VIRGINITY TESTING: TOWARDS OUTLAWING THE CULTURAL PRACTICE THAT VIOLATES OUR DAUGHTERS

(A research paper submitted in partial fulfilment of the requirements for the degree of LLM Constitutional Litigation in the department of law, University of the Western Cape).

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ABSTRACT

Virginy Testing: Towards outlawing the cultural practice that violates our daughters.

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ABSTRACT

Virginy testing refers to the practice of inspecting young girls to determine if they are sexually chaste. Different methods are applied to establish virginity, but primarily, the vagina is examined to see whether or not the girl’s hymen is intact. The hymen is defined as the thin membrane of skin that may stretch across part of the vaginal opening. Although most girls are born with a hymen, some are born without it. There are many doctors who say that the presence of a hymen is not a good indicator of sexual virginity for several reasons. For example, a girl may have been born without a hymen; the hymen can easily be ruptured during normal physical activities and sport; and the hymen can be stretched open by the use of tampons.

Since the mid-90’s, the testing of girls has been revived in South Africa and has grown steadily. However, in recent times the focus has shifted from bride price and religion. Instead, the proponents of this ritual now list its benefits as preventing teenage pregnancy; the spread of sexually transmitted diseases (including HIV/AIDS); and easing the burden on pensioners who always bear the brunt of unplanned-for children. They also regard virginity testing as safer than using contraceptives or resorting to abortion. Moreover, for this group virginity testing represents a way to take current debates about Africanisation and cultural revival to the grassroots level.

The problem is that between the abrogation of the ritual and its revival, South Africa has ratified various international instruments, which afford protection to women and the girl-child against harmful practices such as virginity testing. All these instruments, as well as the Constitution of South Africa, contain provisions concerning the rights to health, privacy, dignity, non-discrimination on the basis of (amongst others) gender or sex, and
the right to physical and mental integrity. Based on these facts, those who oppose the
practice (including the Commission on Gender Equality (CGE) and the South African
Human Rights Commission (SAHRC)), are of the view that virginity testing is nothing
less than a new form of violation and violence against women. They argue that this
practice is contrary to provisions in the Constitution that uphold rights to privacy, bodily
integrity and outlaw all forms of gender discrimination. It also violates South Africa’s
commitments under international human rights law.

On the other hand, South Africa has transformed from an oppressive state to a fully-
fledged democracy, with a Constitution that enshrines human rights for both the victims
of virginity testing, as well as its proponents. Thus, a balance must be struck between the
two competing sets of rights.

In this paper I explore the practice of virginity testing as it occurs in South Africa and
elsewhere. I argue that as a result of South Africa’s international and domestic
obligations to protect women and the girl-child against any cultural practice that is
harmful to them, the Government of South Africa has a responsibility to take steps to
eliminate the practice. I acknowledge that Government also has international and
constitutional obligations to preserve and protect people’s rights to practice their culture
freely, and that legislation aimed at outlawing the cultural practice of virginity testing
might infringe upon that right. However, I argue that such an infringement would be
justifiable within the ambit of the limitation clause contained in section 36 of the
Constitution and the self-limiting scope of the provisions relating to freedom of culture
contained in sections 30 and 31 of the Constitution.

Furthermore, I provide an overview of the initiatives that have been undertaken by the
CGE towards stimulating open debate on virginity testing and make some
recommendations towards outlawing the practice. In essence, the recommendations call
for a holistic approach, as concentrating on any particular aspect of eliminating the
practice (such as legislation) in isolation will not be effective and sustainable in
protecting women and the girl-child against the practice.
Although boys are reportedly also tested for virginity, it has been noted that this happens to a very minimal extent, using much less intrusive methods. This paper thus only focuses on the human rights impact of virginity testing on women and the girl-child.
DECLARATION

I declare that 'Virginity Testing: Towards outlawing the cultural practice that violates our daughters' is my own work, that it has not been submitted for any degree or examination in another university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Ester May

November 2003

Signed:________________________

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CHAPTER 1
INTRODUCTION AND BACKGROUND

Virginity testing refers to the practice of inspecting young girls to determine if they are sexually chaste. It is seen as a way to curb women’s sexual activity before marriage and keeping them “pure” until then. There is much controversy and debate as to whether or not this infringes upon women’s human rights, even if they are willing participants.¹

Virginity testing is done in different ways, depending on the country. Primarily, the vagina is examined to see whether or not the girl’s hymen is intact. The hymen is defined as a thin membrane, which partially closes the opening of the vagina and is usually broken at the first occurrence of sexual intercourse.² Although most girls are born with a hymen, some are born without it. There are many doctors who say that the hymen is not a good indicator of sexual virginity for several reasons, which include:

- A girl may have been born without a hymen.
- The hymen can easily be ruptured during normal physical activities and sport.
- The hymen can be stretched open by the use of tampons.³

Often the bed sheets from a couple’s wedding night are examined to see if any blood is present on them, as a virgin is supposed to bleed during her first sexual encounter. However, a woman may be a virgin and still not bleed during her first intercourse.⁴

In South Africa, virginity testing is a Zulu cultural practice, which predominantly occurs in KwaZulu-Natal, and reportedly also in other provinces.⁵ Initially, the practice was used

² The Oxford Dictionary and Thesaurus at 753.
³ Op cit note 1.
to set the price of a bride. For example, the family of a virgin would be entitled to claim an extra cow. It was also used by the Zulu people to ensure that only virgins danced in the rainmaking ceremonies. The ritual died out years ago, and it became abrogated by disuse. Since the mid-90’s, the testing of girls has been revived and has grown steadily. Seorgie\(^6\) avers that the efforts of two women in KwaZulu-Natal, i.e. Andile Gumede and Nomagugu Ngobese, were central to the process of reviving the practice. The author claims that these women began to organise small-scale events in urban and peri-urban townships that brought teenage girls to public sites for testing. Their vision was reportedly to encourage like-minded women to participate in a movement that would promote pre-marital chastity among young girls in the province, and to thereby reinstate female virginity testing with the symbolic importance it once had. However, with the revival of the practice, the focus has shifted from bride price and religion. Instead, the proponents of this ritual now aver that the aim is to fight modern scourges such as child abuse, teen pregnancy and the HIV infection rate that is reportedly amongst the highest in the world.\(^7\)

Some virginity testers grade girls according to a system derived from folk constructs rather than biomedical knowledge. The “A-Grade” virgin obtains a certificate while obtaining a “C-Grade” is a mark of shame and disgrace.\(^8\) The proponents of the practice list its benefits as including the prevention of teenage pregnancy, the spread of sexually transmitted diseases (including HIV/AIDS), and easing the burden on pensioners who always bear the brunt of unplanned-for children. They regard virginity testing as safer than using contraceptives or resorting to abortion. Some virginity testers also claim that virginity testing plays a positive role in identifying cases and incidents of child sexual abuse in communities. According to them, they have become experienced in diagnosing the symptoms of abuse, and actively refer cases to the appropriate authorities.\(^9\) Moreover,


\(^7\) Daley S., “How South Africans Screen Girls for Abstinence”, the New York Times, August 17, 1999


\(^9\) Leclerc-Madala S., op cit note 5 at 20.
for this group virginity testing represents a way to take current debates about Africanisation and cultural revival to the grassroots level.

However, there is an equally vocal group of opponents to the practice, which includes the Commission on Gender Equality (CGE) and the South African Human Rights Commission (SAHRC). For this group, virginity testing is nothing less than a new form of violation and violence against women. They argue that this practice is contrary to provisions in the Constitution that uphold rights to privacy, bodily integrity and outlaw all forms of gender discrimination.

The point of contention is that between the abrogation of the ritual and its revival, South Africa has ratified various international instruments, which afford protection to women and the girl-child against harmful practices such as virginity testing. All these instruments, as well as the Constitution of South Africa, contain provisions concerning the rights to health, privacy, dignity, non-discrimination on the basis of, amongst others, gender or sex, and the right to physical and mental integrity. The practice of virginity testing is contrary to provisions in the Constitution that uphold the above-mentioned rights for women and the girl-child. It also violates South Africa’s commitments under international human rights law.

On the other hand, South Africa has transformed from an oppressive apartheid state to a fully-fledged democracy, with a Constitution that enshrines human rights for both the victims of virginity testing, as well as its proponents. To this end, section 30 of the Constitution states that persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion and use their language. Thus, a balance must be struck between the two competing sets of rights.

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11 International Instruments discussed in Chapter 3 below.
I submit that if the Government of South Africa does not consider outlawing the practice of virginity testing, it might be perceived by the international community as not only tolerating virginity testing, but also encouraging it. The bottom line is that none of the rights contained in the Bill of Rights are absolute, as section 36 of the Constitution allows for rights to be limited, provided that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.\textsuperscript{13} The question that thus arises is whether outlawing the practice would constitute a justifiable limitation of the right of communities to practice their culture freely.

The aim of this paper is to:

- Provide an overview of the cultural practice of virginity testing. It will, in particular, focus on the practice in South Africa, Turkey, India and Zimbabwe.
- Outline South Africa's international, as well as constitutional, obligations to protect women and the girl-child against any cultural practice that is harmful to them, with specific reference to virginity testing; as well as to outline South Africa's obligation to protect the right of cultural communities to practice their cultures freely.
- Establish a case for justifiably limiting the right to practice culture freely in favour of outlawing the practice of virginity testing.
- Explore the initiatives that have been undertaken by the CGE since 1999 to stimulate open debate and discussion around the issue of virginity testing and how the Commission intends taking this process forward.
- Propose certain recommendations towards outlawing the practice in South Africa.

Although boys are reportedly also tested for virginity, the CGE has stated that this happens to a very minimal extent.\textsuperscript{14} This paper will thus only focus on the human rights impact of virginity testing on women and the girl-child, as virginity tests are conducted on girls as young as three years old and women as old as 22 years.

\textsuperscript{13} Refer to chapter 5 for a comprehensive discussion of the limitation of rights.

\textsuperscript{14} Op cit note 5 at 64.
CHAPTER 2
WOMEN AS VICTIMS OF VIRGINITY TESTING

Leclerc-Madlala\(^\text{15}\) asserts that a strong symbolic and cultural value is attached to virginity and virgin girls in many parts of Africa. According to the author, virgins metaphorically present health, vigour, fertility, and the future, not only as embodied in the individual, but as embodied in communities and in wider society. As a result, many countries are obsessed with protecting the virginity of their girls and young women.

This chapter provides an overview of the practice of virginity testing in South Africa, as well as the international experience in this regard. Countries under review are Turkey, Zimbabwe and India. In conclusion, it will identify common trends that emerge around the practice in the countries reviewed.

2.1 South Africa

In South Africa, the phenomenon of virginity testing is reportedly prevalent throughout the country, but more so in KwaZulu-Natal, where it occurs in urban as well as rural areas.\(^\text{16}\) This view is supported by Leclerc-Madlala\(^\text{17}\) who reports that testing is especially widespread in KwaZulu-Natal, where adult HIV seroprevalence rates are estimated to be between 35-40%, and where the supporters of virginity testing claim the practice to be ‘traditional’ amongst the mostly Zulu speaking population. None of the literature reviewed contain any precise statistics on the prevalence rate of virginity testing. However, government officials and Zulu leaders reportedly estimate that tens of thousands of girls are being tested on a monthly basis.\(^\text{18}\) Amongst the groups reviving the

\(^{15}\) Leclerc-Madlala S., op cit note 5 at 23.


\(^{17}\) Op cit note 5 at 17, quoting statistics provided by the Department of Health in 2003.

practice are the Asivivane Samasiko, AmaGugu asaAfrika, Isiggi seSintu, the All Africa Cultural Group\textsuperscript{10} and the Sakhisizwe Cultural Organisation (SCO).\textsuperscript{20}

Virginity testing takes place in a wide variety of settings. These range from the privacy of the family home to the kraal of the village chief, school halls and community centers, to large public stadiums. While some girls are tested at the annual "first fruits festival" (Nomkhubulwe), others are tested on a monthly basis within their own communities.\textsuperscript{21}

The current process of testing virginity involves a group inspection for an intact hymen, after which a certificate is awarded. Large groups of girls are lined up in a row on grass mats, where they have to (with panties in hand) spread their legs and pull back their labia to be tested. None of the testers have medical qualifications, yet all of them claim that it is easy to tell a virgin if you have special knowledge and training.\textsuperscript{22} While some testers claim to be able to detect signs of an intact hymen with the naked eye, others probe with a finger to establish this fact. In some cases no gloves are used, but even where they are used, the same pair is used to inspect all the girls in the row.

Leclere-Madlala\textsuperscript{23} asserts that some virginity testers grade girls according to a system derived from folk constructs rather than biomedical knowledge, with virgins either being graded "A", "B" or "C". She describes the grading process as follows: to achieve a grade A, the colour of the labia should be a very light pink, the vaginal opening should be very small, the vagina should be very dry and tight and the hymen should be clearly evident and in tact. Furthermore, a girl’s eyes should look innocent, her breasts and abdomen should be firm and taut and the muscles behind her knees tight and straight.

In order to qualify as a grade B virgin, the labia are a deeper shade of pink, the vaginal opening slightly bigger and the vaginal walls slightly lubricated. They hymen is said to

\textsuperscript{10} Leclere-Madlala S., op cit note 8 at 7.
\textsuperscript{20} Kaunda L. and Mkhize K., A Test for Virgins, Pace April 1995 at 128.
\textsuperscript{21} Leclere-Madlala S., op cit note 19.
\textsuperscript{23} Leclere-Madlala S., op cit note 8 at 4.
have been ‘disturbed’. A grade B virgin’s mother will be warned to watch her daughter closely, that someone has touched her in an inappropriate way. She is declared a virgin and given a certificate.

A grade C virgin is a girl whose vagina is too wide and too wet, who shows no evidence of an intact hymen, whose eyes ‘know men’ and who has been abused repeatedly. Being marked a grade C virgin is a sign of disgrace, and the girl’s family may have to pay a fine for ‘tainting’ the community.

2.2 Turkey

In Turkey, cultural norms which dictate that women who are not virgins may not be considered eligible for marriage and could bring dishonour to the family, underlie the practice of virginity testing. This is especially true in rural areas of predominantly Muslim Turkey. Virginity testing is thus used to prove women’s chastity and make her eligible for marriage. This cultural context creates the presumption that female virginity is a legitimate interest of the family, community, and ultimately, the State. According to Human Rights Watch, an interview with a Turkish doctor revealed that if a woman does not bleed on her wedding night, she is likely to be taken for ‘virginity control’. Passing the virginity test is based on whether or not the hymen is torn.24

These cultural norms found support in Turkish laws and regulations before feminist activism around the issue. Those who were subjected to virginity testing included women who applied for certain jobs in the government, girls who applied to attend specialised schools such as nursing school, and prisoners and detainees.25

An example of Turkish legislation that supports discriminatory cultural norms is the Turkish Criminal Code, which places all sexual offences (the victims of which are primarily women and children) under its section entitled Crimes Against Public Decency.

and Family Order, rather than Crimes Against Individuals. This implies that the Code directly identifies women's bodies as belonging to the family and the public, and not to themselves as free individuals and equal citizens. Also, sexual offences against virgins are penalised more severely. This implies that the Code identifies virginity as directly enhancing the value of a girl or woman for families and society. A further example is the Statute for Awards and Discipline in the High School Educational Institutions of the Ministry of Education, which stated that proof of unchastity was a valid reason to expel a girl from the formal educational system. Although the Statute did not define unchaste behaviour and clarify how the evidence should be gathered, the usual practice was to send girl students to have their hymens tested. As a result of the protests of human rights activists and advocacy groups, the Statute was revised in March 2002.

Vigorous and sustained feminist activism, research, on the practice by international human rights groups, and increased media coverage, following the suicide committed by schoolgirls who were forced to undergo the practice, prompted the Minister of Justice to intervene. On 13 January 1999, a Statute was passed to eliminate forced virginity exams. The Statute banned virginity testing on women for reasons of disciplinary punishment, or in a way which will hurt or torment them. The only exceptions in which the practice is allowed is for the gathering of proof for alleged rape; sexual conduct with minors; and encouraging or acting as intermediary for prostitution.

Human rights activists were skeptical of the ability of the Statute on its own to protect women's rights. They were vindicated in their skepticism in July 2001 when the Turkish Health Minister (Osman Durmus) tried to re-instate the practice by issuing a new Statute of Awards and Discipline to be applied in Turkish high schools training health professionals. Article 41(d) of the Statute calls for the expulsion of students from all.

25 Ibid.
26 Articles 416, 419, 423, 429 and 434 of the Turkish Criminal Code, adopted in 1926.
formal institutions of education if they had been proven to have engaged in sexual activity or prostitution.  

Following this action, the women's human rights organization, New Ways-Women for Human Rights, launched an international campaign which called on Durmus to cancel the new Statute and urged the Turkish government to enforce the application of the ban imposed in 1999, in compliance with a number of international instruments Turkey has signed. The pressure brought about by this action forced Durmus to instruct doctors to observe the 1999 ban on virginity testing. Durmus was also instructed by his own political party to declare publicly that he was against virginity testing.

2.3 Zimbabwe  

In Zimbabwe, virginity testing is an ancient tradition that had declined to near extinction before its revival in the past decade. The practice has been revived in Rusape, under chief Makoni, in the guise that it contributes to the prevention of the spread of HIV/AIDS. Many girls are being tested and given certificates of qualification. The young girls are offered counseling and training on HIV/AIDS and encouraged to remain virgins. Chief Makoni hosts celebration parties for virgins after each testing ceremony.

Four chiefs, i.e. Charumbira, Bidi, Bushu and Chirawu, are reportedly in full support of virginity testing. Chief Charumbira is reported to have said that the cultural values [instilled by the practice of virginity testing] helped in the identification of people as Africans, which distinguishes them from Asians, Europeans, Asians, or even wild animals.

Based on personal communication with Lois Lunga (dated May 16 2003), Leclerc-Madladla reports that some Shona chiefs in Zimbabwe have recently introduced

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28 Anil E., op cit note 27.
29 Information on virginity testing in Zimbabwe was mainly obtained from the article on Dynamics of Virginity Testing and HIV/AIDS, The GAD Talk Bulletin, Volume 4 July 2002.
30 Op cit note 5 at 18.
virginity testing in their villages as a way to generate income. Families are reportedly
made to pay the equivalent of five rand to have their daughters tested and publicly
declared as ‘clean’. The father of a girl who fails her test is liable to pay a fine to the
chief because his daughter has tainted the community. This payment usually assumes the
form of a goat.

2.4. India

In India, three different types of tests are applied to establish the virginity of girls. Firstly,
there is the centuries old custom of “Kukari ki Rasam” (thread ritual), where a piece of
thread is used to detect the presence of an intact hymen. This custom is used as a form of
torturing women and often also to enable the bride’s family to make money, by beating
‘impure’ brides to reveal the names of their lovers, and forcing the lovers identified to
pay large amounts of money to the bride’s family. Sansi women will often name any man
they know just to stop the torture which they are subjected to. Police claim that they are
unable to intervene, as this is not illegal, rather just immoral.

Secondly, there is the “Paani ki Dheej” (purity by water) test. This test entails the woman
having to hold her breath under water while another person takes one hundred steps. If
she is unable to do this, she is not considered a virgin. Thirdly, the “Agnipariksha” (trial
by fire) test entails brides having to walk with red-hot iron in their hands with just a plate
made out of leaves and dough to shield their hands from the heat. If their hands are burnt,
you are considered to be impure.

Sansi women are often not willing to draw attention to this problem, which means that
the government is unable to intervene. This is exacerbated by the fact that many Sansi
people consider whatever happens within the home between husband and wife to be
private. The chance of any change intervention in this regard is thus limited. Moreover,

31 Information on virginity testing in India was obtained from the Women and Global Rights Web Page op
cit note 1. The main source used by the Organisation in compiling this information is
as virginity testing is not covered under the Indian Penal Code, it cannot be considered a crime and people who practice virginity testing can thus not be prosecuted.

2.5 Concluding comments

Closer examination of the practice of virginity testing in the countries reviewed reveals the following trends:

Firstly, in all the countries reviewed, virginity testing is performed under the guise of culture or custom. It occurs mainly in relation to girls, as a means to control their sexuality.

Secondly, with the exception of Turkey, none of the countries reviewed has any legislative framework in place to regulate the practice, and thus the testers cannot be legally challenged, as they are not committing a crime.

Thirdly, despite the fact that virginity testing is professed to be undertaken in the name of culture, many testers justify it at the hand of benefits such as the elimination of teenage pregnancies and HIV/AIDS transmission. It thus becomes clear that virginity testing is directly linked to the prevention of teenage pregnancy and the spread of HIV/AIDS, with culture being used to place the sole responsibility for addressing these broader social ills squarely on the shoulders of women and the girl child.

Finally, the practice of virginity testing seems to be borne from ignorance and greed. Ignorance because people (especially women) are unaware of their rights not to be subjected to this practice and that virginity testing cannot solve the broader social ills that it is professed to do. Greed because in some countries (notably India and Zimbabwe) the practice has assumed a commercial character, with families considering it a speedy way to gain financially.
CHAPTER 3

LEGAL PROTECTION FOR WOMEN AND THE GIRL-CHILD AGAINST VIRGINITY TESTING

This chapter provides an overview of the national and international legal framework for the protection of women and the girl-child against virginity testing in South Africa. It also examines the human rights implications of virginity testing on women and the girl-child as entrenched in the Constitution and International instruments.

3.1 National legal framework

3.1.1. The Constitution

At present, South Africa does not have a national legal framework to protect women and the girl-child against harmful cultural practices such as virginity testing. This is despite the fact that the Bill of Rights, contained in Chapter 2 of the Constitution, entrenches rights for women and children that are directly opposed to the principles underlying virginity testing. These include the right to equality and to be free from discrimination on the ground of, inter alia, gender; the right to privacy; the right to be protected from maltreatment, neglect, abuse or degradation; the right to have their dignity respected and protected; and the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.

3.1.2 The Draft Children’s Bill

In October 2002, the Department of Social Development published a Draft Children’s Bill (hereinafter the Bill) for comment. This Bill resulted from a complete review of the

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32 Section 9 (1), (2) and (4).
33 Section 14.
34 Section 28(1)(d).
35 Section 10.
36 Section 12(1)(c).
Child Care Act\textsuperscript{38} by the South African Law Reform Commission (SALRC).\textsuperscript{39} The legislative review was underpinned by the belief that all children should have a right to the protection and promotion of their dignity. Thus, one of the basic principles upon which the Bill is premised is the best interest of the child standard. Clause 9 of the Bill places an obligation on organs of state; officials, employees and or representatives of organs of state; or any other person in authority who has official authority over a child, to apply the standard that the child’s best interest is of paramount importance when acting in any matter concerning the child.

Chapter 3 of the Bill serves as the basis upon which a series of basic rights for children is proposed. The aim of this is two-fold. Firstly, it spells out in more detail, and thus helps to implement or reinforce, the rights which children already enjoy under the Constitution, as well international instruments to which South Africa is party. Secondly, it uses the rights in the Bill of Rights in the Constitution to apply to, and thus underpin, the more detailed provisions which are offered in the subsequent chapters of the Bill.

Clause 11 of the Bill seeks to provide to children the right to be protected (through administrative, social, educational, punitive or other suitable measures and procedures) from all forms of torture, physical violence, mental harassment, injury, maltreatment, abuse, neglect, degradation, sexual molestation and exploitation.

Clause 12 of the Bill aims to protect children against harmful cultural practices that affect the well-being, health or dignity of the child. However, whereas the Bill places an outright ban on the practice of female genital mutilation,\textsuperscript{40} it does not do so in relation to virginity testing. Instead, the Bill provides that a girl may not be subjected to virginity testing without her consent.\textsuperscript{41} It also provides for virginity testing to be carried out in hygienic circumstances.\textsuperscript{42} Thus, in its present form, the Bill legalises the practice of

\textsuperscript{38} Act 74 of 1983.
\textsuperscript{39} SALRC Project 110: Review of the Child Care Act, 1983.
\textsuperscript{40} Clause 12 (3).
\textsuperscript{41} Clause 12 (5)(a).
\textsuperscript{42} Clause 12 (5)(b).
virginity testing, provided that it occurs with the permission of the child and is performed in hygienic circumstances.

The opportunity to submit comments on the Bill to the Department of Social Development closed on 7 September 2003. Although the Department has indicated the envisaged date of introduction of the Bill in Parliament as September 2003, the Bill had not been introduced at the time of writing. Once the Bill is introduced, the public will have a further opportunity to submit comments. The parliamentary process could be used to put forward arguments in favour of amending the provisions relating to virginity testing, in the form of an outright ban on the practice.

3.1.3 The common law crime of indecent assault

The three main sources of criminal law in South Africa are legislation, case law and the common law. As mentioned above, South Africa presently does not have any legislation in place that prohibits the practice of virginity testing. However, one would be able to prosecute virginity testers on a charge of the common law crime of indecent assault. The crime is committed if someone unlawfully and intentionally assaults, touches or handles another person in circumstances in which either the act itself, or the intention with which it is committed, is indecent. In order to commit the crime it is not necessary that the victim’s private parts should actually have been touched, as any action whereby someone aims with some part of his or her body at the victim’s private parts is sufficient to constitute the offence. The crime can be committed by either a male or female, and can be committed against either a male or female victim.

Based on this definition, the crime of indecent assault will cover instances where virginity is tested by the insertion of a finger, as well situations where virginity is assessed by merely looking into the vagina for the presence of an intact hymen.

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45 Ibid at 8.
The Welkom regional court, in the Free State province, reportedly set a precedent in this regard when it convicted and sentenced two women on a charge of indecent assault for testing the virginity of girls as a prerequisite for admission to a church choir. The women allegedly 'tested' eight children between the ages of seven and twelve with their fingers and candles, without prior permission. The women were sentenced to eight months in prison, which was suspended for four years. Unfortunately, neither the record of proceedings, nor the court's judgment was available in print form at the time of writing. One is therefore unable to gauge the magistrate's reasoning in convicting and sentencing the accused.

While this conviction is to be commended as a step in the right direction, I submit that it will not have a significant impact in the long term, as it will only protect a section of a particular community, and possibly only for the duration of the suspension of the sentence. However, if the practice of virginity testing were to be outlawed by legislation of national application, it would include the undertaking of the practice in all parts of the country in its scope of application. Furthermore, the prosecution would be able to secure more severe penalties against those who violate the law.

3.2 International legal framework

Section 39 of the South African Constitution states that when a court, tribunal or forum interprets any right contained in the Bill of Rights, it must consider international law. Moreover, ratification of, or accession to, international instruments creates obligations on state parties to take action to bring domestic policy, law and practice in line with the relevant international instrument.

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46 Ibid at 436-438.
48 Telephonic correspondence with the control prosecutor of the Sexual Offences Court at the Welkom regional court, 29 October 2003.
South Africa is party to a number of international instruments which protect, amongst others, the right of women and the girl-child to health, non-discrimination on the basis of sex, and physical and mental integrity, and include:

3.2.1 The Universal Declaration of Human Rights

In 1948, the Universal Declaration of Human Rights asserted equality for all people, men and women. According to Articles 1 and 2 of the Declaration, all human beings are born free and equal in dignity and rights, and everyone is entitled to all the rights and freedoms, without distinction of any kind, including gender. The Declaration provides parallel support with the non-discrimination provisions contained in Articles 1(3) and 53(c) of the United Nations (UN) Charter.

Along with the UN Charter, which is binding on its signatories, the Universal Declaration of Human Rights has important legal significance because many, possibly all of its provisions, rise to the level of customary international law. Treaties that attain the status of customary international law are legally binding on all states, regardless of whether they are parties to the Convention or not. The (Third) Restatement characterises the non-exhaustive list of many rights proclaimed in the Universal Declaration as constituting customary international law, and includes, among others, the prohibition on cruel, inhuman or degrading treatment or punishment, and consistent patterns of gross violations of internationally recognised human rights.

3.2.2. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).³³

CEDAW is the most important international human rights instrument devoted to promoting women's rights. Article 1 of CEDAW defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying human rights and fundamental freedoms". The use of the words "effect or purpose" could be interpreted to mean that the discrimination does not have to be intentional. If discrimination results, the Convention is violated.

CEDAW also contains other provisions which could be interpreted to require state parties to take action against virginity testing. Firstly, Article 2.f obliges state parties to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Secondly, Article 5.a obliges state parties to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices and customary practices which are based on the notion of inferiority or superiority of the sexes or on stereotyped roles for men and women. A crucial inclusion in CEDAW is Article 17, which provides for the creation of the Committee on the Elimination of Discrimination Against Women to implement and monitor the provisions of the Convention.

As a treaty, the Convention is legally binding on its signatories, since the most fundamental principle of international law is *pacta sunt servanda* (agreements must be observed).³⁴ South Africa ratified the Convention on 15 December 1995.

Criticism that has been leveled against the Convention is that firstly, the Convention has been afforded "less recognition as an embodiment of customary principles" than have

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³⁴ Article 26 of the Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, UN Doc A/CONF. 39/27, states "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".
many other Conventions. Secondly, the Convention has more reservations to it than most international human rights instruments. Thirdly, the implementation of the obligations and procedures designed to enforce compliance are significantly weaker in the Convention than those drafted in other human rights treaties.

3.2.3 International Covenant on Civil and Political Rights

Article 5 of this Covenant is particularly important, as it provides safeguards against the destruction or undue limitation of any human right or fundamental freedom, and against misinterpretation of any provision of the Covenant as a means of justifying infringement of a right or freedom. Furthermore, Article 17(1) states that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Article 7 protects people against torture or cruel, inhuman or degrading treatment or punishment. South Africa ratified the Covenant on 10 December 1998.

3.2.4 The International Covenant on Economic, Social and Cultural Rights

The provisions of Article 5 in the Covenant are identical to those contained in Article 5 of the Covenant on Civil and Political Rights.

Furthermore, Article 10.3 provides that state parties to the present Covenant recognise that “special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social

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exploitation". South Africa signed the Covenant on 3 October 1994, but has not yet ratified it.\[^{60}\]

3.2.5 The Convention on the Rights of the Child\[^{61}\]

The most important provision relating to the protection of the girl-child against virginity testing is contained in Article 24.3 of the Convention, which explicitly requires all state parties to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.

Furthermore, Article 19.1 requires state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse), while in the care of parents, legal guardian or any other person who has the care of the child. Article 37 also places an obligation on states to ensure that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.

The Convention establishes a Committee on the Rights of the Child to monitor the implementation of its provisions.\[^{62}\] The main function of the Committee is to receive and assess the periodic reports that States are required to submit in terms of Article 44 regarding measures that States have taken to give effect to all the rights contained in the Convention and on the progress made on the enjoyment of those rights. The first country report is due within two years from the date on which the Convention comes into operation for a particular state, and thereafter, every five years. Article 45.1 also empowers the Committee to recommend to the General Assembly that the Secretary-General be requested to undertake studies on its behalf on specific issues relating to the rights of the child. Based on the information received, the Committee may then make


\[^{62}\] Article 43.
recommendations to any state party concerned. Such recommendations must be communicated to the relevant state party, as well as the General Assembly.

Van Bueren\textsuperscript{63} notes that the Convention on the Rights of the Child accomplishes five goals. The most important of these in relation to virginity testing are firstly, it creates new rights under international law for children where no such rights existed, including the child’s right to preserve his or her identity and the right of indigenous children to practice their own culture. Secondly, the Convention enshrines rights in a global treaty which had until the Convention’s adoption only been acknowledged or refined in case law under regional human rights treaties. This includes, for example, the right of a child to be heard either directly or indirectly, in any judicial or administrative proceedings affecting that child, and to have those views taken into account.\textsuperscript{64} Thirdly, the Convention imposes new obligations in relation to the provision and protection of children, including the obligation on a state to take effective measures to abolish traditional practices that are prejudicial to the health of children and to provide for rehabilitative measures for child victims of neglect, abuse and exploitation.\textsuperscript{65} South Africa ratified the Convention on 16 June 1995.

3.2.6 African Charter on the Rights and Welfare of the Child\textsuperscript{66}

On a regional level, the Charter draws strongly on the Convention on the Rights of the Child. However, it is considered to be a better reflection of African cultural concerns. The most important provisions of the Charter in relation to virginity testing are contained in Articles 1 and 21. Firstly, Article 1.3 renders any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter null and void to the extent of such inconsistency. Secondly, Article 21.1


\textsuperscript{64} Article 12.

\textsuperscript{65} Other goals which are listed, but which do not relate directly to virginity testing, include firstly that the Convention creates binding standards in areas which, until its entry into force, were only non-binding recommendations (including safeguards in adoption procedures (Article 21)) and the rights of mentally and physically disabled children (Article 23)). Secondly, that the Convention adds an additional express ground by which State Parties are under a duty not to discriminate against children in their enjoyment of the Convention’s rights.

\textsuperscript{66} OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on November 29, 1999.
obliges state parties to take all appropriate measures to abolish customs and practices harmful to the welfare, dignity, normal growth and development of the child, particularly those customs and practices prejudicial to the health or life of the child and those customs and practices discriminatory to the child on the grounds of sex or status. South Africa ratified the Charter on 7 January 2000.

Article 32 of the Convention provides for the establishment of an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child.

3.3 The human rights implications of virginity testing

By ratifying the above-mentioned instruments, South Africa has in effect agreed to uphold various rights for women and the girl-child. These range from the right to life, liberty and security of the person, to the right to have appropriate measures taken (including legislative and administrative measures) to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices and customary practices which are based on the notion of inferiority or superiority of the sexes. The practice of virginity testing violates all these principles. The rights violated by the practice of virginity testing include:

The right against gender discrimination

Traditionalists maintain that virginity testing is the best way to protect their daughters from teenage pregnancies, HIV/AIDS, and other sexually transmitted diseases. The practice is said to teach girls respect for their culture and themselves.

As virginity testing is mainly practiced on girls, I submit that this practice is discriminatory against women and the girl-child. In effect, it places the responsibility of practicing sexual restraint solely on the shoulders of women and the girl-child. This is ironic, as women live in a society where they have little control over their own sexuality.
Women are the ones who are normally expected to undergo harmful cultural practices such as virginity testing and genital mutilation as a way of pleasing their future husbands. Women are the ones who face physical, economic and emotional violence by their partners. Women are the ones who go through psychological torture through forced marriages, rape and sexual harassment, and women are the ones who have to endure a hostile school environment with teachers perpetrating sexual violence.\textsuperscript{67}

Maluleke\textsuperscript{68} asserts that it is usually men, not women, who determine when and how often to have sex, and whether or not a condom is used. It is also men who generally have multiple sexual partners, and therefore more opportunity to transmit HIV to their partners.

\textit{Health rights}

Virginity testing poses health risks to women and the girl-child. As discussed in chapter 2 above, many testers conduct tests on large groups of girls either with their bare hands, or, where gloves are used, the same pair is used to test all girls. Instead of preventing the spread of sexually transmitted diseases, virginity testers could in this way be assisting in spreading HIV and other sexually transmitted diseases from one girl to the next.

Furthermore, there is an African folk belief that sex with a virgin can cure AIDS. This myth puts women and girls who are publicly declared virgins at risk of rape by men hoping for the spurious cure. Already, HIV-positive men are reported to have attacked a few certified virgins in KwaZulu Natal Province. Fortunately, the girls managed to escape.\textsuperscript{69}

The practice of virginity testing could also cause girls to risk their own health. Testers normally inspect girls for an intact hymen, the presence of which is said to be signified


\textsuperscript{68} Maluleke T., \textit{Sexuality Education in the Puberty Rites for Girls}, WHF Review Summer 2001 at 29.

\textsuperscript{69} Singer R. op cit note 18.
by something resembling a white veil located high in the vaginal canal. Leclerc-Madlala reports that some girls, in an attempt to fool testers into believing that their hymens are still intact, have resorted to pushing toothpaste or a piece of white lace dipped in tomato sauce into their vaginas. Others have gone to the extent of inserting pieces of freshly cut meat into their vaginas in order to make their vaginas appear tight. This makes girls susceptible to contracting bacterial infections other than the normal sexual infections they are prone to, as the moist, warm and dark interior of the vagina is the perfect breeding place for bacteria that might be contained in the fresh meat.

The right to privacy and bodily integrity

Virginity testing generally occurs in public places, with large groups of girls being inspected at the same time. This happens in the presence of onlookers such as mothers or other female relatives who are invited to observe the process and then receive the results. Although males are reportedly excluded from such events, boys tend to satisfy their curiosity by scaling walls surrounding venues where girls are being tested. This constitutes a grave infringement of the right to privacy of women and the girl-child.

Furthermore, the process used to test girls for virginity in itself violates the girl’s right to bodily integrity, if one considers that girls have to allow the testers, who more often than not could be complete strangers to them, access to inspect the most private part of their anatomy and then to be graded, either negatively or positively.

The right to freedom from abuse

While some virginity testers claim to be able to detect an intact hymen with the naked eye by mere observation, others actually resort to inserting a finger into the vagina to establish virginity. This action borders on sexual abuse. This is ironic, as many

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70 Leclerc-Madlala S., op cit note 5 at 21.
71 Personal correspondence with medical doctor, Gabriel L.K. (Manager: Information Services Section, Research Unit of the Parliament of the Republic of South Africa), 29 October 2003.
72 Leclerc-Madlala S., op cit note 8 at 6.
traditionalists profess a major advantage of virginity testing to be the detection of child sexual abuse, which enables them to report such abuses to the authorities. As mentioned in chapter 3, the court has found virginity testing to amount to indecent assault.

Thus, if the Government of South Africa does not take any steps to outlaw the practice of virginity testing, it will remain in violation of its obligations arising from these instruments and the Constitution.
CHAPTER 4

LEGAL PROTECTION FOR THE RIGHT TO PRACTICE CULTURE FREELY

This chapter discusses the provisions in the Constitution relating to the right of persons belonging to a cultural community to exercise their culture freely. It will also explore provisions in international instruments aimed at protecting the right of communities to practice their culture freely.

4.1 The Constitution

The Constitution contains various provisions that aim to protect and promote the right of people to exercise their cultural practices freely.

Firstly, section 9 entrenches the right of everyone to equality before the law and to equal protection and benefit of the law. Section 9(3) prohibits the State from unfairly discriminating directly or indirectly against anyone on the ground of, *inter alia*, culture.

Secondly, section 30 entrenches the right of everyone to use the language and to participate in the cultural life of their choice.

Thirdly, section 31(1) states 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, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Section 185 also mandates the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The main functions of this Commission are to promote respect for the rights of cultural, religious and linguistic communities; and to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities.
Currie\textsuperscript{75} asserts that the purpose of the inclusion of the right to culture in the Constitution is to enable a non-dominant community to preserve its distinct culture against the forces of discrimination or assimilation to which it would otherwise be vulnerable. He thus opines that the right requires two things. Firstly, it requires tolerance of cultural practices that diverge from the dominant norm. Secondly, it requires positive measures to protect and preserve the identity of cultural communities that are particularly susceptible to discrimination, assimilation or simple extinction of their distinct culture and identity. According to Currie, modernising law reform that threatens culture and identity would violate the constitutional protection of cultural integrity.

Whilst acknowledging that outlawing the cultural practice of virginity testing would constitute a violation of the right to culture, I submit that such violation can easily be justified.\textsuperscript{74} The Constitution itself expressly qualifies the right to culture in that both the second part of section 30, as well as that of section 31, state that the right to culture may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights. From these provisions it can be deduced that the right to culture may be exercised only if it does not conflict with other rights entrenched in the Bill of Rights. Read with section 2 of the Constitution, which declares the Constitution the supreme law of the country and any law or conduct inconsistent with it invalid, any cultural practice that is inconsistent with the other rights entrenched in the Bill of Rights renders the infringement of the right to culture permissible.

4.2 International Instruments

4.2.1 The International Covenant on Civil and Political Rights\textsuperscript{75}

Article 27 of the Covenant provides that 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 practise their own religion, or to use their own language.

\textsuperscript{75} Currie L., Indigineous Law in Chaskalson et al, Constitutional Law of South Africa (2001) at 36-25.

\textsuperscript{74} Refer to chapter 5 for a discussion on the limitation of the right to culture.
4.2.2  *The International Covenant on Economic, Social and Cultural Rights*\(^{26}\)

Article 1 of the Covenant guarantees to all people the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. In Article 3, state parties to the Convention undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set out in the Charter. Article 4 provides for the limitation of rights afforded by the Covenant (including cultural rights) provided that the sole purpose of the limitation is to promote the general welfare in a democratic society.

4.2.3  *The Charter of the United Nations*\(^{27}\)

The United Nations Charter also provides for the protection of cultural rights. Article 1.2 of the Charter states that one of the purposes of the United Nations is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples....’.

4.2.4  *The Convention on the Rights of the Child*\(^{28}\)

The provision contained in Article 30 of the Convention is identical to Article 27 of the International Covenant on Civil and Political Rights, with specific reference to children. Article 30 provides that states with ethnic, religious or linguistic minorities or persons of indigenous origin may not deny a child belonging to such a minority, or who is indigenous, the right to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

In article 29, state parties agree that the education of the child shall be directed to developing respect for the child’s parents, his or her own cultural identity, language and values; and to preparing the child for responsible life in a free society, in the spirit of

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\(^{26}\) Supra note 58.

\(^{27}\) Supra note 59.

\(^{28}\) Supra note 50.
understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.\textsuperscript{76}

Furthermore, Article 4 requires all state parties to undertake the appropriate legislative, administrative and other measures, to the maximum extent of their available resources, for the implementation of the economic, social and cultural rights recognised in the Convention.

\textit{4.2.5 The African Charter on the Rights and Welfare of the Child}\textsuperscript{80}

Article 12 of the Convention recognises the right of the child to participate freely in cultural life and the arts. To this end, Article 12.2 requires state parties to respect and promote the right of the child to fully participate in cultural and artistic life, and to encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

\textit{4.3 Concluding comments}

It is evident that the Constitution and the international community place a high premium on the right of people to practice their culture freely, provided that it is not exercised in a manner that is inconsistent with the human rights of the individual. As stated in chapter 2 above, the practice of virginity testing clearly violates a number of the individual human rights that are afforded to women and the girl-child in terms of the Constitution and international human rights instruments. These include the right to equality and to be free from discrimination on the ground of, \textit{inter alia}, gender; the right to privacy; the right to be protected from maltreatment, neglect, abuse or degradation; the right to have their dignity respected and protected; and the right to the highest attainable standards of health. Thus, legislation aimed at outlawing the practice would be permissible.

\textsuperscript{76} Supra note 66.
\textsuperscript{79} Article 29.1 (c) and (d).
\textsuperscript{80} Supra note 61.
CHAPTER 5

HUMAN RIGHTS VERSUS CULTURE: A BALANCING EXERCISE

As becomes clear from the previous two chapters, both the Constitution of South Africa, as well as various international instruments, enshrine human rights for the victims of virginity testing (which this paper contends include mainly women and the girl-child), as well as for those who test girls for virginity in the guise of culture. Since the advent of the global impetus to respect and protect the rights of the individual, legal systems in multicultural societies have continuously been confronted with the problem of the rational and legitimate accommodation of conflicting cultural practices within the confines of a human rights dispensation. What is required is for a balance to be struck between the two competing sets of rights. The pertinent question that arises in the context of this paper is whether outlawing the practice of virginity testing would constitute a justifiable infringement of the right of people to practice their culture freely.

This chapter establishes a case for justifiably limiting the right to practice one’s culture freely in favour of outlawing the cultural practice of virginity testing. In doing so, it focuses on the limitation clause contained in section 36 of the Constitution and draws on cases in which the Constitutional Court has applied the test for limiting enshrined rights contained in section 36. It also explores the provisions that limit the right to culture contained in sections 30 and 31 of the Constitution, as well as the interpretation clause contained in section 39.

The limitation of rights

5.1 Section 36

The fact that a fundamental right has been infringed by a statutory provision does not automatically render such provision unconstitutional and invalid, as none of the rights

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contained in the Bill of Rights are absolute. They may be limited, provided that the infringing provision meets the requirements for permissible limitation contained in section 36 of the Constitution. In terms of section 36, a fundamental right may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on freedom, human dignity and equality. In assessing the reasonableness and justifiability of the infringing provision, the court must take into consideration all the relevant factors. These include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose.\footnote{Section 36 (1).}

In the case of \textit{S v Manamela}\footnote{2000 (5) BCLR 491 (CC) at paras 32 and 33.} the court opined that the factors listed do not constitute an exhaustive list, but are only included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. These factors cannot be used to arrive at an analysis mechanically. Instead, the court must balance competing values and ultimately base its assessment on proportionality.

Furthermore, in the case of \textit{S v Makwanyane and Another}\footnote{Section 36 (1).} the court held that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the “weighing up of competing values, and ultimately, an assessment based on proportionality.” It also found that there is no absolute standard that can be laid down for determining reasonableness and necessity. At best, principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis, as this is an inherent requirement of the principle of proportionality.

In its limitation assessment, the court followed a two-stage approach. Stage one entailed considering the extent of the limitation of the constitutional right and stage two entailed...
considering the purpose, importance and effect of the infringing provision, and whether there are less restrictive means to achieve the purpose. With regard to the first stage of the test, the court opined that the level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.

Applied to the context of this paper, the principles enumerated in these cases require that the extent of the limitation of the right to culture be weighed against the purpose, importance and effect of legislation that would outlaw virginity testing. I submit that such a balancing exercise will definitely tilt the scale in favour of the justifiability and reasonableness, and thus constitutionality of legislation that outlaws virginity testing on the following grounds:

The nature of the right that is infringed.

The nature of the right to practice one’s culture freely must be considered in order to determine which kind of purpose would justify the limitation of the right. The nature of the right refers mainly to the importance of the right.

As professed by the proponents of virginity testing, the revival of the practice saw a shift from the traditional values attached to the practice, to focus on the benefits such as combating teenage pregnancies, preventing the spread of sexually transmitted diseases such as HIV/AIDS and detecting cases of child abuse. The practice has persisted despite the fact that there is no documented evidence to prove that it has impacted positively on addressing the social ills it is intended to address. The value of the practice in modern day society is thus questionable, and limiting the right to practice culture freely by abolishing virginity testing will thus not have a significant negative impact on the right.

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14. 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.
15. Para 69.
Support for this position can be found in the judgment of Ngcobo J. in *Prince v President of the Law Society of Cape of Good Hope* who expressed the view that a constitutional right cannot be denied on the basis of mere speculation, unsupported by conclusive and convincing evidence.

*The importance of the purpose of the limitation*

The importance of the purpose of the limitation assists in deciding whether the limitation is justified in view of the importance of the right that is limited. In this regard, section 28(2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child. In the case of *Christian Education South Africa v the Minister of Education*, the Court held that the state is under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally, and to protect all people, especially children [emphasis added], from maltreatment, abuse or degradation. Moreover, by ratifying international instruments such as the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women, the state undertook to take all appropriate measures to protect women and the girl-child from violence, degradation and indignity. On this basis I submit that although the right to practice one’s culture freely is important, both the Constitution and the international instruments seem to suggest that the right of an individual child supersedes that of a cultural or religious group.

*The nature and extent of the limitation*

Clarity on the nature and extent of the limitation assists in determining whether there is a rational relationship between the limitation and its purpose. In *S v Bhulwana*:

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57 2002 (2) SA 794 at para 74E. In this case, the court had to grapple with the issue of the use of cannabis as part of Rastafarian religious practices.
58 Mulherbe R. op cit at 410.
59 2000 (10) BCLR 1051 (CC) at para 40-43. The issue in this case was the constitutionality of the provisions of the Schools Act of 1996 which prohibit corporal punishment in schools.
In *S v Gwadiso* the court explained that it places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. In the opinion of the court, the more substantial the inroad is, the more persuasive the grounds for justification must be. This position found support in the judgment handed down in *S v Lawrence; S v Negal; S v Solberg* where the court stated that the severity of the breach must be a highly relevant factor in any proportionality exercise. The court opined that the more grievous the invasion of the right, the more compelling its justification must be. On the other hand, the lighter the invasion, the less stringent the requirements of justification would be.

Applied to the present case, outlawing the practice of virginity testing would constitute a substantial infringement of the right to exercise this particular ‘cultural practice’. However, it would not place a blanket prohibition on cultural communities to participate in other cultural activities that are not harmful to or that do not discriminate unfairly against a particular group of that community.

In *S v Steyn* the court opined that the question that arises is whether the limitation is at all capable of promoting its purpose and, if so, how and to what extent it does so. This implies that there must be a rational connection between the limitation and the purpose that such limitation is intended to serve. In the context of the present case, outlawing virginity testing would serve the legitimate purpose of fulfilling the state’s obligation to protect women and the girl-child against harmful and discriminatory cultural practices. This is particularly so as virginity testing has recognised implications for the human rights of women and the girl-child. As mentioned in Chapter 3 above, women’s rights and

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50 1995 (12) BCLR 1579 (CC) at para 18.
51 1997 (10) BCLR 1051 (CC) at para 168. In this case the court had to pronounce on the constitutionality of the Liquor Act insofar as it prohibited aspects of the sale of liquor on Sundays.
52 LeClere-Madlala S., op cit note 5 at 19 argues that at best the current revival of virginity testing represents an invocation of culture and tradition in a distorted form, as the social value of the practice is part of a social system that, for the most part, no longer exists.
53 2001 (1) BCLR 52 (CC) at para 31.
the rights of the girl-child are protected by the Constitution, as well as several universal and regional instruments, which contain language concerning the rights to health, non-discrimination on the basis of gender and sex, and physical and mental integrity. The practice of virginity testing violates all these principles.

Less restrictive means to achieve the purpose

The last question in the limitation test is whether the purpose of the limitation can be achieved by less drastic measures. This compels those who limit a right to show that alternative measures to achieve the purpose have indeed been considered. In my opinion, the only option available is to outlaw the practice of virginity testing completely, as any lesser measure (such as regulated testing) would not serve the purpose of the state in meeting its obligation to protect women and the girl-child against the harmful cultural practice.Virginity testing, even when performed under the best circumstances, will always constitute an infringement of the rights of women and the girl-child to dignity, privacy, non-discrimination, etc.

5.2 Self-limiting provisions

As mentioned in chapter 4, the same provisions in the Constitution that provide for the right to culture limit themselves through their restrictive wording. Whilst the provisions of sections 30 and 31 support group solidarity and continuity, they are placed in the context of a list of rights aimed at guaranteeing individual freedom and equality, which dictates that they may not be exercised in a manner inconsistent with any provision of the Bill of Rights. The constitutional protection of culture has therefore been phrased so as not to undermine the primacy of individual rights.

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54 Brink v Kitchoff 1996 (6) BCLR 752 (CC) at para 49.
55 Second part of section 30 and section 31(2).
56 Currie J., op cit at 36-27.
In the case of *Christian Education South Africa v the Minister of Education*\(^\text{97}\) the Constitutional Court, per Sachs J, opined that the qualification contained in section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. In the opinion of the Court, this explicit qualification serves a dual purpose. Firstly, it prevents protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. Secondly, it relates to oppressive features of internal relationships, primarily within the communities concerned.

In my opinion, the practice of virginity testing does not meet the requirement for the exercise of the right to culture contained in the second part of section 30 and in section 31(2). My opinion is based on the fact that virginity testing infringes the rights of women and the girl-child to equality and to be free from discrimination under section 9 of the Constitution; to have their dignity respected and protected under section 10; to freedom and security of the person (which includes the right to be free from all forms of violence from either public or private sources) under section 12; to have their privacy respected under section 14; and the right of the girl-child to be protected from maltreatment, neglect, abuse or degradation under section 28(1)(d).

5.3 *The interpretation clause*

Section 39(1) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In addition, section 39(2) obliges a court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. In the case of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit*\(^\text{98}\) the Constitutional Court held that all laws must be interpreted "through

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\(^{97}\) Supra note 89 at para 26.

\(^{98}\) 2000 (10) BCLR 1679 (CC) at para 21.
the prism of the Bill of Rights”. This means that, where possible, a reasonable interpretation must be given to a statute that gives effect to the fundamental values underlying the Constitution. Section 1 of the Constitution, read with the Preamble to the Constitution, strongly bases these values on human dignity, equality and freedom. The practice of virginity testing opposes all these values, and a statute outlawing the practice would thus be favourable.

59 Malherbe R., op cit at 409.
CHAPTER 6
THE COMMISSION FOR GENDER EQUALITY: STIMULATING OPEN
DEBATE AND DISCUSSION ON VIRGINITY TESTING

Chapter 9 (section 181(1)) of the Constitution establishes various institutions to
strengthen constitutional democracy. These institutions are independent and impartial,
able to exercise their powers and perform their functions without fear or prejudice and are
subject to the Constitution and the law only.\textsuperscript{100} They are the Human Rights Commission,
the Public Protector, the Auditor-General, the Electoral Commission, the Commission for
the Promotion and Protection of the Rights of Cultural, Religious and Linguistic
Communities and the Commission for Gender Equality (CGE).

This chapter provides an overview of the initiatives that have been undertaken by the
Commission for Gender Equality (hereinafter the Commission) to stimulate debate and
discussion on the practice of virginity testing. Although the chapter was initially intended
to also explore progress made in this regard and the Commission’s plan of action for
further engagement on the issue, its scope has been limited by a lack of response to
requests for information from the Commission’s Office in KwaZulu-Natal at the time of
writing.

6.1 Functions of the CGE

The functions of the Commission are laid down in the Constitution and the Commission
of Gender Equality Act.\textsuperscript{103} In terms of section 187 of the Constitution, the main functions
of the Commission are to promote respect for gender equality, and to protect, develop,
and attain gender equality. The Constitution also empowers the Commission to monitor,
investigate, research, educate, lobby and advise to enable it to perform its functions.

\textsuperscript{100} Section 181(2).
\textsuperscript{103} Act 39 of 1996.
6.2 The CGE and virginity testing

In a joint press statement released by the Commission, the South African Human Rights Commission and the National Youth Commission, the three agencies express their grave concern at the potential violation of human rights, gender equality and health issues brought about by the practice of virginity testing. The three agencies also voice their opposition to the practice, on the basis that it undermines human dignity, gender equality and youth development. While recognising the importance of the right of individuals to practice their culture, the agencies note that this cannot be done in contravention of other rights contained in the Bill of Rights, as the Constitution is the supreme law of the country.

The agencies thus call on government, non-governmental organizations, community based organizations, parents and the youth to raise awareness on issues such as child abuse, rape and the increasing spread of HIV/AIDS to find solutions that are less intrusive than virginity testing. They also urge all stakeholders to adopt a holistic approach to address the social problems that plague the South African society, and which are detrimental to the dignity and health of the individual.

6.3 CGE activities on virginity testing

The Commission has been engaged in a project on virginity testing since 1999, with the aim of creating a platform for open debate and discussions on the topic, and, in particular, to gauge the reasons for this practice. This project was initiated in response to the growth in prevalence of the practice in KwaZulu-Natal.

The project was divided into three phases, i.e. an information-gathering phase (1999); a consultative provincial workshop (2000); and a post conference programme (2000-2001). The first phase of the project involved gathering information by hosting various

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103 Ibid (page 3).
workshops and interactions with a number of stakeholders. The first workshop was held in Durban, KwaZulu-Natal, in March 1999. Following this, various other workshops on virginity testing were held throughout the province. Participants at the workshops included the youth, parents and other stakeholders. The broad objectives of this phase were to establish open discussions and debates on virginity testing in order to gain a better understanding of the practice; gather information on the practice; discuss concerns with regard to the practice; investigate the human rights implications of virginity testing; and to network with stakeholders who can further facilitate the process in areas where the Commission will not be able to reach.

During these workshops it was revealed that the reasons for reviving the practice include the prevention of the further spread of HIV/AIDS, the prevention of teenage pregnancy, the detection of child sexual abuse, and a return to the Zulu culture and tradition.

These sessions culminated in the second phase of the project, namely a Virginity Testing Consultative Conference, which was held in Richards Bay, KwaZulu-Natal, from 12 to 14 June 2000. The Commission and the South African Human Rights Commission co-hosted the conference. The main aim of the conference was to provide a platform for discussion on ways to promote gender equality in South Africa by harmonising cultural practices with the provisions of the Constitution and gender equality.

A comprehensive report of the presentations and ensuing discussions during the conference was compiled and distributed by the Commission. However, a major weakness of the report is that it does not contain any information on how, if at all, the Commission intends processing the information received at the various workshops held. Although one of the stated objectives of the conference was to forge relations with stakeholders who can further facilitate the process, the report does not refer to any allocation of tasks in this regard or timeframes within which the project is to be taken to the next phase. As mentioned above, requests for information to the KwaZulu-Natal office of the Commission in this regard has not yielded any results. This deprives me of the benefit of assessing the impact the Commission's project has had towards eliminating
the practice. Hopefully, this is not an indication of the fact that all the hard work and effort that has been put into the first two phases of the project by the Commission, as well as other stakeholders, was in vain.
CHAPTER 7

RECOMMENDATIONS

7.1 Legislative reform

As mentioned in chapter 3 above, the Department of Social Development is currently in the process of finalising the Children’s Bill for introduction in Parliament. Although the Bill aims to protect children against harmful cultural practices, it does not place an outright ban on virginity testing. Instead, it provides for consensual virginity testing. I submit that this right will not be enforceable, particularly within the patriarchal cultural context that permits virginity testing, which renders freedom of choice for girls non-existent. It is, for example, difficult (and unacceptable in terms of cultural values) to envisage the daughter of a staunch traditionalist challenging her father by refusing to be subjected to having her virginity tested. Moreover, a girl who refuses to submit to the practice risks being ostracised and stigmatised by the community she lives in as a non-virgin, and social pressure often results in girls ‘volunteering’ to undergo the process. Support for this argument can be found in the Turkish experience. Laseo\(^4\) submits that even though women were entitled to refuse virginity tests before it was officially banned in Turkey, they seldom invoked this right in practice, because of pressure from family or police in cases where prisoners are tested. Furthermore, women who refused virginity testing were often assumed to be non-virgins. Thus, Turkish women were likely to rather undergo virginity testing than risk their reputation.

Furthermore, if South Africa does not take steps to outlaw the practice of virginity testing, it will fall foul of its international obligations incurred as a result of ratifying international instruments discussed in Chapter 3 above. By ratifying these instruments, South Africa has incurred the responsibility to refrain from acts which would defeat the purpose of the instruments.\(^5\) More importantly, South Africa has incurred the

\(^{104}\) Op cit note 24.

responsibility to bring its domestic legislation in line with the provisions of the international instruments, which all call for outlawing traditional practices prejudicial to the health and well being of women and the girl-child. I therefore recommend that the current clause in the Children's Bill be amended to outlaw virginity testing in the same way as it does female genital mutilation. The Bill should subject those who contravene this provision to severe penalties.

Although it is important to establish the appropriate legal framework to outlaw virginity testing, this measure in itself will not be sufficient to protect girls against the practice. Mechanisms and institutions to ensure its proper implementation, coupled with a comprehensive educational campaign, must support the legislation. For example, a simple piece of legislation will not change the mindset of men who in general regard themselves as superior to women and thus entitled to control women's sexuality.

Moreover, simply outlawing the practice without developing other measures to support the legal framework could potentially isolate a particular part of the community who might choose to continue the practice in the guise of culture (possibly in "underground" and thus dangerous conditions), thereby falling foul of the law all the time. Thus, a holistic approach is required to address the problem, which incorporates an appropriate legal framework with other measures, such as those discussed below.

7.2 Creating a safe platform for dialogue

A group of people who subscribe to a particular culture view the practices of that culture as the right way of doing things. Anyone who contravenes any of the practices in a culture feels guilty, because culture creates cohesion, identity, a sense of belonging, confidence and security.\textsuperscript{106} Moreover, people are afraid to speak out against such practices because of the very real risk of victimisation.

I therefore recommend that a physical, emotional and intellectual space be created that will allow people (particularly women) to share their thoughts and fears about virginity testing within a safe environment. This could take the form of periodic meetings to provide women the opportunity to discuss their experiences with one another. Providing women with such a safe opportunity to share thoughts and fears will allow them to gain confidence to speak out against virginity testing. Virginity testers should also be invited to such meetings to relay their experiences from their unique perspectives. At some point, after sufficient confidence had been developed by women, these two groups could be brought together to discuss and attempt to find solutions to address the social ills which underlie the revival of virginity testing, i.e. unwanted teen pregnancies and sexually transmitted diseases.

Non-Governmental Organisations are best placed to facilitate this process, in cooperation with government and government agencies such as the Commission on Gender Equality and the South African Human Rights Commission.

7.3 Empowering women

Virginity testing encourages a particular subservience that is completely at odds with current ideas of empowering women to protect themselves against HIV/AIDS.\textsuperscript{107} Justification for the practice, hidden under the guise of culture, obfuscates the fact that girls and women suffer physically and psychologically, that their sexuality is controlled, and that they are denied their rights to, inter alia, health, bodily integrity, and freedom from violence.\textsuperscript{108}

I thus submit that any programme aimed at eliminating virginity testing should advocate for a move toward greater gender equity, shared responsibilities and the empowerment of women to take their rightful place in forums where decisions, especially on issues affecting women, are taken.

\textsuperscript{107} LeClerk-Mdladla op cit note 5 at 21.
7.4 Advocating human rights

Harmful cultural practices such as virginity testing thrive mainly because women, having adjusted to the subservient role society has placed them in, have become accustomed to not stating what they want and what they do not want to happen to their bodies. Human rights are powerful tools that can be used to introduce a universal concept of human dignity and a value system that promotes self-respect, recasting individuals’ relationships to their communities. Women must be taught about their rights, including their right to health, physical and mental well-being, bodily integrity, freedom from violence and the right to express their opinions freely.

The idea that all women have rights to protect and to promote their dignity can lead to a new understanding of the women’s own ability to acquire and use knowledge and their capacity to take action. If women can be convinced that they are entitled to state their wants, needs and beliefs (including what they do not want to happen to their bodies) and that they have an obligation to take action for the betterment of their communities, their confidence in their own opinions can be boosted and it can motivate and encourage them to claim those rights.

7.5 Empowering communities to independently abandon virginity testing

Empowerment can be defined as the sustained ability of individuals and organizations to freely, knowledgeably, and autonomously decide how best to serve the strategic self-interest and the interest of their societies in an effort to improve their quality of life.\(^\text{109}\) NGOs can play an effective role as facilitators that support individuals to become change agents for themselves and their communities. This can be done by involving communities in the design of virginity testing intervention programmes; integrating reproductive health, human rights and virginity testing awareness into education programmes; and allowing for individual decision making.


\(^{109}\) Ibid at 28.
7.6 Developing integrated education programmes

Any attempt at changing such a deeply ingrained behaviour as virginity testing of women and girls will require a changed mindset, both on the part of women, and more especially on the part of men. In order to achieve this, the capacity of women and men to make informed and autonomous decisions regarding the physical and emotional well-being of their girls and young women must be strengthened. The success of education programmes to this effect will be largely dependent on the provision of accurate information and awareness raising around such information. For example, knowledge about the female reproductive system, coupled with an understanding of how diseases are sexually transmitted and infections occur, might lead people to understand why virginity testing is not the answer to eliminating these problems, and the possible health risks it may expose women and the girl-child to.

A similar approach was adopted in Sri Lanka, where the custom of virginity testing for brides still occupies a significant place in the Sinhala wedding. In response to huge outcries by distraught brides who failed the test and angry grooms, the Family Planning Association of Sri Lanka (FPASL) decided to do something about addressing the misconception that if a woman does not bleed during her first experience of sexual intercourse, she is not a virgin. This was done by developing and distributing leaflets on the hymen and virginity at a stall at an annual bridal fair held in Colombo. Also on hand at the fair were medical staff to talk to people and explain common misunderstandings.\(^6\)

7.7 Encouraging political support and participation

Experience has shown that Parliament, through its committees, has a valuable contribution to make towards ensuring the protection and promotion of the rights of women and the girl-child. Over the past few years, various committees in Parliament have been involved in promoting legislation affecting women and children, and monitoring and overseeing the implementation of rights enshrined in existing legislation.

For example, the Portfolio Committee on Social Development was instrumental in advocating for the complete review and development of comprehensive childcare legislation. This review culminated in the Draft Children’s Bill.

Between 2000 and 2003, the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women undertook public hearings to all nine provinces to investigate problems experienced as well as successes achieved in the implementation of the Domestic Violence Act\(^{111}\) and the Maintenance Act.\(^{112}\) The problems identified and proposed recommendations from all nine provinces were consolidated into a single report, and debated in plenary.\(^{113}\) Further, in 2001, the Select Committee on Education and Recreation in the National Council of Provinces (NCOP) spearheaded a project of conducting public hearings on sexual violence in schools in all nine provincial legislatures. A comprehensive report was compiled and debated in the NCOP plenary.\(^{114}\) Also, in March 2002, a Task Group on Sexual Abuse of Children was established by a motion of the National Assembly to hold public hearings on the high incidence of sexual violence against children. The National Assembly held a debate on the issue after a comprehensive report on the hearings was adopted by the Task Group.\(^{115}\)

Although the Executive cannot be compelled to comply with recommendations contained in such reports (because of the principle of the separation of powers), section 56(b) of the Constitution empowers a committee to summon the head of the relevant Institution or State Organ to give a detailed explanation for failure to implement the recommendations. Moreover, debating reports in the House provides a public platform to discuss issues of public concern.\(^{116}\)

\(^{111}\) Act 116 of 1998.
\(^{112}\) Act 99 of 1998.
\(^{113}\) NCOP debate A review of the accomplishments in respect of the quality of life and status of women over the past 9 years and of challenges that lie ahead to push back the frontiers of poverty, 16 September 2003.
\(^{114}\) NCOP debate Meeting the challenges of sexual harassment and violence in schools, 19 February 2002.
\(^{115}\) National Assembly debate held on 13 June 2002.
\(^{116}\) Official records of proceedings of debates, as well as speeches delivered, are available online at www.parliament.gov.za.
I therefore recommend that the Commission for Gender Equality lobby Parliament for political support in its fight against virginity testing. This could be done in partial fulfillment of the Commission's obligation to report to the National Assembly on its activities in terms of section 181(5) of the Constitution. In this way, the Commission can also assist in bringing the gravity of the matter to the attention of Parliament, as Members of Parliament (MPs) often do not have the time and resources to conduct in-depth investigations.

The appropriate entry point would be the Joint Monitoring Committee (JMC) on the Improvement of the Quality of Life and Status of Women\textsuperscript{117} and the Joint Monitoring Committee on Children, Youth and Disabled Persons.\textsuperscript{118} In terms of Joint Rule 132D, the JMC on Children must monitor and evaluate progress with regard to the improvement in the quality of life and status of children, youth and disabled persons in South Africa, with special reference to the Government's commitments in respect of any applicable international instruments and to duties and responsibilities in respect of any applicable legislation. In terms of Joint Rule 131, the main function of the JMC on Women is to monitor and evaluate progress with regard to the improvement in the quality of life and status of women in South Africa, with specific reference to the Government's commitments to the Beijing Platform of Action, the implementation of CEDAW and any other applicable international instruments. The Joint Rules also empower these committees to make recommendations to either the NCOP or the National Assembly, or to both Houses, on any matter arising from their work.

\textsuperscript{117} Established in terms of Joint Rule 132A.

\textsuperscript{118} Established in terms of Joint Rule 128.
8 CONCLUSION

As becomes evident from this paper, traditionalists have been using the practice of
virginity testing to address some of the most gripping social ills facing society today,
such as teenage pregnancies, sexually transmitted diseases (particularly HIV/AIDS) and
the detection of child abuse, in the name of culture. However, no evidence has been
documented of the impact of the practice in addressing these problems. Also, on closer
examination of the practice in the different countries, it becomes clear that what really
underlies the practice is the traditional status of subordination and inferiority of women in
a male dominated, patriarchal society.

Whilst the Constitution and international instruments acknowledge the importance of
protecting and preserving people's right to practice their culture freely, this cannot be
tolerated at the expense of the human rights of the individual. This can especially not be
tolerated if it discriminates unfairly against a particular group, which in this case includes
mainly women and the girl-child.

The government of South Africa is thus urged to take the necessary steps towards
outlawing the practice. In this regard, a holistic approach will be required as eliminating
the practice is not only about enacting legislation, but also about changing mindsets of
particularly men. Thus, in addition to passing legislation to outlaw the practice,
Government, in partnership with the NGO sector, should embark on a vigorous public
education campaign. This campaign should, amongst others, focus on the empowerment
of people by providing accurate information on issues which are currently misunderstood
and thus support the spread of the practice; encouraging men to respect women and their
bodies; and, most importantly, encouraging women to claim their human rights.
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