2.

<sup>30</sup> Constitution of the Republic of South Africa, 1996. Section 28(2).

- (i) Does the Children's Act sufficiently protect children against the harmful practice of virginity testing?
- (ii) Can virginity testing be justifiable in an open and democratic society wherein the Bill of Rights is used as the yardstick?

### *1.6 Research Methodology*

This research relates purely to analysing primary sources such as statute, case law and academic commentary on same, hence the need to use a qualitative desktop study through the "black letter" methodology as it relates to concentrating on the "letter of the law". This approach will majorly be applied in analysing the relevant treaties, regional instruments as well as the applicable domestic statutes, viz the constitutional provisions and Children's Act alongside all the other applicable legal doctrines. The purpose hereof is to endeavour to ascertain the magnitude of interaction between human rights and the virginity testing of girls.

### *1.7 Objectives and Scope of the study*

This study is substantially intended to explore the constitutionality of virginity testing in South Africa. This will be achieved through examining the practice as set out in the Children's Act alongside its Regulations as well as other applicable laws. The provisions thereof will then be juxtaposed with the relevant provisions in the Bill of Rights. The study will also minimally encompass virginity testing and such other related practices globally. The ultimate objective of the research is to ascertain whether the law that relates to virginity testing should be amended or completely repealed.

### *1.8 The reintroduction of the practice of virginity testing in South Africa*

The documentation of the virginity testing practice in South Africa is noted from the period of its reintroduction by King Goodwill Zwelithini in 1991. This coincided with a period when the

country was quite hard hit by the HIV (Human Immunodeficiency Virus) pandemic.<sup>31</sup> However, other writers record that the virginity testing practice made a visible comeback sometime around the year 1994, [the time of the country's independence and first democratic elections] "when most South Africans began to feel free to practice their cultural beliefs without fear".<sup>32</sup> Regardless of the exact period of time whereupon virginity testing resurfaced, the major reason behind the practice appears to have been that it was believed to be effective in promoting abstinence, hence encouraging delayed premarital sexual activity which was in turn believed to enhance the bride price upon marriage. It was also believed to be a good measure for preventing teenage pregnancy.<sup>33</sup> A drastic reduction of the possibility of HIV transmission was also believed to be achievable through the testing.<sup>34</sup>

Virginity is still currently considered as a prestigious status such that it has also been associated with the awarding of academic bursaries to the extent that sometime in January 2016, in KwaZulu-Natal, at least sixteen girls under the governance of the uThukela district<sup>35</sup> mayor, were reported to have qualified for ('Maiden Bursaries') a bursary for tertiary education studies.<sup>36</sup> This was contingent on their virginity which was to be ascertained by them successfully undergoing *ukuhlolwa* (virginity testing) procedures and such status had to be maintained throughout the duration of their studies in order for them to retain the bursaries.<sup>37</sup>

In South Africa, it has been common sight for girls to travel from all parts of Zululand for the annual reed dance ceremony. In recent years there have been additional smaller groups from

<sup>31</sup> T S Mokoboto - Zwane Virginity Testing Practices: The best of both worlds September 2016 DOI:10.25159/1016-8427/1263.

<sup>32</sup> A Tandon, T Kanchan, C Wadhwa: Virginity Test-how is it still a Thing? Journal of Women's Health Care 2018, Vol 7(3): p 437.

<sup>33</sup> Karin Brulliard (26 September 2008). "Zulus Eagerly Defy Ban on Virginity Test" available at ([https://www.washingtonpost.com/wp-dyn/content/article/2008/09/25/AR2008092504625\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2008/09/25/AR2008092504625_pf.html)). *The Washington Post*. NONGOMA, South Africa. Date accessed on 14 Mar 2019.

<sup>34</sup> McNeill, Fraser G. (2011). *AIDS, Politics, and Music in South Africa*. Cambridge University Press. p. 27. Available at <https://www.cambridge.org/core/books/aids-politics-and-music-in-southafrica/2B753626A4AAFED45683D11E89A673DC>, accessed 14 March 2019.

<sup>35</sup> UThukela district is one of KwaZulu-Natal Province's eleven districts.

<sup>36</sup> K Maema *Supplementary Investigative Report: Investigative Report in the Maiden Bursary at uThukela District Municipality*. Commission for Gender Equality. (2016) 1-24.

<sup>37</sup> Ibid Note 36.

Pondoland<sup>38</sup> as well as reports of increasing activity in schools in the Eastern Cape and in Mpumalanga.<sup>39</sup> It has also been observed that the prevalence of virginity testing is recorded amongst the Zulu ethnic group. Amongst the latter, some girls are inspected on a regular basis within the family or communal set up, while others are inspected annually at the Enyokeni Royal Palace in Nongoma, KwaZulu-Natal.<sup>40</sup> This inspection precedes the annual September Royal Reed Dance ceremony.

Notwithstanding the fact that medical doctors perform the test in other countries, it is a rare spectacle in South Africa. The rarity is such that some doctors have disassociated themselves from the test by asserting in some circumstances, "that although provided for with consent, there is no role for the forensic medical examiner or any health care practitioner in the unscientific practice which some may consider a breach of human rights".<sup>41</sup> A certain doctor declared that no doctor or health care practitioner is a "virginity tester".<sup>42</sup> Another doctor accordingly corroborated through asserting, "no-one can examine a patient and guarantee, one hundred percent, whether or not they are a virgin because the presence of a hymen is not an indicator of virginity".<sup>43</sup>

In light of the above contentions by the doctors, virginity testing in South Africa is mainly conducted by elderly communal women who cause the virginity test candidates to lay on straw mats with their legs spread and labia pulled back hence allowing for easy access to their hymens.<sup>44</sup> This enables the elderly women to check if their hymens are intact or not. The process normally precedes the royal reed dance ceremony whereupon the presence of an intact hymen

<sup>38</sup> "Nongoma". Zululand Tourism available at <https://www.zulu.org.za/destinations/zululand/> accessed 21 August 2019.

<sup>39</sup> L. Richter, A. Davies, C. Higson Smith, eds (2004). Sexual abuse of young children in southern Africa available at [https://www.google.com/search?client=safari&rls=en&q=L.+Richter,+A.+Davies,+C.+Higson+Smith,+eds+\(2004\).+Sexual+abuse+of+young+children+in+southern+Africa&ie=UTF-8&oe=UTF-8](https://www.google.com/search?client=safari&rls=en&q=L.+Richter,+A.+Davies,+C.+Higson+Smith,+eds+(2004).+Sexual+abuse+of+young+children+in+southern+Africa&ie=UTF-8&oe=UTF-8), accessed 21 Aug 2019.

<sup>40</sup> Milena Ivanovic (2008). *Cultural Tourism*. Juta and Company Ltd. p. 155. ISBN 978-0-7021-7185-7 available at [https://www.academia.edu/18973673/BOOK\\_Cultural\\_tourism](https://www.academia.edu/18973673/BOOK_Cultural_tourism), accessed 14 Mar 2019.

<sup>41</sup> S Naidoo, S Naidoo, SR Bugwandeen *A Guide to Understanding & Interpretation- Medical Findings in Sexual Abuse*. (unpublished lecture notes, University of KwaZulu-Natal, 2016.

<sup>42</sup> Naidoo *op cit* at pg 107.

<sup>43</sup> Comments of Dr Fuziwe Dlakavu, a gynaecologist who practices as such in a Johannesburg Hospital available at <https://www.soulcity.org.za/news/what-is-the-truth-about-virginity-testing>, accessed 17 May 2019.

<sup>44</sup> See Note 1.

qualifies each girl for the Royal Reed Dance.<sup>45</sup> For the ceremony, each of the girls is expected to carry the longest and strongest reed in accordance with the girl's choice which reed is expected to tower above the girl's head before being deposited unbroken as she approaches the king.<sup>46</sup> In case the reed breaks before the girl reaches the king, it is considered as a sign of previous sexual activity (this reasoning confirms in quite a crisp manner that virginity testing is based on a myth). In light of the vast opinions in relation to the practice of virginity testing, its prevalence in the 21st century has continued to trigger questions on the relevance of the practice.

### 1.9 *Constitutional legal protection of social, cultural and religious practices in South Africa*

The Constitution of the Republic of South Africa bears an elevated status by virtue of being the highest law in the land.<sup>47</sup> This implies that the Constitution is law that neither any other law nor government action can supersede.<sup>48</sup> In essence, it is the supreme law of the Republic whose obligations must be fulfilled, thus declaring law or conduct inconsistent with it as invalid.<sup>49</sup> In Chapter 2 of the Constitution is entrenched the Bill of Rights which spells out in detail, stretching from section 9<sup>50</sup> to 35,<sup>51</sup> all the human rights<sup>52</sup> whose mandate to respect, protect, promote and fulfill is borne by the state.<sup>53</sup> The Bill of Rights applies to all law without any exception and is therefore binding upon the legislature, executive, judiciary and all organs of state.<sup>54</sup> The above provisions not only speak to the supremacy of the Constitution but also lay a foundational test for all other subservient statutes by specifically providing that not only law but

<sup>45</sup> Leclerc-Madlala. "Virginity testing: managing sexuality in a maturing HIV? AIDS epidemic" 2001 Medical Anthropology Quarterly Special Issue "The contributions of medical anthropology to anthropology and beyond") Page 533-539.

<sup>46</sup> Steven Dubin (7 January 2013). *Spearheading Debate: Culture Wars & Uneasy Truces*. Jacana Media. Page 61. ISBN 978-1-4314-0737-8 available at <https://www.ncbi.nlm.nih.gov/pubmed/11794875>, accessed 21 Aug 2019.

<sup>47</sup> Constitution of the Republic of South Africa, 1996, [formerly Act 108 of 1996].

<sup>48</sup> <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>, accessed 27 Aug 2018.

<sup>49</sup> Constitution of the Republic of South Africa, 1996, Section 2.

<sup>50</sup> The Equality clause is the first of the constitutionally entrenched human rights and it places emphasis on the equality of everyone before the law and the right of all citizens to equal protection and benefit of the law.

<sup>51</sup> The last of the human rights under the Bill of Rights in the Constitution of the Republic of South Africa, and it constitutes of the rights of arrested, detained and accused persons.

<sup>52</sup> Rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language or any other status.

<sup>53</sup> Constitution of the Republic of South Africa, 1996, Section 7(2).

<sup>54</sup> Constitution of the Republic of South Africa, 1996, Section 8(1).



also conduct which is inconsistent with the Constitution is invalid and therefore without legal force. In essence, all law and conduct must be consistent with the Constitution.

It is also noteworthy that when interpreting the Bill of Rights, every court, tribunal or forum is mandated to promote the values that underlie an open and democratic society based on human dignity, the achievement of equality as well as the advancement of human rights and freedoms.<sup>55</sup> In furtherance of the promotion of these values, a duty is conferred on every court, tribunal or forum to promote the object, purport and spirit of the Bill of Rights when developing common or customary law.<sup>56</sup>

It is argued that Section 39(2) is the development clause and further that since 1994 South African law has been characterized by the constitutional imperative to introduce substantive equality and bring social transformation.<sup>57</sup> It can thus be argued that the development of customary law extends even to the virginity testing practice that is generally counted amongst the customary practices of the day. It follows therefore that the spirit, purport and object of the Bill of Rights must be promoted through the interpretive process is so far as it relates to virginity testing. Essentially, the virginity testing law must percolate with the Bill of Rights. This is also in light of the fact that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill of Rights.<sup>58</sup>

It is imperative to note that all the rights which are entrenched in the Bill of Rights may be limited under one condition and that is 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 with all the relevant factors having been taken into account.<sup>59</sup> It is argued that a law of general application is a law whose application is equal in

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<sup>55</sup> Constitution of the Republic of South Africa, 1996, Section 39(1).

<sup>56</sup> Ibid Note 55, Section 39(2).

<sup>57</sup> Hawthorne, Luanda, The Development Clause Section 39(2) of the Constitution and the Law of Contract (February 5, 2018). Journal of Contemporary Roman-Dutch Law, Vol. 81, p. 108-120, 2018, Available at SSRN: <http://ssrn.com/abstract=3226455>.

<sup>58</sup> Constitution of the Republic of South Africa, 1996 Section 39(3).

<sup>59</sup> Constitution of the Republic of South Africa, 1996 Section 36(1)(a)-(e).

relation to everyone in general and not only to specific subjects. A limitation is reasonable when it is necessary, inexorable and justifiable as the least restrictive means employable in the given circumstances. It is further provided that, except there be compelling circumstances to the contrary and in accordance with the provisions of section 36(1) of the Constitution or any other provision thereof, no law may limit any right entrenched in the Bill of Rights.<sup>60</sup>

In a bid to embrace cultural diversity, the Bill of Rights provides that it is a fundamental right for everyone to use the language and to participate in the cultural life of their choice.<sup>61</sup> Section 31 further provides that “persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language”.<sup>62</sup> This is subject to the condition that these rights be exercised in a manner that is consistent with the Bill of Rights provisions.<sup>63</sup> This condition acts as a limitation that is imposed immediately after the pronouncement of each of the section 30 and 31 fundamental rights. The limitation/condition is clearly indicative of the fact that the right to cultural practices may not overlap or violate other constitutional rights and to the extent that it may so overlap, the limitation clause becomes applicable.<sup>64</sup>

#### *1.10 Social, cultural and religious practices in terms of the Children’s Act in South Africa*

In furtherance of the right to cultural practices in the Constitution, the Children’s Act makes provision for the enjoyment of certain social, cultural and religious practices while concurrently prohibiting the practice of others.<sup>65</sup> There is a sizeable number of diverse practices that relate to children in South Africa, some of which are permissible and others non permissible. The practices relate to both boys and girls.

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<sup>60</sup> Constitution of the Republic of South Africa, 1996, Section 36(2).

<sup>61</sup> Ibid. Note 60. Section 30.

<sup>62</sup> Ibid. Note 60. Section 31(1)(a).

<sup>63</sup> Constitution of the Republic of South Africa, 1996. Section 31(2).

<sup>64</sup> Ibid. Note 63. Section 36.

<sup>65</sup> The Children’s Act, 38 of 2005, Section 12(1)-(10).

The first non-permissible practice is that of giving a child out in marriage or engagement whereas that child is below the minimum age set by the law for a valid marriage.<sup>66</sup> The giving in marriage or engagement of a child who is above the minimum stipulated age, without the child's consent is the second non-permissible practice. Deducing from the two provisions, it follows that it is permissible practice to give a child who is above the minimum age set by the law in marriage or engagement. However, this can only be done with the child's consent. Female circumcision and genital mutilation constitute the third and fourth non-permissible practices.<sup>67</sup> The testing of children below the age of 16 is prohibited in terms of the Act and this happens to be the fifth non-permissible practice.<sup>68</sup>

In relation to virginity testing, the Act permits the testing of children older than 16 when it is done in accordance with the norms in the Children's Act.<sup>69</sup> It can be argued that the term children refers to both boys and girls, thus for purposes of virginity testing, both qualify. However, it is submitted that this is only on paper. Additionally to the above, consensual male circumcision is permissible if performed on a boy older than 16 and in accordance with the norms in the Children's Act.<sup>70</sup> The male circumcision of boys under the age of 16 is prohibited unless it relates to a religious rite or performed for medical reasons upon recommendation by a medical practitioner.<sup>71</sup>

It should be noted that the Children's Act is the only subservient legislation to the Constitution in relation to cultural practices in so far as they relate to children. Furthermore, it was enacted in order to give effect to certain rights of children as contained in the Constitution and like numerous other statute, it is accompanied by regulations and in this instance, the General Regulations Regarding Children, 2010.<sup>72</sup> By virtue of being subordinate to the Constitution, the Children's Act has to meet the constitutionality test by being consistent with the provisions in the Bill of Rights. Having regard to the above, it becomes plain that should any provision of the

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<sup>66</sup> Ibid. Note 65. Section 12(2)(a).

<sup>67</sup> Act 38 of 2005, Section 12(3).

<sup>68</sup> Ibid. Note 67, Section 12(4).

<sup>69</sup> Act 38 of 2005, Section 12(5).

<sup>70</sup> Section 12(9) of the Children's Act, 38 of 2005.

<sup>71</sup> Section 12(8)(a) and (b) of the Children's Act, 38 of 2005.

<sup>72</sup> Published under GN R 261 in GG 33076 of 1 April 2010 as amended by GN R497 in GG 35476 of 29 June 2012 and GN 978 in GG 40243 of 2 September 2016.

Children's Act appear to be repulsive to the Constitution, the latter, is empowered to prevail. The same standard applies to the virginity testing practice.

### *1.11 The social, cultural and/or religious practice of virginity testing in terms of the Children's Act (South Africa)*

This study seeks to explore the virginity testing practice whose foundations are crisply laid out in section 30 and 31 of the Constitution. These sections as discussed above, relate to the right to participate in the cultural life of one's choice. In the Children's Act, the practice is encapsulated in section 12 thereof wherein virginity testing under certain conditions set out in Chapter 2 of this study is legalised. The conditions under which virginity testing is permissible are regulated in terms of Regulation 3 and 4 and these can be summarised as the testing of children older than 16, with their consent for both the testing and the disclosure of test results.<sup>73</sup> The manner of consent is properly prescribed and clearly set out in the Regulations. In a nutshell, the consent must be preceded by proper counselling which must also precede the testing.

### *1.12 Arguments in favor of virginity testing*

It appears to be the prevailing rationale amongst the proponents for virginity testing in South Africa that an unmarried female's virginity is indicative of aspects of the female's morals in terms of her character and social value. Resultantly, the female's qualification for marriage, employment and possible medico-legal assessment(s) in case of sexual assault, have all, in a way become associated with the outcome of the female's virginity test in the concerned circles. It has further been argued that frequently testing helps in ascertaining the chastity of girls, hence increasing their likelihood of abstaining from sexual acts and thereby preventing HIV and other sexually transmitted infections while at the same time preventing teenage pregnancy.<sup>74</sup>

### *1.13 Arguments against virginity testing*

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<sup>73</sup> General Regulations Regarding Children, 2010. Regulation 3(1)-(4) and Regulation 4(1)-(4).

<sup>74</sup> Durojaye E, 'The human rights implications of virginity testing in South Africa' (2016) 16 (4) *International Journal of Discrimination and the Law*. Page 231.

Virginity testing of boys is at this stage, either a rarity or an unheard-of phenomenon. One writer argues that the markers for establishing a boy's virginity are incredibly tenuous and there is no evidence of widespread testing on boys.<sup>75</sup> He further suggests that the inclusion of boys is seemingly to establish an illusion of equality.<sup>76</sup> This exhibits disparity in the treatment of girls in comparison to boys in relation to virginity testing. Some opponents of the practice contend that it is inherently unjust and thus cannot be morally justified.<sup>77</sup> Essentially, the practice appears to be suggestive of the fact that the sexual activity of a woman as opposed to that of a man should be subject to scrutiny and condemnation. The arguments against virginity testing are in their entirety suggestive of the fact that the practice violates certain constitutional rights of girls older than 16.

Notwithstanding the fact that there are numerous ways of performing the test, it is indisputable that a female person's vagina is examined for purposes of locating the thin piece of mucosal tissue that surrounds or partially covers the external vaginal opening and is similar in structure to the vagina. This tissue forms part of the vulva or external genitalia, has few, if any, nerve endings and is termed the hymen.<sup>78</sup> Much as the hymen does not seem to have a specific physiological function, if found to be "present" and "intact", the testers depend on its laxity and/or firmness to make a determination on the girl's virginity status.<sup>79</sup>

Using the hymen as conclusive proof of virginity is problematic because women's bodies are formed differently, such that some women's vaginal openings are tighter or looser than others and some females are born without a hymen.<sup>80</sup> In cases where a female is born with a hymen, the difficulty may become the fact that hymens happen to be shaped and sized differently while at the same time varying in elasticity and types thereof. The variations are crescentic (a more

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<sup>75</sup> Kevin G. Behrens, Virginity testing in South Africa: a cultural concession taken too far? (2014) 177-187 South African Journal of Philosophy. Available at [https://www.researchgate.net/publication/276888306\\_Virginity\\_testing\\_in\\_South\\_Africa\\_A\\_cultural\\_concession\\_taken\\_too\\_far](https://www.researchgate.net/publication/276888306_Virginity_testing_in_South_Africa_A_cultural_concession_taken_too_far), accessed 7 Feb 2019.

<sup>76</sup> Ibid Note 75.

<sup>77</sup> Behrens K. Virginity (2014) *op cit* p 177.

<sup>78</sup> Blank, Hanne (2008) see Durojaye E, The human rights implications of virginity testing in South Africa' (2016) 16 (4) *International Journal of Discrimination and the Law*. Page 231.

<sup>79</sup> McNeil, Jr., Donald G. (13 September 2010). "Rape: Rights Group Calls Test to Determine Sexual Activity a 'Second Assault' in India". (<https://nytimes.com/2010/09/14/health/14glob.html?scp=1&sq=rape%20test&st=cse>) New York Times, accessed on 28 Jul 2018.

<sup>80</sup> "What is the truth about virginity testing?" available at <https://www.soulcity.org.za/news-events/news/what-is-the-truth-about-virginity-testing>, accessed on 12 November 2018.

common appearance in children but during puberty, estrogen causes it to change in appearance and become very elastic<sup>81</sup> thereby resulting in variations of the post pubertal hymen ranging from thin and stretchy to thick and somewhat rigid; or complete absence).<sup>82</sup> There also is the annular, imperforate, micro perforate, septate, cribriform, fimbriated and labialise,<sup>83</sup> of which the only variation that may require medical intervention is the imperforate hymen, which is closed off because the urogenital membrane failed to divide during birth and such could either completely prevent the passage of menstrual fluid or slow it significantly.<sup>84</sup> In either case, surgical intervention may be a necessity to allow menstrual fluid to pass or intercourse to take place.<sup>85</sup> Besides, the surgical procedure to correct an imperforate hymen, a female can undergo hymenorrhaphy or hymenoplasty, to repair or replace a torn hymen, to “pass” a virginity test.<sup>86</sup> When considering all the above, it becomes more evident that there are plenty misconceptions associated with the hymen as well as its ability to tear or rupture either during first intercourse or at any other stage in the development of a female person.

#### 1.14 Literature Review

“Literature review is a critical analytical evaluation of what has been published on a topic by accredited scholars and researchers. In other words, literature reviews are secondary sources and as such, do not report any new or original experimental work”.<sup>87</sup> Accordingly, in this section, a brief literature review is given on the opinions of the writers who have thus far endeavored to dissect the practice of virginity testing by raising questions and subsequent thereto, rendering answers in relation to the main questions which the practice of virginity testing raises. This study briefly states the views expressed by different writers on the subject and discusses points of

<sup>81</sup> Lahoti, Sheela L.; McClain, Natalie; Girardet, Rebecca; McNeese, Margaret; Cheung, Kim (March 1, 2001). Evaluating the Child Sexual Abuse”. American Family Physician. 63(5). ISSN 0002-838 X.

<sup>82</sup> Heger, Astrid H.; Elans, S Jean, eds (2000). Evaluation of Sexually Abused Child: A Medical Textbook and Photographic Atlas. (PDF) (2nd ed.) New York: Oxford University Press. P61-65. ISBN 9780195074253.

<sup>83</sup> See Note 41.

<sup>84</sup> Ibid Note 75 above.

<sup>85</sup> <https://en.wikipedia.org/wiki/Hymen>, accessed on 21 August 2019.

<sup>86</sup> “Muslim women in France regain virginity in clinics” available at (<https://www.reuters.com/article/wtMostRead/idUSL2532025120070430>) Reuters. 30 April 2007, accessed 13 Jun 2019.

<sup>87</sup> How to write a Literature Review. Available at [https://libguides.unisa.ac.za/literature\\_review](https://libguides.unisa.ac.za/literature_review). Date accessed 21 Jun 2019.

convergence and divergence thereon. However, it is noted that the main points are basically similar in nature from one writer to another.

The Children's Act provides for testing for purposes of establishing virginity or non-virginity. It further provides that the testing ought to be conducted on children older than 16. There appears to be consensus amongst most of the writers that virginity testing is a social, cultural or religious practice as envisaged by the provisions of section 30 and 31 of the Constitution.<sup>88</sup> Much as practices are constitutionally protected, virginity testing appears to be the kind of practice that is discriminative of women and girls, thus raising constitutionality questions.

The Children's Act is clearly gender non-discriminative as it plainly provides that virginity testing applies to children and a child is either a boy or a girl. The Act further sets out the norms for the practice of virginity testing. However, the test is commonly endured by girls, which most writers describe as a form of gender discrimination. It has thus been argued that virginity testing should be counted amongst harmful practices whose aim is to subjugate the bodily integrity of women.<sup>89</sup> Additionally and somewhat similarly to gender discrimination, it perpetuates a tradition wherein girls are not treated as equals with boys, thus violating the equality clause.

The fact that virginity testing is considered as a harmful practice suggests the propensity of harm in its consequences. It is argued that such practices, some of which "cause excruciating pain while others subject women to humiliating and degrading treatment" exhibit themselves in dissimilar forms and variations.<sup>90</sup> It is further argued that some of these practices "wear down the physical, psychological health and integrity of individuals, especially women and girls".<sup>91</sup> To some extent, the practices have perpetuated the subordination of women in society and

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<sup>88</sup> The Children's Act's Section 12 as well as Section 30 and 31 of the Constitution depict virginity testing as social, religious or cultural and no writer has disputed that as yet.

<sup>89</sup> Rafudeen, Auwais; Mkasi (Khuzwayo), Lindiwe P.. Debating virginity-testing cultural practices in South Africa: a Taylorian reflection. *J. Study Relig.*, Pretoria, v. 29, n. 2, p. 118-133, 2016. Available from <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1011-76012016000200007&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1011-76012016000200007&lng=en&nrm=iso)> accessed on 24 June 2019.

<sup>90</sup> Newman Wadesango, Symphoroza Rembe and Owence Cabaya, "Violation of Women's Rights by Harmful Traditional Practices" 2011 13(2) *Anthropologist* 121.

<sup>91</sup> Nelly Lukale, "Harmful Traditional Practices: A Great Barrier to Women's Empowerment", in: End Fistula (ed.), *Gender Equality, Gender Based Violence*. Available at: <http://girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment>. Date accessed 17 Dec 2018.

legitimised gender-based violence.<sup>92</sup> This view that virginity testing constitutes harmful practices is also held by the majority of opponents of the practice, (including the Commission on Gender Equality (CGE) and the South African Human Rights Commission (SAHRC), who maintain the view that virginity testing is the origination of a new form of violation and/or violence against women.<sup>93</sup>

According to May, like other scholars, the practice of virginity testing has both opponents and proponents. She contends that opponents argue on one hand that the practice is contrary to the constitutional provisions whose effect is to uphold the right to privacy, bodily integrity and outlaw all forms of gender discrimination. She further asserts that there is argument that the practice violates South Africa's commitments under international human rights law. However, on the other hand are the proponents who view virginity testing as "a back-to-basics remedy for some of the country's worst ills, including the growing AIDS pandemic". They also contend that it is a revival and appreciation of Zulu culture, which helps in detecting child abuse, minimises teenage pregnancies as well as preserves and instills a sense of good morals, which in all earnest is considered by the concerned parties to have been introduced rather too late.<sup>94</sup>

A summary of the views of the opponents exhibits the presence of contention on whether the practice is unconstitutional and detrimental to the wellbeing of children. This is the case more particularly when one considers the fact that the practice enjoys being sanctioned by the Constitution. Such clearly calls for the critical analysis of the stated competing constitutional rights. The points of convergence and divergence have consequently resulted in enquiries by the majority of writers on the subject in relation to the constitutionality of the relevant provisions of the Children's Act, both in so far as the law and the conduct thereof are concerned.

The age of 16 being the stipulated age for virginity testing has not endured much criticism to this end, perhaps in light of the consideration that writers have for evolving capacity. However, one writer opines that at the age of 16 and older, girls who take part in virginity testing are relatively

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<sup>92</sup> May R.M. *Virginity Testing: Towards outlawing the cultural practice that violates our daughters* (LLM thesis University of Western Cape. South Africa, 2003).

<sup>93</sup> May R.M (2003 see Footnote 92 above).

<sup>94</sup> Ibid.



young for the practice as they will be suffering from a lack of knowledge of their constitutional rights which also leaves them open to manipulation and violation.<sup>95</sup> Another writer contends that the participants who appear freely to choose to have their virginity tested, are either not really freely choosing because they are influenced by an oppressive cultural milieu or are incapable of autonomous choice by virtue of being legal minors.<sup>96</sup>

In another writer's opinion, the test is commonly performed on unmarried females and in most cases, forcefully or with a measure of coercion as they would have circumstantially been rendered incapable of giving such consent.<sup>97</sup> The manner in which girls are handled in relation to virginity testing suggests patriarchy thus falling short of portraying virginity testing as a consensual practice whose consent should be informed.

It has already been argued that there is no scientifically, clinically and/or medically proven instrument, measure and/or test for virginity testing. The basis for such argument is that some of the medical practitioners aver that there is no role for the forensic medical examiner (FME) or any health care practitioner in this unscientific practice which some may consider a breach of human rights.<sup>98</sup> No doctor or any health care practitioner is a "virginity tester".<sup>99</sup> It has additionally been argued that no doctor can examine a patient and guarantee, unreservedly, that the particular patient is a virgin because the presence of a hymen in no way conclusively indicates virginity.<sup>100</sup> It is therefore unimaginable that the elderly and mostly illiterate community Zulu women can conclusively ascertain virginity by merely casting their eyes into a girl's genitalia or even through the two-finger test.

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<sup>95</sup> R Chakamba 'The Clash Over Virginity Testing in South Africa. Available at [https://www.huffingtonpost.com/entry/south-africa-virginity-tests\\_us\\_57fbd36ee4b0e655eab67e4f](https://www.huffingtonpost.com/entry/south-africa-virginity-tests_us_57fbd36ee4b0e655eab67e4f), accessed 14 Mar 2019.

<sup>96</sup> Vincent L, Virginity testing in South Africa: Re-traditioning the post colony. *Culture, Health & Sexuality*, January-February 2006: 8(1): 20.

<sup>97</sup> Independent Forensic Expert Group. Statement on virginity testing. *J Forensic Leg Med*. 2015;33:121-4. Available at <https://www.ncbi.nlm.nih.gov/pubmed/26048511>, accessed 18 Feb 2019.

<sup>98</sup> Naidoo S et.al Note 41.

<sup>99</sup> *ibid*.

<sup>100</sup> Comments of Dr Fuziwe Dlakavu, a gynaecologist who practices as such at some hospital in Johannesburg available at <https://www.soulcity.org.za/news/what-is-the-truth-about-virginity-testing>, accessed 20 May 2019.

One scholar believes and hence argues that virginity testing is a 'preventive ritual' more than a 'diagnostic measure', by describing the testing as a strategy that involves the deployment of collective pressure and symbolic means both to increase the individual's and the community's responsibility for sexual relations and to strengthen girls' and women's positions at a time of chronic HIV/AIDS.<sup>101</sup>

Human rights groups (such as International Human Rights Organizations including the Human Rights Watch) have over the years insurmountably pestered Indonesia to desist from virginity testing and as a result of such pressure, virginity testing is no longer sanctioned in Indonesia.<sup>102</sup> However, despite the above, a study published in 2018 found vaginal and hymen examinations as still being a key part of police recruitment under the guise of a "morality or physical examination," whereby unrecorded "two-finger" tests, are conducted by inserting two fingers into the vagina to see if the woman's hymen is still intact.<sup>103</sup>

For decades, prior to the official cessation of virginity testing, all branches of the Indonesian military – air force, army, and navy used "virginity tests" and in certain circumstances, also extended the requirement to the fiancées of military officers despite the tests not being (legislated) or an official requirement.<sup>104</sup> Judging from the fact that Indonesia eventually succumbed to international pressure in relation to virginity testing, one opines that the law and conduct thereof must be scrutinised even in the other countries where the practice is still prevalent. South Africa is also amongst the list of the countries. This may ultimately yield the same results as were yielded in Indonesia and hence lead to the cessation of the practice and a restoration of the affected rights of the girls.

### 1.15 Conclusion

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<sup>101</sup> Anette Wickström, Virginity testing as a local public health initiative: a 'preventive ritual' more than a 'diagnostic measure', 2010, *Journal of the Royal Anthropological Institute*, (16), 3, 532-550. Available at [https://www.researchgate.net/publication/227682104\\_Virginity\\_testing\\_as\\_a\\_local\\_public\\_health\\_initiative\\_A\\_%27preventive\\_ritual%27\\_more\\_than\\_a\\_%27diagnostic\\_measure%27](https://www.researchgate.net/publication/227682104_Virginity_testing_as_a_local_public_health_initiative_A_%27preventive_ritual%27_more_than_a_%27diagnostic_measure%27), accessed 27 June 2019.

<sup>102</sup> Tasha Wibawa. Indonesian policewomen measured through 'purity and beauty', subjected to virginity testing. Available at <https://www.abc.net.au/news/2018-10-20/indonesian-policewomen-must-be-pretty-subjected-to-tests/10333762>, accessed 23 Jun 2019.

<sup>103</sup> <https://nypost.com/2018/10/23/policewomen-in-indonesia-must-go-through-virginity-testing/>, accessed 23 Jun 2019.

<sup>104</sup> Ibid Note 103 above.

Whereas the legislation and regulation of the virginity testing practice is common knowledge, it does not follow that it is constitutional, hence the numerous questions about its constitutionality which this study will seek to answer. The fact that numerous writers advance the argument that it cannot be proven by any reliable measure, renders it a possible myth, yet mythology is, in my opinion, only religious or cultural and does not constitute any law hence it does not enjoy any legislative attention. In summary, virginity testing is described in vast unconstitutional terms which will be explored in greater depth in this study as well as a discussion on possible reformatory measures which ought to be undertaken by way of educating people on the validity of a virginity test and the constitutional rights upon which the practice tramples. It will also be discussed whether law reform is of any necessity in primarily, more stringently regulating the practice of virginity testing and/or altogether repealing the laws that legalise the practice.

## CHAPTER TWO

### THE RIGHT TO PRACTICE ONE'S SOCIAL, CULTURAL AND RELIGIOUS TRADITIONS AND PRACTICES

#### 2.1 *Introduction*

The international conventions on human rights obligate States Parties to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.<sup>105</sup> Regional instruments and domestic laws also take cognisance of human rights amongst which are social, cultural and religious practices.

#### 2.2 *Background*

The observance of the right to practice one's culture or religion is seen in a vast number of the core international human rights treaties, regional instruments as well as certain South African statutes. These are amongst others, the International Covenant on Civil and Political Rights (ICCPR),<sup>106</sup> the Convention on the Rights of the Child,<sup>107</sup> Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAWU")<sup>108</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>109</sup> The Universal Declaration of Human Rights also emphasises the importance of the protection of human rights amongst which is the right to cultural practices.<sup>110</sup>

In Article 27 of the (ICCPR), emphasis is put on the right to culture, language and religion. The Article states thus:-

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<sup>105</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979.

<sup>106</sup> The International Covenant on Civil and Political Rights, 1966 Article 27.

<sup>107</sup> Convention on the Rights of the Child, 1989 Article 30.

<sup>108</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

<sup>109</sup> International Covenant on Economic, Social and Cultural Rights, 1966 Article 15(1)(a).

<sup>110</sup> Universal Declaration of Human Rights, 1948 Article 22.

“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language”.

According to Currie and De Waal,<sup>111</sup> it is evident in the General Comment on Article 27<sup>112</sup> that even though the rights protected under Article 27 are individual rights, they are dependent in turn on the minority group’s ability to ensure the perpetuation of its culture, language or religion.<sup>113</sup> It is further argued that “culture, religion and language are essentially communal objects and they happen to be the means of expression of a common sense of identity, values and traditions.”<sup>114</sup> Accordingly, the enjoyment of a culture presupposes the existence of a community of individuals with similar rights”.<sup>115</sup>

Regionally, the African Charter on Human and People’s Rights<sup>116</sup> and the African Charter on the Rights and Welfare of the Child,<sup>117</sup> both unanimously provide for the right to the enjoyment of cultural practices. The latter advocates for the recognition, respect and promotion by State Parties of the right of the child to, amongst others, free participation in cultural life.<sup>118</sup>

South Africa is made up of diverse cultural, religious and linguistic communities which in certain circumstances may be minorities, yet notwithstanding the numbers, international, regional and domestic instruments provide in unison that it is not legally permissible to deny such communities the right to enjoy their specific communion be it in specific relation to culture, religion and/or language.<sup>119</sup> The mere fact that there is unanimity internationally, regionally and domestically in relation to the observance and protection of human rights, exhibits crisply that all

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<sup>111</sup> Currie I, De Waal J, *The Bill of Rights Handbook*, 6 ed, *Juta* (2013) 626.

<sup>112</sup> General Comment Adopted by the Human Rights Committee under Article 27, of the International Covenant on Civil and Political Rights, No.23 (8 April 1994).

<sup>113</sup> General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, No 23 (50) (art 27) (26 April 1994) para 5.2.

<sup>114</sup> Ibid. Note 111. Page 627.

<sup>115</sup> Ibid.

<sup>116</sup> African Charter on Human and People’s Rights, 1981 Article 22.

<sup>117</sup> African Charter on the Rights and Welfare of the Child, 1990 Article 12

<sup>118</sup> Ibid Note 117.

<sup>119</sup> The International Covenant on Civil and Political Rights, 1966 Article 27.

human rights are universal, indivisible, interdependent and interrelated.<sup>120</sup> This imposes the duty on the international community to treat human rights in a fair and equal manner as well as on the same footing and with the same emphasis.<sup>121</sup> The above also confirm that no right bears greater value than another, each right must be treated in conjunction with another. It can further be argued that social, cultural and religious rights are linked to a person's dignity and this implies therefore, that a person's culture may well be an inherent part of who the person is and that needs to be respected.

### *2.3 The right to participate in social, cultural and religious practices as a constitutional right in South Africa*

Adopted from international treaties and legal instruments, the right to participate in social, cultural and religious practices is not alien to South Africa as it is enshrined in the Constitution.<sup>122</sup> This right is a fundamental right whose foundation is in section 30 and 31 of the Bill of Rights. The right applies generally to all citizens who specifically desire out of their own free will, to participate in cultural practices. Section 30 provides on one hand that everyone has the right to use the language and to participate in the cultural life of their choice.<sup>123</sup> Alongside section 30 is section 31 which provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language.<sup>124</sup>

In summary, section 30 of the Constitution provides individuals with the right to participate in the cultural life of their choice while section 31 encapsulates the right of persons belonging to a cultural, religious or linguistic community to enjoy their culture, practice their religion and use their language, thus making the right an individual as well as a community entitlement.<sup>125</sup> Evidently, the section 31 right extends protection not only to individual but also to group

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<sup>120</sup> Vienna Declaration and Programme of Action, 1993 Article 5.

<sup>121</sup> Ibid Note 120.

<sup>122</sup> Constitution of the Republic of South Africa, 1996 Section 30 and 31.

<sup>123</sup> Ibid. Note 122. Section 30.

<sup>124</sup> Children's Act 38 of 2005, Section 31(1)(a) and (b).

<sup>125</sup> Currie and De Waal at page 627.

interests in relation to the ethics of the relevant culture.<sup>126</sup> Culture, in sections 30 and 31 relates to the distinct manner in which an identifiable group of people leads its lives.<sup>127</sup> This extends to the right to family life, which, in *Hattingh v Juta*,<sup>128</sup> was held to give effect to the rights in section 30 and 31 of the Constitution, in accordance with the particular family's culture. The importance of the right to cultural practices can also be gleaned from the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. This Commission is one of the Chapter 9 institutions and its objective is to promote cultural diversity.<sup>129</sup>

There are crisp linguistic similarities between Section 31 of the Constitution and Article 27 of the ICCPR. Both relate to the diverse cultural, religious and linguistic communities.<sup>130</sup> Similarly to Article 27, section 31 is phrased negatively ('may not be denied the right') as compared to the positive phrasing in most other rights (usually, everyone has the right').<sup>131</sup> However, Currie and De Waal argue that section 31 is more than simply a right to be left alone to practice culture, language and religion but that, arguably, the purpose of section 31 is to indicate a commitment to the maintenance of cultural pluralism amidst any threats of disintegration faced by minority cultures.<sup>132</sup>

It is noteworthy that section 30 and 31 provide that all persons exercising such rights may do so in a manner which is uncontentious with any provision of the Bill of Rights.<sup>133</sup> This in essence amounts to imposing a limitation on both rights which clearly confirms that these rights are not absolute and are accordingly limitable in accordance with the limitation clause which is enshrined in section 36 of the Constitution.<sup>134</sup> Constitutionally, rights in the Bill of Rights may

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<sup>126</sup> Refer to Note 125.

<sup>127</sup> Currie and De Waal at page 627.

<sup>128</sup> *Hattingh v Juta* 2012 (5) SA 237 (SCA).

<sup>129</sup> Constitution of the Republic of South Africa, 1996 Section 185.

<sup>130</sup> Currie and De Waal *supra* at page 626.

<sup>131</sup> Currie and De Waal *supra* at page 630.

<sup>132</sup> Currie and De Waal *supra* at page 631 para 2.

<sup>133</sup> This limitation is imposed in both Section 30 and 31(2) of the Constitution, which is suggestive of the fact that, such right, like all other relevant ones, is not absolute, hence subject to the limitation clause.

<sup>134</sup> Constitution of the Republic of South Africa, 1996. Section 36.

be limited only in terms of law of general application.<sup>135</sup> According to the limitation clause, a right can only be limited 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 account all relevant factors stated.<sup>136</sup> A limitation is reasonable when it is necessary, inexorable and justifiable as the least restrictive means employable in the given circumstances. It is further provided that all relevant grounds for the limitation of rights are provided for under section 36(1) of the Constitution as well as in certain other constitutional provisions. Consequently, unless so provided, no law may limit any right entrenched in the Bill of Rights.<sup>137</sup>

'Limitation' is a synonym for 'infringement' or perhaps, 'justifiable infringement'.<sup>138</sup> The limitation of a right can only be imposed after all relevant factors have been taken into consideration. This is in view of the fact that the limitation of a right essentially amounts to an infringement of such a right, implying therefore, that the right is of lesser value or importance than the other rights with which it may be in contention. An infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom.<sup>139</sup> The above is pursuant to the fact that section 36 provides for justifiable infringements of fundamental rights in accordance with the criteria of the limitation clause. It follows therefore that the right to social, cultural and religious practices can be limited for as long as there can be justification for the limitation in accordance with the provisions of the limitation clause.

#### *2.4 Other constitutional rights applicable to children and of relevance to the virginity testing practice*

Fundamental constitutional rights are rights which are conferred on "everyone" or denied to "no one" in the Constitution.<sup>140</sup> However, voting rights and the right to contest for election into

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<sup>135</sup> A law of general application is a law which applies across the board, to everyone equally and not only to specific subjects.

<sup>136</sup> Constitution of the Republic of South Africa, 1996. Section 36(1)(a)-(e).

<sup>137</sup> Ibid. Note 136. Section 36(2).

<sup>138</sup> Currie I, De Waal J, The Bill of Rights Handbook 151.

<sup>139</sup> Ibid. Note 138.

<sup>140</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para [38]. The right to vote and the right to stand for or hold public office are not applicable to children, as



public office are rights whose restriction is limited to 'every adult citizen', implying therefore that it is every child's entitlement to enjoy the same magnitude of human rights protection as their adult counterparts save for the stated political rights.<sup>141</sup> Section 28 sets out those rights whose application is only peculiar and exclusive to children.<sup>142</sup> These rights are effective from birth.<sup>143</sup> Since the rights are exclusive to children, they accordingly terminate at the age of 18 upon attainment of majority.<sup>144</sup> However, the rights are neither exhaustive of all rights applicable to children, nor do they strip them of the rights not specifically listed therein.

In essence, it can be argued that the section 28(1) provisions are a summary of some of the fundamental rights in the sense of encompassing the right to freedom and security of the person,<sup>145</sup> citizenship,<sup>146</sup> slavery, servitude and forced labor,<sup>147</sup> labor relations,<sup>148</sup> education,<sup>149</sup> housing,<sup>150</sup> health care, food, water and social security,<sup>151</sup> access to courts,<sup>152</sup> as well as the rights of arrested, detained and accused persons<sup>153</sup> under the same section on the rights of children.

The other provisions of the Bill of Rights which are applicable to children and at the same time closely interacting with the virginity testing practice are the following constitutional rights;

- equality;<sup>154</sup>
- inherent dignity and the right to have their dignity respected and protected;<sup>155</sup>
- freedom and security of the person, which includes the right-not to be treated or punished in a cruel, inhuman or degrading way;<sup>156</sup>

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these rights are expressly afforded to "every adult citizen" in s 19(3) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>141</sup> *Bhe v Magistrate, Khayelitha* 2005 (1) SA 580 (CC) [52].

<sup>142</sup> Section 28(1)(a)-(i) of the Constitution of the Republic of South Africa, 1996.

<sup>143</sup> Constitution of the Republic of South Africa, 1996 Section 28(1)(a).

<sup>144</sup> Section 28(3) of the Constitution defines a "child" as a person under the age of 18.

<sup>145</sup> Section 12 of the Constitution of the Republic of South Africa, 1996.

<sup>146</sup> Ibid. Note 145. Section 20.

<sup>147</sup> Ibid. Note 145. Section 13.

<sup>148</sup> Ibid. Note 145. Section 23.

<sup>149</sup> Ibid. Note 145. Section 29.

<sup>150</sup> Ibid. Note 145. Section 26.

<sup>151</sup> Ibid. Note 145. Section 27.

<sup>152</sup> Ibid. Note 145. Section 24.

<sup>153</sup> Ibid. Note 145. Section 35.

<sup>154</sup> Ibid. Note 145 Section 9(1)-(5).

<sup>155</sup> Ibid. Note 145. Section 10.

<sup>156</sup> Ibid. Note 145. Section 12(1)(e).

- and the right to bodily and psychological integrity, which includes the right-to security and control over their body.<sup>157</sup>

Within South Africa's legal framework, the judiciary is empowered to interpret the law in terms of section 165 of the Constitution. Additionally to interpreting the law, the Constitution provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.<sup>158</sup> The above clearly shows that the courts have the power to address and deal with any legal anomalies once established. They also have the capacity to declare any law or conduct which violates rights to be inconsistent with the Constitution, thus invalid to the extent of such inconsistency.<sup>159</sup>

## 2.5 *The legal framework for child related practices in South Africa*

The Children's Act is very specific with regards to permissible and non-permissible religious, social and cultural practices in so far as such practices apply to children.<sup>160</sup> In terms of section 12(1), it is provided thus:-

that it is the right of every child not to be subjected to practices which are socially, culturally and/or religiously detrimental to the child's wellbeing.<sup>161,162</sup> It proceeds further to specify the practices to which it refers.<sup>163</sup> These are listed in section 12(2) up to 12(9) of the Children's Act.

Section (2)(a) sets a prohibition against the giving out in marriage or engagement of children who are below the minimum age set by law for the purposes of the conclusion of a valid marriage.

<sup>157</sup> The Constitution of the Republic of South Africa, 1996. Section 12(2)(b).

<sup>158</sup> The Constitution of the Republic of South Africa, 1996. Section 172(1)(a) and (b).

<sup>159</sup> Ibid.

<sup>160</sup> 38 of 2005.

<sup>161</sup> Section 1 of the Children's Act, like the Constitution, defines a child as a person under the age of 18 years, an illustration of congruity between the Constitution and the Children's Act in relation to the definition of "child."

<sup>162</sup> Section 12(1) of Act 38 of 2005.

<sup>163</sup> Section 12(8) of Act 38 of 2005.

Section (2)(b) makes it a legal requirement for children who are above the set minimum marriage age to freely give consent to marriage.

Section (3) prohibits the mutilation of female children's genitals and/or their circumcision.<sup>164</sup>

Section (4) provides that children below the age of 16 shall not be tested for virginity.<sup>165</sup>

Section (5) sets out the conditions under which virginity testing of children older than 16 may be conducted. These are spelt out in sub sections 6 and 7.<sup>166</sup>

Section 12 (8) and (9) specifically provide for circumcision of male children and the conditions under which same is permissible.

Essentially, it is specifically stipulated in the Children's Act that for a virginity test to be conducted on a child, the following have to be adhered to:-

- the age (the child has to be older than 16);
- he/she must undergo counselling both pre and post testing;
- he/she must give consent to the testing; and
- the child's body may not be marked post testing.

## 2.6 Conclusion

Taking cognizance of the fact that the Constitution is the supreme law of the Republic, it does follow that every piece of legislation or conduct that is contrary to the Constitution is rendered inconsistent with it and thus invalidated by such inconsistency. The fulfillment of the obligations imposed by the Constitution is mandatory.<sup>167</sup> Social, cultural and religious practices should therefore be enjoyed in a manner that shows consistence with other provisions in the Bill of

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<sup>164</sup> Section 12(3) of Act 38 2005.

<sup>165</sup> Section 12(4) of Act 38 of 2005.

<sup>166</sup> Section 12(5)(6) and (7) of Act 38 of 2005.

<sup>167</sup> Constitution of the Republic of South Africa, 1996 Section 2.

Rights. The right to participate in social, religious and cultural practices on its own does not appear to exhibit any signs of contention with other provisions in the Bill of Rights. However, quite intense contention has been observed when the constitutional right to participate in social, cultural and religious practices has been discussed in relation to children in Section 12 of the Children's Act and more specifically in relation to virginity testing.

## CHAPTER THREE

### A CRITICAL ANALYSIS OF THE LAW ON VIRGINITY TESTING AS A SOCIAL, CULTURAL AND RELIGIOUS PRACTICE

#### 3.1 *Introduction*

The enactment of the Children's Act was intended to give effect to certain constitutional rights of children.<sup>168</sup> Like numerous other statutes, it is accompanied by regulations that in this instance are the General Regulations Regarding Children, 2010.<sup>169</sup> The Children's Act is thus far the only subservient legislation to the Constitution in relation to religious, social and cultural practices in so far as these practices relate to children.

This chapter will deal specifically with the constitutional right to participate in social, cultural and religious practices which is given effect in section 12 of the Children's Act. An in-depth analysis of the virginity testing practice will be conducted and it will be achieved through examining and attempting to explain the differences in terminology between mainly the section 30 and 31 constitutional rights and section 12(1) of the Children's Act. The purpose hereof is to endeavour to ascertain whether the Children's Act provisions in so far as they relate to social, cultural and religious practices are constitutionally contentious or not. The manner in which virginity testing is conducted and the conditions under which it may be performed will be discussed in depth with a view to ascertaining its contentiousness, if any, towards the relevant and applicable provisions of the Bill of Rights.

#### 3.2 *The nexus between the constitutional and Children's Act's right to participate in social, cultural and religious practices.*

In accordance with the South African legal framework, the recognition of social, cultural and religious practices has its roots in the interrelated section 30 and 31 constitutional provisions.

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<sup>168</sup> Act 38 of 2005.

<sup>169</sup> Published under GN R 261 in GG 33076 of 1 April 2010 as amended by GN R497 in GG 35476 of 29 June 2012 and GN 978 in GG 40243 of 2 September 2016.

Section 12(1) of the Children's Act is intended to give effect to the rights of children to participate in practices of their choice.<sup>170</sup> It sets out permissible and non-permissible social, religious and cultural practices. Amongst the said practices is the practice of virginity testing which appears to have been accepted by the legislator as a social, cultural and religious practice almost globally and more specifically, in South Africa. This practice has two sides to it, that is, it is both permissible<sup>171</sup> (when performed on children older than 16 and in accordance with the norms of the Children's Act) and non-permissible<sup>172</sup> (in relation to children below 16 and carried out without due regard to the norms in the Children's Act).

*Prima facie*, there appears to be some measure of similarity in terminology between the provisions of section 30 and 31 of the Constitution as well as those of section 12(1) of the Children's Act. However, upon in-depth analysis, the provisions are worded differently. The section 30 and 31 constitutional provisions impress on one hand that persons belonging to a cultural, religious or linguistic community and desirous of participating in the cultural life of their choice, may not be denied such rights. This right applies indiscriminately. The Children's Act on the other hand provides in section 12(1) that "every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing".<sup>173</sup> Constitutionally, all social, cultural and religiously inclined persons may not be denied the rights provided in Section 30 and 31 whereas in terms of the Children's Act, children may not be subjected to any such practices, to their detriment.

The following distinct terminology is used in section 30 and 31 of the Constitution; "participate" "choice" and "may not be denied the right". It is submitted that the word "participate", means to take part in or become involved in an activity.<sup>174</sup> The focus here is on the element of "choice", that is, the opportunity or power to choose between two or more possibilities and even to refuse to participate.<sup>175</sup> It can be argued that the use of the stated terms doubtlessly excludes any form

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<sup>170</sup> Section 12(1) of Act 38 of 2005.

<sup>171</sup> Section 12(4) of Act 38 of 2005.

<sup>172</sup> Section 12(5) Act 38 of 2005.

<sup>173</sup> Section 1 of the Children's Act, like the Constitution, defines a child as a person under the age of 18 years, an illustration of congruity between the Constitution and the Children's Act in relation to the definition of "child".

<sup>174</sup> <https://dictionary.cambridge.org/dictionary/english/participate>, accessed 20 May 2019.

<sup>175</sup> <https://www.merriam-webster.com/dictionary/choice>, accessed 20 May 2019.

of interference while at the same time affirming that participation in social, religious or cultural practices should be out of one's own free volition.<sup>176</sup>

It is noted that in the place where the Constitution<sup>177</sup> creates room for the exercise of choice, the Children's Act<sup>178</sup> instead uses the terminology, "right not to be "subjected" to practices which are detrimental to his or her wellbeing". An argument is tendered that this can be ascribed to the notion that choice does not apply to children who are individually vulnerable and defenceless despite the fact that it is during the period of childhood that cultural connections are mostly formed.<sup>179</sup>

Save for the term child, the remainder of the wording in section 12(1) of the Children's Act requires conscientious interpretation, more particularly, the fact that though derived from section 30 and 31 of the Constitution, the legislator elected not to import the specific wording but instead bestowed a negative right. A negative right imposes a negative duty on others to do nothing and not to interfere.<sup>180</sup> In the case of children and in relation to social, religious and cultural practices, it is the right of every child not to be subjected to such practices at all or alternatively, against their will. Such right in relation to children calls upon all the relevant parties (parents, guardians, the state etc.) to take precautionary measures to ensure that children are not subjected and to their detriment, to such cultural practices as follow thereunder and amongst which is the virginity testing practice in section 12(5) of the Children's Act.

It is noteworthy that section 12(1) of the Children's Act plainly provides that it is the right of every child to enjoy social, cultural and religious practices but only in so far as the child is not being subjected thereto to its detriment. This directly leads one to the definition of the term subjected. The meaning thereof is "being in a position or in circumstances that place

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<sup>176</sup> The terms participate and choice in section 30 and 31 of the Constitution.

<sup>177</sup> Constitution of the Republic of South Africa, 1996.

<sup>178</sup> Section 12(1) of the Children's Act, 38 of 2005.

<sup>179</sup> M Mswela Cultural practices and HIV in South Africa: a legal perspective' (2009) v. 12, n. 4, p. 172-213.

Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso), accessed 26 January 2020.

<sup>180</sup> Positive and Negative Rights Capitalist Party. Available at <https://www.liberalistene.org/knowledge/positive-and-negative-rights/>, accessed 13 Jun 2019.

one under the power or authority of another or others".<sup>181</sup> In other words it means to compel someone to endure certain circumstances, typically unpleasant or unwelcome ones. This raises the question, can a child be subjected to some social, religious or cultural practice(s) and how? The immediate answer would be, indeed a child can be subjected to such practices. This happens when the child is made to undergo the said practices involuntarily or under duress as a result of circumstances around them.

Another question would be, what does detrimental to the child's wellbeing mean? Detrimental is defined as bringing into disrepute, causing harm, damage or disadvantage.<sup>182</sup> Wellbeing refers to diverse and interconnected dimensions of physical, mental and social well-being that extend beyond the traditional definition of health.<sup>183</sup> It is said to include choices and activities aimed at achieving physical vitality, mental alacrity, social satisfaction, a sense of accomplishment and personal fulfilment. Wellbeing is further described as the experience of health, happiness and prosperity and these emerge from one's thoughts, actions and experiences. Well-being is mainly constituted of five major types, viz emotional, physical, social, societal and work place wellness.<sup>184</sup>

In essence, taking the above arguments into consideration, a conclusion can be drawn that section 12 (1) of the Children's Act creates room for the reasoning that there is the possibility that the practices which are spelt or set out thereunder may be detrimental or disadvantageous to the wellbeing of the child. It is submitted that this is suggestive of elements of possible interference with the rights of children and this may be harmful to them mentally, physically and socially. A call is thus extended to the relevant parties and/or bodies to exercise due caution when it comes to such rights in relation to children.

Deducing from the Constitution, Children's Act and the General Regulations, a virginity test should not have a negative bearing on the child's personality and the vast components of its

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<sup>181</sup> <https://www.thefreedictionary.com/subjected>, accessed on 19 December 2018.

<sup>182</sup> <https://www.thesaurus.com/browse/detriment>, accessed 13 Jun 2019.

<sup>183</sup> <https://www.google.com/amp/s/www.psychologytoday.com/za/blog/click-here-happiness/201901/what-is-well-being-definition-types-and-well-being-skills%3famp>, accessed on 22 February 2019.

<sup>184</sup> Refer to Note 183 above.



wellbeing.<sup>185</sup> This therefore means that a child may not be forced to undergo any social, religious or cultural practice(s) to his/her disadvantage. Explored in another light, the section could also imply that much as the child may not be enduring being subjected thereto, the practices may still be to his/her detriment from a constitutional view point.

Seen from another angle, the approach that the legislator adopted in the wording of the section 12(1) provisions of the Children's Act evinces that particular attention was paid to the best interests of the child. This standard is entrenched in section 28(2) and in accordance therewith the best interests of a child are of paramount importance in every matter that relates to the child.<sup>186</sup> This confers upon every child the right to enjoy specialized legal protection of rights. Essentially, it provides that decisions affecting or relating to children must be made/taken and/or arrived at in a manner that bears no measure of detriment to the children. However, much as the protection of rights is assured, such right is not absolute. The highest court's [Constitutional Court] decision provided clear guidelines on the interpretation of section 28(2). In *S v M (Centre for Child Law as Amicus Curiae)*<sup>187</sup> the court opined that the protection of the children's said interests is not an "overbearing and unrealistic trump" that will automatically assume dominance over other rights. In the words of Sachs J<sup>188</sup>

"The fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited".

The Constitution and the Children's Act are indeed interwoven in relation to social, religious and cultural practices. This can be seen in the recognition by the Children's Act of the constitutional principle in so far as such practices are concerned. It clearly provides that virginity testing should not be conducted without the child's consent and further that children should not to be subjected to practices which are detrimental to their well-being. The intention of the legislator in so far as the Children's Act provisions with regards to such practices are concerned, was to ensure

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<sup>185</sup> Section 12(4)-(7) of Act 38 of 2005 and Regulation 3 to 4 of the Regulations regarding Children (see footnotes 167-169).

<sup>186</sup> The Constitution of the Republic of South Africa, 2006 Section 28(2).

<sup>187</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

<sup>188</sup> *S v M (Centre for Child Law as Amicus Curiae)* *supra*.

harmony with the Constitution. However, the Children's Act provisions appear to endure flouting thus rendering the children vulnerable to the abuse of their social, religious and cultural rights. This ultimately renders the relevant Children's Act provisions at loggerheads with parts of the Constitution.

### 3.3 *Virginity testing and its formal requirements in terms of the Children's Act*

Section 12(4) of the Children's Act not only introduces the practice of virginity testing but also specifically provides that virginity testing of children under the age of 16 is prohibited or non-permissible unless undertaken in line with the detects of the Act. It is in section 12 (5) that permissible virginity testing is provided for and the criteria for its practice set as already discussed. Primarily, the child has to be 16 years and older and has to have consented to the testing. There is a prescribed manner through which the consent must be given; and the consent must be preceded by proper counselling of the child which is also accordingly prescribed. It can be argued that the use of the terms "may only" be performed if the child has given consent to the testing in the prescribed manner, suggest that it is solely when the child or girl herself has given consent to virginity testing that it may be performed. The consent must be given in writing and/or as specifically regulated and it must precede the testing. The use of the said terms serves as emphasis of the fact that there is no room with regards to virginity testing for the consent of another person on behalf of a girl, save for that of the girl who has to endure the test herself.

In terms of section 12(5)(a)-(c) of the Children's Act, the child should have undergone pre-test counselling and subsequently rendered consent to the testing as specifically provided in terms of the Regulations. The General Regulations regarding Children are unambiguous in relation to the counseling, an issue that is closely linked to consent. It is argued that the counseling serves as fulfillment of the requirement that a child must be provided with information before she can consent to the procedure. Section 4(3)(ii) thereof sets out who the role players are when it comes to counseling. It provides that it must either be the parent, guardian or caregiver and/or a social service professional who renders the counseling. A relevant case in this regard is *C v Minister of Correctional Services*.<sup>189</sup> The case mainly relates to pre-HIV test counseling for purposes of

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<sup>189</sup> 1996 (4) SA 292 (T).

obtaining informed consent as well as post-test counseling as per the Department of Correctional Services' mandatory policy regarding pre and post HIV test counseling and informed consent. One would argue that the same counseling principle applies to virginity testing thus rendering it imperative for girls to undergo pre and post virginity test counseling per the dictates of the Children's Act and its Regulations.

Subsequent to the counselling, the girl must consent to the testing, which consent further extends to the disclosure of the test results, should the need to so disclose arise. The consent must have been attended to in writing. However, in spite of these safeguards, certain writers are of the opinion that it may not be out of choice that girls undergo the virginity test because in a vast number of communities globally, girls endure lack of independence as they are often thought of as properties of their fathers and/or husbands such that their bodies become gadgets of male control.<sup>190</sup> Resultantly, there may be coercion to some extent and in case of any measure of coercion, be it by the family, the community or even by the child's peers, the testing is rendered non consensual and therefore a violation of the child's rights. Such violation renders the virginity testing impermissible.

### 3.4 *The requirement of consent with regards to virginity testing*

South African law currently operates on the principle of "informed consent". This principle is based on the common law doctrine: *volenti non fit injuria* [Latin] which is interpreted to mean, "to a willing person, injury is not done".<sup>191</sup> This was explored in Van Oosten's text on informed consent whereupon he outlined the circumstances under which consent may be used as a defence in South Africa.

The requirements are as follows;<sup>192</sup>

- a. "It must be recognised by law, that is, it must not be *contra bonos mores*;

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<sup>190</sup> See Tandon et.al Note 32.

<sup>191</sup> Barit A, *The Doctrine of Informed Consent in South African Medical Law* (LLM thesis University of Pretoria, 2017).

<sup>192</sup> Van Oosten FFW, *The Doctrine of Informed Consent in Medical Law*. (unpublished LLD thesis, UNISA, 1989).

- b. It must be given by a person capable in law of consenting, that is, by someone who is capable of forming an intention or, of understanding what he consents to;
- c. It must be free and voluntary, that is, not induced by fear, force or fraud. It must be comprehensive, that is, extend to the entire transaction, inclusive of its consequences;
- e. It must be clear and unequivocal;
- f. It must precede the conduct in question;
- g. It must be manifested externally to qualify as a legal act;
- h. It must, as a rule, be granted by the Plaintiff or the complainant himself;
- i. The conduct itself must fall within the limits of the consent given, that is, it must not exceed the bounds of the consent given”.

More recently, the principle of informed consent which has its basis in *Castell v De Greef*<sup>193</sup> has been set out in sections 6<sup>194</sup> and 7(1)<sup>195</sup> of the National Health Act<sup>196</sup> (NHA) which provides that the user (patient) must have knowledge or be informed of the harm or risk. That is to say, he/she must understand and appreciate the nature and extent of the harm or risk associated with the impending procedure. The user must also consent to the harm or risk and the consent must be intelligible, such that, it covers every aspect of the harm or risk.<sup>197</sup> Much as the National Health Act’s enactment preceded that of the Children’s Act, it can still be argued that virginity testing is sexual and reproductive health oriented, hence the relevance of the application of the principles of informed consent as would be the case with all other medico-legal spheres. Consent is a primary requirement for both the virginity test and the disclosure of test results hence it should accordingly be obtained pre and post testing. It is argued that the fact that it is a requirement for the test to be accompanied by pre and post test counseling brings virginity testing in line with the principles of informed consent.

<sup>193</sup> *Castell v De Greef* 1994 (4) SA 408 (C) A.

<sup>194</sup> Section 6 (1)-(2) of the National Health Act 61 of 2003, emphasises that the user must have full knowledge of their health status, the range of diagnostic procedures and treatment options generally available to them, the benefits, risks, costs and consequences generally associated with each option as well as the user’s right to refuse health services which should be coupled with an explanation regarding the implications of such refusal, its risks and obligations.

<sup>195</sup> Section 7 (1) of the National Health Act 61 of 2003, provides that subject to section 8, a health service may not be provided to a user without the user’s informed consent.

<sup>196</sup> Act 61 of 2003 which was assented to on the 18th July 2004 and thereafter published on the 23rd July 2004.

<sup>197</sup> *Castell v De Greef* case para 425 H-I.

Subsequent to the anticipated consensual test, results are inevitable but these may not be disclosed without the child's consent.<sup>198</sup> Further, the body of the child who has undergone virginity testing may not be marked because virginity testing is a private matter. It can be argued that the provisions relate to the confidentiality of information that relates to virginity testing. The marking of the body of the child is tantamount to the disclosure of test results, of which both amount to breach of confidentiality.<sup>199</sup> In the case of *NM & Others v Smith and Others*,<sup>200</sup> non-consensual disclosure of the names and HIV status of three women was made. The court found that such disclosure was not in the interest of the public hence the disclosure was wrongful publication of a private fact which amounted to a violation of the applicant's right to privacy hence a violation of their dignity and psychological integrity. The same principle was applied in *Jansen Van Vuuren and Another NNO v Kruger*.<sup>201</sup> In *casu*, a doctor was penalized for breaching confidentiality in relation to the HIV status of his client (a patient) by disclosing to his wife and/or family and/or friends/colleagues, that the patient was HIV positive.

### 3.5 *Are the provisions in the Children's Act which legalize virginity testing justifiable?*

The Constitution is the supreme law of the Republic and all other statutes are subservient to it. In essence, all other statutes must be relevant to the Constitution failing which they may be declared invalid by the courts. The right to social, religious and cultural practices has its roots in section 30 and 31 of the Bill of Rights and the two provisions are self-limiting in the sense that they both state that no one exercising the right to participate in such practices may do so in a manner inconsistent with any provision of the Bill of Rights.<sup>202</sup> This exhibits that the right to these practices is not absolute, it is limitable in terms of section 36 of the Constitution (the limitation clause).<sup>203</sup> This implies that the provisions of the limitation clause may be invoked if the right to participate in the practice of virginity testing is exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>198</sup> Section 12(6) of Act 38 of 2005.

<sup>199</sup> Section 14 of the National Health Act, 61 of 2003.

<sup>200</sup> *NM & Others v Smith and Others* 2007 (5) SA 250 (CC).

<sup>201</sup> *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 A.

<sup>202</sup> The Constitution of the Republic of South Africa, 1996. Section 30 and 31(2)

<sup>203</sup> In Section 36 of the Constitution of the Republic of South Africa, 1996, is entrenched the limitation clause which applies to all rights in the Bill of Rights, save for the non-derogable rights.

In order to determine the constitutionality of the virginity testing provisions, they must be justifiable. One has to primarily consider those rights that the practice is intended to promote and protect on one hand and the ones that endure infringement at the expense of the former, on the other. In the case of virginity testing, the right to social, cultural and religious practices is the one that enjoys promotion and protection and this right on its own lacks signs of antagonism towards any provision in the Bill of Rights. The right to the section 30 and 31 practices appears to be like all other constitutional rights until it is explored in terms of the Children's Act where it is discussed in the context of the virginity testing practice. This practice is seen in some spheres as a violation of certain fundamental constitutional rights of girls. Essentially, the United Nations Human Rights agencies and Women along with the World Health Organization (WHO) have constantly advocated for the phasing out of the contentious practice.<sup>204</sup>

In South Africa there are both proponents and opponents of virginity testing. Opponents believe virginity testing to be unjustifiable and therefore advocate for an end to the practice. Human Rights and women's advocacy groups have shown strong resentment towards virginity testing. In particular, the Commission on Gender Equality, for example, described the testing as unconstitutional, discriminatory, invasive of privacy, unfair and impinging on the dignity of young girls.<sup>205</sup> There also have been fears that young girls may be less keen to report sexual abuse for fear of disclosing that they are no longer virgins.<sup>206</sup> Moreover, it is believed that until the year 2000, most rape victims were adults. An abrupt turn-around from 2001 saw at least 65 to 70 per cent of victims being children, some as young as two weeks old.<sup>207</sup> This is attributed to the general belief or myth that sex with a virgin does cure HIV/AIDS. Resultantly, public identification as a virgin may in fact put the life of a girl in jeopardy by not only exposing her to rape and/or sexual abuse but also increasing the risk of HIV infection. There generally has been

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<sup>204</sup> 'Virginity testing': a human rights violation, with no scientific basis – UN available at <https://news.un.org/en/story/2018/10/1023401>, accessed 20 May 2019.

<sup>205</sup> May R.M (2003 see Footnote 92 above).

<sup>206</sup> Mswela, M. Cultural Practices and HIV in South Africa: A Legal Perspective. *PER* [online]. 2009, vol.12, n.4], pp.172- Available at: <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso)>. ISSN 1727-3781 accessed on 1 October 2019.

<sup>207</sup> David Beresford (29 June 2003). "South Africans rape children as cure for Aids". available at <https://www.theguardian.com/world/2003/jun/29/southafrica.aids>. accessed on 22 June 2020.

intense criticism world over for harmful practices of which female genital mutilation and virginity testing are never excused from the list.

On the other hand, its proponents presently contend that the practice promotes chastity which not only leads to family honour and attracts a higher bride price but also assists in the reduction of sexually transmitted infections like HIV/AIDS and unwanted teenage pregnancies.<sup>208</sup> They further contend that the test helps in the detection and prevention of child sexual abuse hence justifying the practice.<sup>209</sup> Even though neither of the above has any factual basis, the perceptions show that to some, the practice is indeed justifiable more especially to the families who benefit directly from it through the yielding of a high bride price. However, there is some contradiction amongst the proponents and opponents with regards to whether the practice reduces or increases the risk of HIV transmission and child sexual abuse.

Much as there are opponents and proponents of the practice, the Bill of Rights still remains the determining standard in terms of justifiability of the practice or not. It is never a matter of opinion, justifiability is a matter of testing the relevant provision(s) against section 36 of the Constitution. In this case, it can be argued that the virginity testing practice imposes a limitation on the equality clause, inherent dignity, the right to freedom and security of the person and the right to be protected from maltreatment, neglect, abuse or degradation. It has to be determined therefore, whether such limitation meets the section 36 criteria.

Section 36 [the limitation clause] provides thus: -

- “the rights in the Bill of Rights may be limited only in terms of a law of general application (a law which applies across the board, to everyone equally and not only to specific subjects) 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 account all relevant factors, including—

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<sup>208</sup> Eliminating virginity testing: an interagency statement. Geneva: World Health Organisation; 2018. Licence: CC BY- NC-SA 3.0 IGO.

<sup>209</sup> Leclerc-Madlala supra.

- (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) less restrictive means to achieve the purpose”.

In terms of Section 36, a limitation of rights can only be applied upon the basis of reasonableness of the limitation. Which implies that sound rationale or good cause must be shown for a limitation of rights to be effected. Further thereto, the nature of the right that has to endure limitation must be taken into consideration alongside the kind of limitation that may be impending as well as its magnitude. The limitation and its purpose must be related to the extent that the limitation is seen as the least severe means of achieving the purpose.

The above brings us to the rationale for virginity testing, which is mainly to determine the presence or absence of a girl’s hymen in the belief that either way, the girl’s sexual history will be revealed. The unfounded belief that HIV/AIDS can be actively prevented through virginity testing is also one of the reasons for the practice as well as that virginity testing ensures family honor while concurrently enhancing the bride price.

However, the fact that the practice does not involve the use of any medical instruments renders the examination devoid of either scientific merit or clinical indication. Such ultimately confirms that the appearance of the hymen is by no means a reliable indicator of vaginal intercourse.<sup>210</sup> It is dependent on the eyes and fingers of the tester who it is believed, is capable of assessing a girl’s sexual exposure by merely getting into physical contact with her genitalia either through the insertion of the finger or through examining the genitalia with her eyes.

The authenticity of such determination is very questionable, firstly in light of the fact that as discussed, hymens appear in at least seven different types and their appearance differs extensively. The age, level of puberty, manner of examination and exposure to estrogen, all

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<sup>210</sup> Olson R, García-Moreno C. Virginity testing: a systematic review. *Reprod Health*. 2017; 14(1):61. doi:10.1186/s12978-017-0319-0 available at <https://www.ncbi.nlm.nih.gov/pubmed/28521813> accessed on 9 January 2019.



contribute to the hymen's appearance.<sup>211</sup> Secondly, the test is not viable (scientifically, medically, and/or clinically) as attested to by medical doctors who have averred that there is no medical means by which virginity testing can be proven. Thirdly, it has not been conclusively proven that the test reduces the risk of HIV transmission. Finally, it can then be argued that the practice is based on a myth and thus should not even constitute any part of the law. In light hereof, the practice of virginity testing is purely an unreliable, legally unjustifiable exercise. Upon consideration of the above reasons for the limitation of the girl child's rights, an argument is advanced that the virginity testing practice is an unjust limitation of other constitutional rights by virtue of the fact that it has neither legal nor medical basis and is therefore unfounded as it is based on a myth. This warrants that the virginity testing practice either be more stringently regulated or completely phased out. Should the practice be phased out, then the law that regulates it would have to follow suit and be abolished.

### 3.6 *A contentious cultural practice - virginity testing*

It is possible to argue that virginity testing is contentious in the sense that it poses a clash between the constitutionally enshrined rights to social, religious and cultural practices, (of which virginity testing is part) as well as a number of similarly ingrained human rights. Resultantly, taking cognizance of the fact that the voice of the child is often silent and when so, the articulation of the right may come from others,<sup>212</sup> some scrutiny of both the virginity testing law and the conduct is necessitated. This is in order to ensure consistence with the Constitution or otherwise in an endeavor to protect the best interests of the child.

Essentially, section 12 (5) of the Children's Act makes it clear that the practice of virginity testing applies to children older than 16 years. This is despite the fact that in terms of the Convention on the Rights of the Child ("CRC"),<sup>213</sup> African Charter on the Rights and Welfare of

<sup>211</sup> Scared at school: sexual violence against girls in South African schools. New York: Human Rights Watch; 2001 (<https://www.hrw.org/legacy/reports/2001/safrica/>, accessed 2 March 2018).

<sup>212</sup> Ogunbanjo GA: The rights and wrongs of children's rights. SA Fam Pract 2010 S17 Vol 52 No 6 (Supplement 1).

<sup>213</sup> Article 1 of the United Nations Convention on the Rights of the Child, 1989 which was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and it entered into force on the 2nd September 1990, in accordance with article 49 defines the term, "child".

the Child (ACRWC),<sup>214</sup> the Constitution<sup>215</sup> and the Children's Act,<sup>216</sup> a child refers to every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Resultantly, there is contention in relation to whether a child older than 16 is sufficiently mature to consent to virginity testing.

In accordance with the CRC, there has been recognition of the fact that differences in environments, cultures and the diversity of life experiences directly affect the capacity of children to acquire competencies.<sup>217</sup> Such recognition birthed the very first introduction of the concept of the 'evolving capacities' of the child in an international human rights treaty.<sup>218</sup> It therefore follows that children acquire different competencies at different ages depending on the prevalent circumstances and thus becomes unquestionable that action is needed in law, policy and practice so that the contributions children make and the capacities they hold are acknowledged.<sup>219</sup> It is noteworthy that even in South Africa, the legislators were not oblivious of the evolving capacities that children are endowed with, to the extent of enacting laws that permit children to make certain decisions independently, without any parental assistance or supervision.<sup>220</sup>

Much as there is argument against virginity testing, which specifically relates to the reasoning that children older than 16 are not sufficiently mature to undergo the practice, an argument to the contrary may hold. This being in view of the fact that in South Africa, Act 38 of 2005 brought about a paradigm shift.<sup>221</sup> This shift is observed in its recognition of the evolving capacity of children.<sup>222</sup> Essentially, it provides that children have the capacity to consent to specific health

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<sup>214</sup> African Charter on the Rights and Welfare of the Child 1990(18). Article 2.

<sup>215</sup> Constitution of the Republic of South Africa, 1996 Section 28(3).

<sup>216</sup> Act 38 of 2005. Section 1.

<sup>217</sup> Convention on the Rights of the Child, 1989 Article 5.

<sup>218</sup> Lansdown, G. (2005). The evolving capacities of the child. Florence: UNICEF Innocenti Research Centre. ISBN: 8889129158 available at <https://childethics.com/library/other-literature/the-evolving-capacities-of-the-child/> accessed on 17 December 2018 at page 3.

<sup>219</sup> Ibid. Note 218.

<sup>220</sup> Strode A, Slack C, Z Essack Z Child Consent in South African Law: Implications for researchers, service providers and policy-makers' (2010) 100 *SAMJ*. Page 247-249.

<sup>221</sup> The Children's Act of South Africa 38 of 2005.

<sup>222</sup> Strode A; Slack C, Essack, Z, Child consent in South African law: implications for researchers, service providers and policy-makers. *SAMJ, S. Afr. med. j.* [online]. 2010, vol.100 p 247-249. Available from: <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0256-95742010000400026&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742010000400026&lng=en&nrm=iso)>. ISSN 2078-5135, accessed 29 Sep 2018.

interventions dependent upon their ages. It is submitted that the competence of a girl older than 16 to consent to the practice of virginity testing is founded on the fact that competence relates to one's capacity to make an informed decision with regards to a specific set of circumstances.<sup>223</sup> The competence of a person to make a particular decision depends on the nature of the decision that has to be made as well the circumstances under which the decision ought to be made.

Section 2(1)(a)<sup>224</sup> of the Choice on Termination of Pregnancy Act<sup>225</sup> (Choice Act) expounds further on evolving capacity by stipulating that a woman of "whatever age",<sup>226</sup> may discretionary terminate a pregnancy during its first twelve weeks. The Children's Act also makes provision amongst others, for consent to medical treatment,<sup>227</sup> HIV testing<sup>228</sup> and contraception<sup>229</sup> amongst children from the age of 12. It is argued that a number of factors have contributed to this relaxation viz the "global re-ordering of the parent-child relationship" coupled with the recognition of the child as a potentially autonomous person, depending on the task at hand, the child's age and level of maturity.<sup>230</sup> Children's maturity levels have to date endured intense research by children's rights movements. The competence of children older than 16 to give consent in South Africa is unquestionable. The only question that may follow with regards to virginity testing may perhaps be whether children older than 16 are sufficiently mature to consent to the law and conduct of virginity testing. However, this study will not ventilate further on such an enquiry.

In light of the above, it can be argued that at the age of 16, girls are sufficiently mature to consent to the virginity test. The contention may well be whether children older than 16 have the freedom to make the choice whether or not to endure the virginity test. This becomes a concern when one considers arguments of such nature as, "choice does not, however, apply to children,

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<sup>223</sup> Buchanan A E, Brock D W, *Deciding for Others: The Ethics of Surrogate Decision Making* (1989) 1.

<sup>224</sup> Choice on Termination of Pregnancy Act 92 of 1996: a pregnancy may be terminated- upon request of a woman during the first 12 weeks of the gestation period of her pregnancy.

<sup>225</sup> Choice Act 92 of 1996.

<sup>226</sup> The emphasis on 'whatever age' is mine.

<sup>227</sup> 38 of 2005. Section 129 (1)(2) & (3) of Act 38 of 2005.

<sup>228</sup> Ibid. Note 227. Section 130.

<sup>229</sup> Ibid. Note 227. Section 134 (1) & (2).

<sup>230</sup> Kruger H "The Protection of Children's Right to Self- Determination in South African Law with Specific Reference to Medical Treatment and Operations" PER / PELJ 2018(21) – available at DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4609>, accessed 20 May 2019.

who are individually vulnerable and defenceless, yet it is during the period of childhood that these cultural connections are mostly formed”.<sup>231</sup>

As discussed earlier, the process of virginity testing involves physical contact with the female genitalia, either through the examination of the hymen for possible tears or enlarged opening or the insertion of two fingers into the cavity of the vagina in order to determine the extent of the openness or enlargement of the vaginal wall. Constitutionally, section 12 states that one of the autonomy choices we all have is on sexual health as well as reproduction. However, the physical interaction between the tester and the body/genitalia of the girl involves temporary control over the girl’s body by the tester, which entails the girl’s temporary loss of security in and control over her body and this in turn equates to the loss of bodily and psychological integrity which includes the right to security in and control over their body.<sup>232</sup> According to Currie and De Waal “security in” relates to the protection of bodily integrity against intrusions by the state and others and “control over” deals with the protection of what could be called bodily autonomy or self-determination against interference.<sup>233</sup>

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. This not only confirms the fact that human dignity is an intrinsic, permanent and essential individual attribute but also that it is everyone’s duty to respect this protected human right. In the very first constitutional matter, *S v Makwanyane*,<sup>234</sup> the court held that capital punishment was a constitutional anomaly which dealt a crushing blow on human rights such as the right to life and human dignity. In her *dictum*, O’ Regan J: stated that the mere recognition of the right to dignity is an acknowledgement of the intrinsic worth of human beings.<sup>235</sup> Chakalson P: wholly concurred, through reaffirming that the most crucial of all human rights, are the right to life and dignity. He further stated that all other personal rights have their source in the two rights.<sup>236</sup> Considering the discussed value of human dignity, one opines that

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<sup>231</sup> M Mswela Cultural practices and HIV in South Africa: a legal perspective’ (2009) v. 12, n. 4, p. 172-213. Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000400007&lng=en&nrm=iso), accessed 26 January 2020.

<sup>232</sup> The Constitution of the Republic of South Africa, 1996. Section 12(2)(b).

<sup>233</sup> Currie and De Waal, *at page 287*.

<sup>234</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) [144].

<sup>235</sup> *Ibid* [para 328].

<sup>236</sup> *Ibid* [para 144].

beyond the physical interaction with a girl's genitalia, virginity testing violates the inherent dignity of girls, primarily by exposing their bodies and sexuality to others. Further, it subjects them to social humiliation in case of their failure of the test. The *dictum* of the Constitutional Court of South Africa in *Minister of Home Affairs v Watchenuka*<sup>237</sup> illustrates the inherent nature of human dignity on all humans by virtue of their humanity. Human dignity is listed as being entirely non derogable and as such, under no circumstances can a human be stripped of such a right.<sup>238</sup> Non-derogable rights are rights whose limitation, suspension or restriction, no circumstance can ever justify, even during a state of emergency.<sup>239</sup>

It is submitted that the dignity of girls is also violated upon having regard to the women's claps and ululations subsequent to a girl's virginity test pass because such joyful shouts and noises are neither made nor heard when the test is failed. In actual fact, an accusing silence follows the girl such that she endures segregation from other girls by being made to sit in a private corner and wait for an older woman to "counsel" her'.<sup>240</sup> This conduct not only infringes on the right to have one's dignity respected and protected but also on the right to be protected from maltreatment, neglect, abuse or degradation.<sup>241</sup> Such rights are socio-economic (economic, social and cultural) and directly enforceable against the state as was held in *Government of the Republic of South Africa v Grootboom and Others*.<sup>242</sup> Socio-economic rights are summarized as the rights of children to protection from abuse, neglect, maltreatment and degradation.<sup>243</sup>

It is further argued that by definition and conduct, virginity testing clearly applies to girls and not boys, yet the practice as described in the Act is meant to apply to children (boy and/girl) older than 16. The exclusion of boys in practice is a clear departure from the equality clause which

<sup>237</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 24.

<sup>238</sup> List of Non-Derogable rights under section 37 of the Constitution of the Republic of South Africa, 1996.

<sup>239</sup> Article 4(2) of the International Covenant on Civil and Political Rights- Adopted by the General Assembly of the United Nations on December 1966.

<sup>240</sup> Virginity testing - absence of a small tissue becomes big issue. Available at <http://www.thenewhumanitarian.org/feature/2005/09/08/virginity-testing-absence-small-tissue-becomes-big-issue-0>. Date accessed 17 Dec 2018.

<sup>241</sup> Section 28(1) of the Constitution of the Republic of South Africa, 1996.

<sup>242</sup> *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

<sup>243</sup> Section 28(1)(d) of the Constitution.

constitutes the first human right constitutionally in South Africa.<sup>244</sup> The exclusion of boys has been to such an extent that it has been argued that virginity testing infringes on the rights of girls to equal treatment, protection and benefit of the law with boys.<sup>245</sup> It also amounts to unfair discrimination on the grounds of gender and sex.<sup>246</sup> The gender discrimination is largely observed in the expectation that girls must exercise chastity by abstaining hence preserving their virginity at all costs whereas boys can go ahead and sow wild oats and yet suffer no detriment. It is submitted that this practice of excluding boys from the virginity test not only violates the equality clause but also amounts to a violation of section 8 (d) of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>247</sup> (PEPUDA) which provides thus:

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

### 3.7 Conclusion

Everyone (save for the legally incompetent) is capable of ensuring non-interference with their rights. However, though competent, children may endure the violation of their rights in numerous ways. Hence children enjoy more protection by virtue of their vulnerability. While the virginity testing provisions are in place, it may be the case that they are not followed in the strict sense of the wording in the Children's Act. For instance, the possibility of compulsion which may lead the children to participating in the practices out of fear and not consensually or out of their own choice. Such circumstances would render the testing non-consensual and therefore in breach of the relevant provisions of the Children's Act. The breach would then extend to the constitutional right to participate in social, religious and cultural practices out of choice. Even in cases where the above may not be the case, it may possibly be the case that the virginity test provisions directly infringe on other rights in the Bill of Rights. For as long as the virginity

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<sup>244</sup> Section 9 of the Constitution of the Republic of South Africa, 1996

<sup>245</sup> Ibid. Note 247. Section 9(1).

<sup>246</sup> Ibid. Note 247. Section 9(3), (4).

<sup>247</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

testing provisions persist to violate the girl child's discussed fundamental rights, then the practice also continues to be inconsistent with certain provisions of the Bill of Rights. It can thus be argued that the limitation of the girl child's other constitutional rights in favor of virginity testing is unjustifiable, hence it follows that virginity testing is not an important social, religious or cultural practice. In light hereof, the rights of children are vividly violated through virginity testing and the practice must thus be declared inconsistent with the Constitution.

## CHAPTER FOUR

### DISCUSSION AND CONCLUSION

#### 4.1 *Introduction*

This chapter encapsulates an overview of all the preceding chapters, discusses the findings coupled with a reflection of the study's shortcomings as well as assesses the relevant literature in an earnest endeavor to articulately and exhaustively answer the research questions; namely: -

- (i) Does the Children's Act sufficiently protect children against the harmful practice of virginity testing?
- (ii) Can virginity testing be justifiable in an open and democratic society wherein the Bill of Rights is used as the yardstick?

#### 4.2 *Overview of the Study*

This study is constituted of four chapters that are interwoven to each other in the manner that each chapter sets the tone for the next in order to enhance the study's logical sequence.

- The background of the virginity testing cultural practice both globally, regionally and domestically as well as the legal implications thereof are laid out in Chapter One. I outlined my motivation to explore the study then proceeded to state the problem that ignited the desire within me to undertake the particular study. Subsequent to the above, I set out the objectives of the research as well as the questions that it would seek to answer before discussing the methodology thereof. The practice as it relates to South Africa is explored in terms of the Children's Act and in order to exhibit clear comprehension of the subject, I analyzed certain constitutional provisions against which the practice appears to be contentious by discussing arguments for and against virginity testing. A preliminary literature review was also laid out before I could conclude the chapter.



- Chapter Two discusses the international and regional legal instruments as well as domestic laws that govern cultural, religious and social practices. Domestic laws include the Constitution, the Children's Act, the Regulations regarding the rights of children and such other related statutes.
- A critical analysis of the virginity testing provisions is constituted in Chapter Three. This analysis rendered answers to the research questions as well scrutinized the medico-legal principle of informed consent.

### *4.3 Discussion of the findings*

This section abstracts the findings made in the Chapter Three analysis. The first clear finding is that cultural, religious and social practices enjoy legal attention internationally as seen in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), amongst others. The ICCPR provides that, "in those states in which the ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language". The practices also enjoy protection domestically as evinced by the constitutional right to use the language and participate in the cultural life of one's choice.

Essentially, participating in cultural, religious and linguistic practices is a matter of individual choice and/or affiliation. Accordingly, no one has the right to deny the persons who participate in such cultural practices or affiliations, the right to their enjoyment. This was stretched even further through the establishment of the Commission for the Promotion of Protection of the Rights of Cultural, Religious and Linguistic Communities, (a Chapter 9 institution) whose functions are set out clearly in Section 185 of the Constitution. However, notwithstanding all the above, cultural rights are not absolute, they have to be balanced with other constitutional rights of which this thesis specifically dissects the right to equality, human dignity and such other rights alongside social, religious and cultural rights. This is particularly with regard to children who are vulnerable to choices being imposed on them by adults and this may violate their rights.

Finding Two – It is assumed that upon drafting the Children’s Act, the legislator attempted to balance social, cultural and religious rights alongside other rights in so far as they relate to children thereby legalizing the virginity testing practice. The Children’s Act was enacted in order to ensure the protection of children amongst others, which protection extends even to the virginity testing practice.

Finding Three – It is strongly argued that testing a girl’s virginity is an infringement of such girl’s rights. This is premised on the reasoning that, by its very nature, the test is invasive of the privacy and dignity of girls as it amounts to the touching of their genitalia solely for the purposes of attempting to establish virginity, which for all purposes and intents, this thesis has proven that it is next to impossible to conclusively ascertain. Resultantly, the test is quite glaringly constitutionally challenging in South Africa as it also oversteps on the right to equality. It is gender discriminatory, while at the same time dealing a blow on the girl’s integrity both bodily and psychologically.

Finding Four - I have personally formulated an opinion that virginity testing is in contention with, more particularly, the equality clause,<sup>248</sup> human dignity,<sup>249</sup> freedom and security of the person and the girl’s integrity both bodily and psychological.<sup>250</sup> Where virginity testing is concerned, one observes abuse, neglect and maltreatment of already vulnerable girls.<sup>251</sup> In actual fact, the practice is inconsistent with the said constitutional provisions. Seen in another light, the practice is a limitation of the stated rights hence this study had to establish whether the limitation is justifiable in accordance with the provisions of the limitation clause.<sup>252</sup> In light of the above, the major research hurdle I encountered is that the limitation is not a justifiable infringement of the girl child’s rights. In the opinion of a vast majority of opponents, whose number I also constitute, the practice is based on untruths, myths and altogether unfounded conclusions which lack medical basis. In my opinion, a limitation based on such can only be an unjust limitation.

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<sup>248</sup> The Constitution of the Republic of South Africa, 1996. Section 9.

<sup>249</sup> Ibid. Note 248. Section 10.

<sup>250</sup> Ibid. Note 248. Section 12 (2) (b).

<sup>251</sup> Ibid. Note 248. Section 28(1) (d).

<sup>252</sup> Ibid. Note 248. Section 36.

Finding Five - It has (since my assessment of the cultural practice of virginity testing) become my contention that the practice is inconsistent with the afore-stated provisions of the Constitution. Resultantly, the provisions must be challenged whereupon if the courts will be satisfied therewith, they will declare the virginity testing provisions invalid and order a repeal of the provisions.<sup>253</sup>

#### 4.4 *The shortcomings of the study*

Like all other research work, this thesis is not without shortcomings. The major shortcoming of this research is that it is a desktop type of research, hence most of the contentions I have discussed about virginity testing, have not been originally sourced from the girls themselves but from the various people who hold different contentions about the practice. The contentions as already discussed, revolve around a number of already discussed issues. The fact that virginity testing lacks medical basis is yet another shortcoming because it depicts the western standard as the only authentic test for the practice, yet by its very nature, the practice is somewhat, social, religious or cultural and culture scarcely involves medical standards, weights and/or measures. Testing the authenticity of virginity through weighing it on a medical scale is discriminative of the per vaginal, hymen or "two-finger test" which are mainly used culturally and it indirectly suggests that any other standard other than the medical one, is nothing but primitive and unworthy of consideration.

Another shortcoming is that the research may have fallen short of revealing the full virginity testing picture owing to the fact that there is no physical virginity testing examination which was undergone in my presence and which upon documentation could have given a crisp clear picture of the practice from the onset to its very end. Such would have assisted in ascertaining with conciseness whether or not the regulations are followed in their strictest sense. It would also in turn have confirmed that all the concerned parties have clear comprehension of the preliminary requirements for the practice, thereby establishing the extent, if any, to which the virginity testing practice infringes on any of the constitutional rights of concern with regards to the practice.

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<sup>253</sup> Section 172(1)(a)-(b).

The mere discussion of the practice as being commonly practiced by the Zulu ethnic group may be viewed by some people as racist and/or tribalistic thereby rendering same another shortcoming. It should be noted that the sole reason for limiting the research to the said ethnic group is purely academic, due to the prevalence of the practice amongst the Zulu ethnic group. Further to the above, the research centers on girls because of lack of literature at my disposal that could in any way have related to the virginity testing of boys. Such inability to show the extent of virginity testing amongst boys may be construed as potential bias in terms of the finding that virginity testing is exclusively endured by the girl child.

#### *4.5 Recommendations*

Despite evolving capacity, girls older than 16 appear to lack the competence to consent to the virginity testing practice such that it has become my opinion on one hand that virginity testing be conducted on girls older than 18 as opposed to the stipulated age of 16. This is in view of the fact that girls older than 18 possess full mental and legal capacity that capacitates them to unreservedly determine the magnitude to which virginity testing violates any of their rights.

In light of the reasoning that the virginity testing age be revised, it becomes inevitable that the law should also be reformed accordingly to the extent that virginity testing becomes permissible only with regards to girls older than 18 hence necessitating new regulations in relation to the practice. In my view, the regulations must incorporate the requirement that the consent must be informed. This requirement will be parallel with the National Health Act 61 of 2003.<sup>254</sup> The requirement of informed consent is bound to essentially result in an amendment to Regulation 3 and 4 of the General Regulations regarding Children, 2010, which only currently require consent for virginity testing and not informed consent. Any possible law reform on the subject of virginity testing will accordingly result in a subsequent amendment to the section 12 provisions of the Children's Act.

On the other hand, it is my reasoning that the above recommendation may not offer a permanent solution to the unconstitutional "primitive" practice. In light hereof, the practice must be

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<sup>254</sup> Section 7(1) of Act 61 of 2003.

abolished in its entirety, as it serves no viable purpose whatsoever but only infringes upon the rights of the girl child. The abolishment of the practice will lead to the repeal of the law that governs it.

#### *4.6 Concluding Remarks*

Virginity testing may not be the only contentious cultural practice in South Africa but its effects appear to be felt quite widely and extensively. While it is true that it does promote chastity to some degree, it is also true that to quite an enormous extent, it violates certain constitutional rights of girls hence the need for law reform on the subject. In so far as law reform is concerned, there appears to be only two solutions to the problem and these are, either to amend or repeal the virginity testing law, of which I hold the sterner view that it be repealed. This most considered opinion is that the governments not only in South Africa but also globally ought to enact and enforce virginity test banning laws because the practice is discriminatory towards women and girls. Perpetuating the practice amounts to the perpetuation of discrimination against the already vulnerable female gender in a global society that is enjoying vast advancements and the protection of human rights.

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