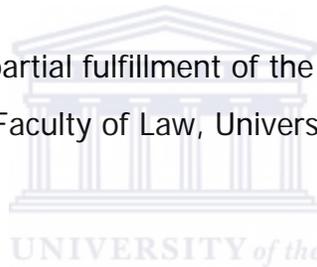


**HARMFUL TRADITIONAL PRACTICES, (MALE CIRCUMCISION AND  
VIRGINITY TESTING OF GIRLS) AND THE LEGAL RIGHTS OF  
CHILDREN.**

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A mini-thesis submitted in partial fulfillment of the requirements for the degree  
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## **ABSTRACT**

In South Africa the practice of virginity testing is most prevalent in KwaZulu-Natal amongst the Zulu and Xhosa. Proponents of the practice claim that some of the benefits include the prevention of the spread of HIV/Aids as well as teenage pregnancy and the detection of children who are sexually abused by adults, amongst others. In South Africa most black males undergo an initiation when they are approximately 16 years old to mark the transition from boyhood to manhood. Male circumcision is also performed as a religious practice amongst the Jews and Muslims.

A number of human rights groups in South Africa, including the Commission on Gender Equality (CGE) as well as the South African Human Rights Commission (SAHRC) has called for a total ban on the practice of virginity testing on the basis that it discriminates against girls, as the practice is carried out predominantly amongst teenage girls. The CGE and SAHRC are particularly concerned about the potential for human rights violations of virginity testing.

The problem with traditional male circumcisions in South Africa is the number of fatalities resulting from botched circumcisions and the spreading of sexually transmitted diseases through unhygienic procedures and unqualified surgeons. Also of concern are other hardships often accompanied by traditional circumcisions such as starvation, frostbite, gangrene and infection amongst other health related injuries. Thus, according to human rights activists, when carried out in these circumstances, traditional male circumcisions have the potential to violate a number of rights aimed at protecting boys including the right to physical integrity and life, in cases of the death of an initiate.

South Africa has also ratified a number of international treaties aimed at protecting children against harmful cultural practices such as the United Nations

Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). As such it has been argued by rights groups that virginity testing as well as male circumcisions carried out in the conditions set out above have the potential to violate a number of provisions contained in international instruments aimed at protecting the dignity of children.

Despite the potential risk of harm to children in both practices, the Children's Act 38 of 2005 allows for both virginity testing and male circumcision under certain conditions as set out in the Act. In this paper it will be argued that the provisions aimed at protecting children from harmful cultural practices in the Children's Act, do not offer children adequate protection against abuse and maltreatment.

Recommendations include the discouragement of virginity testing as proposed by the Committee on the Rights of the Child. If this is not possible, it is recommended that alternative non-invasive methods of performing virginity testing be considered. In the case of male circumcisions, recommendations will centre around legislative reforms in order to improve the conditions in which the practice is performed, making it much safer and hygienic for male children.

**KEYWORDS**

1. Male circumcision
2. Virginity testing
3. International Law
4. Human Rights
5. Children's Bill
6. Culture
7. Consent
8. Harmful
9. Best interest
10. Constitutional Law



**DECLARATION**

I declare that *Harmful cultural practices, (male circumcision and virginity testing of girls)* and the legal rights of children is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Lucinda Le Roux



November 2006

Signed: .....

## **ACKNOWLEDGMENTS**

Appreciation is extended to my supervisor, professor Julia Sloth-Nielsen, for her support, encouragement and for always being accessible.

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## **DEDICATION**

This mini-thesis is dedicated to my mother Veronica Le Roux who has supported me both financially and emotionally. You have been a pillar of strength to me throughout my academic endeavours.

To my brother Francois Le Roux, thank you for your love and support and for always believing in me.



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## **CHAPTER 1**

### **1. BACKGROUND AND INTRODUCTION**

Chapter 1 will provide a broad overview of the practice of virginity testing and male and infant circumcision as it occurs in South Africa and elsewhere. The first part of chapter 1 will focus on virginity testing, how and where it is practiced, and why it has the potential to be 'harmful'. The second part of chapter 1 will elaborate on the origins and reasons for male and infant circumcision and why it is potentially 'harmful'.

Chapter 2 will focus on the provisions relating to harmful cultural practices in the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Reference will also be made to General Comment No.3 by the Committee on the Rights of the Child in order to determine the impact of gender-based discrimination on the rights of women. Since the CRC is underpinned by four general principles, namely, the best interest principle, the right to non-discrimination, the right to survival and development and the right to respect for the views of the child, these provisions will be examined more closely with the aim of determining the impact of harmful cultural practices on these provisions.

Chapter 3 will examine the Constitutional requirements of the right to culture and religion. The chapter will also focus on section 36 of the Constitution and how it is applied by the South African courts in order to justify an infringement of a fundamental right in the Constitution. The chapter will provide an analysis of court decisions relevant to the topic of traditional practices with specific emphasis on the application of the limitation clause.

In chapter 4 the provisions of the Children's Act 38 of 2005 relating to cultural practices will be examined in order to determine whether they go far enough in protecting the human dignity of children. Reference will also be made to submissions made by various non-governmental organizations and individuals with regard to harmful practices before the Children's Act was passed by parliament with the aim of critically analyzing the extent to which public submissions were accommodated in the final draft of Act.

Chapter 5 will focus on recommendations with regard to law reform. Here I will refer to recommendations made by human rights activists such as the Gender Commission of Equality and the South African Human Rights Commission, amongst others, as well as my own recommendations.

Chapter 6 will comprise of concluding remarks.



## **1.1 The Origins of Virginity Testing**

In South Africa, the practice of virginity testing is a longstanding custom among the Zulu and to a lesser extent the Xhosa.<sup>1</sup> After having died out in the 20<sup>th</sup> century, it emerged with renewed vigour in the 1990's as a result of the increase of deaths due to HIV/Aids.<sup>2</sup> Central to the revival of this Zulu custom in KwaZulu-Natal were the efforts of two women, namely Andile Gumede and Nomagugu Ngobese who brought young girls to public sites for testing.<sup>3</sup> After working independently of one another, they decided to join forces in an effort to reinstate the high social value which was previously placed on Zulu virgins.<sup>4</sup>

In practice, Zulu girls are physically examined in order to determine whether their 'hymens' are intact.<sup>5</sup> The hymen is a small membrane which stretches across the opening of the vagina. Girls with their hymens intact are considered to be virgins. Those in favour of testing claim that some of the benefits include the prevention of the spread of HIV/AIDS and teenage pregnancy, the detection of children who are sexually abused by family members or friends and that it eases the burden on pensioners who always bore the brunt of raising children that were unplanned-for.<sup>6</sup>

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<sup>1</sup> Lafraniere S, "Women's Rights Movement in Africa Emerges." Available online at [http://www.taipeitimes.com/News/feat/archives/2006/01/2003286981\\_at\\_1](http://www.taipeitimes.com/News/feat/archives/2006/01/2003286981_at_1). Accessed on 8 April 2006.

<sup>2</sup> Author unknown, "Sex and Sexuality – Now, South Africa is about to ban virginity testing after years of criticism from rights groups ...", Available online at [http://www.sexualitycompendium.com/node/103\\_at\\_1](http://www.sexualitycompendium.com/node/103_at_1). Accessed on 22 April 2006.

<sup>3</sup> Scorgie F, Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention, *African Studies* (University of Cambridge) 61 1 2002 at 57.

<sup>4</sup> Ibid at 57.

<sup>5</sup> See fn 1 above.

<sup>6</sup> Author unknown, "Commission for Gender Equality Report - Consultative Conference on Virginity Testing", Richard's Bay, June 2000, at 20.

Doctors<sup>7</sup> indicate that the hymen is an unreliable indicator of chastity as:

- (a) some girls are born without a hymen,
- (b) the hymen could be ruptured during physical activity and
- (c) tampons could stretch the hymen open.

The procedure for testing often involves a gathering of up to 56 girls at a time where they are inspected one at a time by lying on a straw mat beneath a tent with their legs apart.<sup>8</sup> The number of participants may vary depending on the occasion and could include anything between forty and three hundred girls being tested on a single day.<sup>9</sup>

## **1.2 Why virginity testing is potentially 'harmful'**

According to human rights activists, virginity testing is unreliable, it places the burden of sexual responsibility on the shoulders of girls to the exclusion of boys, it is humiliating and it infringes on a number of rights in the South African Bill of Rights including the right to physical integrity, non-discrimination on the basis of sex or gender, privacy and dignity. The harmful consequences of traditional cultural practices will be discussed in further detail in the ensuing sections.

### **1.2.1 The right to physical integrity.**

This right includes the right to bodily integrity as stated in section 12(2) of the Constitution Act 108 of 1996, (hereafter referred to as the Constitution.) According to doctors, the testing of up to 600 girls at a time, using the same pair of gloves, creates a climate for the transmission of sexually transmitted

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<sup>7</sup> Author unknown, "Virginity Testing," at 1. Available online at <http://www.webster.edu/~woolfm/virginitytest.html>. Accessed on 22 April 2006.

<sup>8</sup> See fn 1 above.

<sup>9</sup> See fn 3 above at 58.

diseases.<sup>10</sup> Since it was well known that virginity testers looked for something resembling a white veil (an indication of an intact hymen) in the vaginal canal, some girls in KwaZulu-Natal resorted to inserting toothpaste or freshly cut meat into their vaginas to make the vagina appear 'tight' and so mimic the white veil effect.<sup>11</sup> Other harmful consequences include the belief among some rural black men that sex with a virgin can cure HIV/AIDS, thus identifying virgins could render them vulnerable to rape.<sup>12</sup> Women who have failed the test are also ostracized and often forced into prostitution.<sup>13</sup>

### **1.2.2 The right to human dignity**

Candidates who pass the test are marked with a white clay spot on the forehead as well as being awarded with certificates.<sup>14</sup> Non-virgins are marked with a red clay dot and receive counselling where necessary.<sup>15</sup> According to Andile Gumede, a prominent virginity tester in KwaZulu-Natal, loose buttocks and a flabby stomach could indicate that a girl was sexually active.<sup>16</sup> The above-mentioned submissions reveal the potential harm to the dignity of the participants in virginity testing. The commitment to uphold the rights to human dignity have been highlighted in a number of leading South African cases.

In the case of *Pillay v KwaZulu- Natal MEC of Education and Others* 2006 (10) BCLR 1237 (N) a Hindu learner was prohibited from wearing a nose stud as

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<sup>10</sup> Rauch R, LLM Dissertation, Harmful Sexual Practices and Gender Conceptions in KwaZulu-Natal and their effects on the HIV/Aids Pandemic, University of Stellenbosch, 2003 at 11.

<sup>11</sup> Leclerc-Madlala S, "Protecting Girlhood? Virginity Revivals in the Era of Aids", in Agenda 56, 2003, at 21.

<sup>12</sup> Maharaj A, "Virginity testing: a matter of abuse or prevention?", Agenda 41 1999 at 96.

<sup>13</sup> Ibid at 96.

<sup>14</sup> Author unknown, Virginity Testing and the Children's Bill, Discussion Paper, 11 October 2005, Children's Institute UCT, at 2. Available online at <http://web.uct.ac.za/depts./cirplr/docs/virginity%20Testing%20Discussion%202010%20Oct2005.doc>. Accessed on 22 April 2006.

<sup>15</sup> Ibid at 2.

<sup>16</sup> See fn 11 above at 19.

stated in the school's code of conduct which was adopted by the school's governing body. The decision of the governing body to prohibit the wearing of the nose stud was challenged by the appellant (the mother of the learner) on the basis that it infringed her daughter's right to culture and religion. In elaborating on the impact of the governing body's decision on the human dignity of the learner, Moseneke J made the following submission;

"The jurisprudence of this Court makes plain the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights."<sup>17</sup>

In the case of *Hoffmann v South African Airways* 2000 (2) SA 628 (W), the appellant had been refused employment as a cabin attendant at South African Airways (respondent) after the discovery that he (appellant) was HIV – positive. In commenting on the impact of the action of the South African Airways, Ncgobo J stated as follows;

"Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination."<sup>18</sup>

### 1.2.3 The right to equality

Joyce Piliso-Seroke, head of the Commission on Gender Equality rejects the idea

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<sup>17</sup> Para 47.

<sup>18</sup> Para 34. See also *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) at para 43 and *National Coalition For Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 28.

that it is acceptable to pass judgment on the virtue of girls while ignoring the morals of boys.<sup>19</sup> She argues that educating both girls and boys is a better weapon against the AIDS pandemic.<sup>20</sup>

The awarding of certificates to those who passed the test discriminates against girls, as their male counterparts are free to do as they please, while girls are saddled with the responsibility of ensuring that their hymens are intact.<sup>21</sup> The South African Human Rights Commission supports the position of the Commission on Gender Equality (CGE) that virginity testing should be prohibited on the basis that it discriminates against women and girls and infringes on a number of rights in the Bill of Rights, as listed above.<sup>22</sup>

In my view, virginity testing could lead to confusion amongst young girls especially when the practice is performed by someone unknown to the child, as parents very often warn children not to allow strangers to touch them inappropriately. In addition to this, it is my view that the practice is degrading and humiliating since the inspection of the genitals is often carried out in front of large crowds comprising of members of the community where the results are often made public.

From the above-mentioned submissions it can be argued that instead of curbing the spread of HIV/AIDS, virginity testing may actually compound the problem by exposing those who passed the test to rape and sexual abuse, prostitution, as

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<sup>19</sup> See fn 1 at p3.

<sup>20</sup> Ibid at 3.

<sup>21</sup> Author unknown, "Report by Commission on Gender Equality – Submission to the Select Committee on Social Services, Children's Bill [B70B – 2003]", 1 October 2005 at 7. Available online at <http://www.cge.org.za/userfiles/documents/select-committee-1oct05.doc>. Accessed on 8 April 2006.

<sup>22</sup> Author unknown, "Harmful Social and Cultural Practices – Virginity Testing?", Children's Bill [B70 – B2003], Submission to the Select Committee on Social Services NCOP, at 1. Available online at <http://web.uct.ac.za/depts/ci/pl/docs/SAHRC%20Submission%20-%20virginity%20testing.doc>. Accessed on 22 April 2006.

well as the risk of contracting sexually transmitted diseases through the use of unhygienic procedures. Stigmatization and ostracising of young girls and their families are also the direct result of the publication of virginity results.

### **2.1 The origins of infant and male circumcision**

Although the precise origin of male circumcision is unclear, it almost certainly began as a religious rite.<sup>23</sup> Although there are several types of male circumcision, routine infant circumcision, which is the removal of the foreskin or prepuce is most commonly practiced.<sup>24</sup>

The Koran is silent on the issue of male and female circumcision and nothing is mentioned about the circumcision of Abraham although Abraham is regarded as the first Muslim.<sup>25</sup> Although circumcision is not mentioned, it is highlighted in the *Sunnah*, the recorded words and actions of the Prophet Muhammad.<sup>26</sup> In Islam, circumcisions are usually carried out in a hospital or clinic by someone trained in medicine who is not required to be a Muslim.<sup>27</sup>

The foreskin is removed in order to prevent dirt and impurities from being trapped underneath the skin.<sup>28</sup> Approximately 10 days after the birth of a boy child, he is taken to a medical doctor who will perform the procedure in the

<sup>23</sup> Smith J, "Male Circumcision and the Rights of the Child", at 2. Available online at <http://www.cirp.org/library/legal/> smith. Accessed on 8 April 2006.

<sup>24</sup> Ibid at 2.

<sup>25</sup> Aldeeb Abu Sahlieh SA, "Muslims' Genitalia in the Hands of the Clergy" – Religious Arguments about Male and Female Circumcision, edited by Denniston C G, Mansfield Hodges F and Milos MF in *Male and Female Circumcision, Medical, Legal, and Ethical Considerations in Pediatric Practice*, Kluwer Academic/Plenum Publishers, 1999 at 134.

<sup>26</sup> Author unknown, "Religion and Ethics" at 1. Available online at <http://www.bbc.co.uk/religion/ethics/male-circumcision/islam.shtml>. Accessed on 27 August 2006.

<sup>27</sup> Ibid at 1.

<sup>28</sup> Interview with Feroz Mohamed, Imam at Cravenby Mosque (Husami) on 29 August 2006.

presence of either the mother or father or both parents.<sup>29</sup> After the removal of the foreskin, a “protective cap, which falls off within a week” is sewn onto the tip of the penis in order to prevent friction between the raw wound and clothing.<sup>30</sup>

Many Jews find their justification for circumcision in the Old Testament or Jewish Bible.<sup>31</sup> In addition to the holy books contained in the Jewish Bible are the Mishna and the Talmud, which constitute the second source of Jewish law.<sup>32</sup> There are numerous passages contained in these books which refer to circumcision.<sup>33</sup>

In Judaism, circumcisions are performed in a ceremony called the *Bris Milah* (Covenant of Circumcision) by a religious practitioner on the 8<sup>th</sup> day after an infant’s birth.<sup>34</sup> During the procedure an empty chair is placed in the room symbolizing the belief amongst Jews that the prophet Elijah is present at each and every circumcision.<sup>35</sup> At some ceremonies up to 250 people are invited, usually family and friends, to celebrate a “new life” not only for the child but for all present.<sup>36</sup>

A *mohel*, the person carrying out the procedure, has to have both the surgical skill as well as knowledge of Jewish law in order to perform the procedure.<sup>37</sup> Before being allowed to practice, a *mohel* undergoes an intensive apprenticeship under the guidance of an experienced senior Mohel.<sup>38</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Interview with Rabbi Maizels of Camps Bay Synagogue on 27 September 2006.

<sup>32</sup> Aldeeb Abu Sahlieh SA, “Male and Female Circumcision – Among Jews, Christians and Muslims, Religious, Medical, Social and Legal Debate”, Shangri-La Publications, 2001 at 17.

<sup>33</sup> Ibid at 17.

<sup>34</sup> See fn 29.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Author unknown, “Mazel Tov! It’s a boy!” At 1. Available online at <http://www.circlist.com/rites/bris.html>. Accessed on 27 August 2006.

<sup>38</sup> Ibid at 1.

During the ceremony prayers are recited and blessings are said as the child takes his place as a member of the Jewish people.<sup>39</sup> According to Jewish tradition, the accompanying religious ceremony is of vital importance as a medical circumcision alone does not meet all the requirements of Jewish law.<sup>40</sup>

Circumcision is not a requirement of the Christian religion.<sup>41</sup> Certain passages in the holy bible state that circumcision does not confer any special status or holiness on an individual and that qualities such as faith and love are important instead (Galations 5:1-6, Galations 6: 12-16).<sup>42</sup>

In South Africa, most black males undergo an initiation ceremony when they are approximately 16 years old to mark the transition from boyhood to manhood. An initiation ceremony is held during which boys are covered in white clay and removed from the community to live in specialized tents.<sup>43</sup> On the day of the ritual the boys are required to burn all the items that they had used during the ceremony as well as burying the foreskin.<sup>44</sup> After washing away the white sandstone from their bodies they return to their villages where they are covered in red ochre.<sup>45</sup> After this, they are considered to be men.<sup>46</sup>

Proponents of circumcision as a cultural practice claim that initiation schools instill the virtues of discipline, courage, endurance and resilience in initiates.<sup>47</sup>

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<sup>39</sup> Ibid at 1.

<sup>40</sup> See fn 28.

<sup>41</sup> Author unknown, "Not just skin.org" at 4. Available online at <http://www.notjustskin.org/en/religiouresources.html>. Accessed on 27 August 2006.

<sup>42</sup> Ibid at 4.

<sup>43</sup> Smith J, "Male Circumcision and the Rights of the Child", at 2. Available online at <http://www.cirp.org/library/legal/smith>. Accessed on 8 April 2006.

<sup>44</sup> Author unknown, "Circumcision practices around the world" at 1. Available online at <http://www.circumcisioninfo.com/circ-world.html#cworld3>. Accessed on 27 August 2006.

<sup>45</sup> Ibid at 1.

<sup>46</sup> Ibid at 1.

<sup>47</sup> Matshekgga JN, "Quo vadis? A discussion of the universalism-relativism debate in the light of male circumcision in South Africa" in SA Public Law, Vol 18, No. 1, 2003, University of South Africa, at p 398.

Traditional leaders have argued that traditional male circumcision is part of their culture and that section 31 of the Constitution allows for the participation of individuals in cultural practices of their choice.<sup>48</sup>

## **2.2 The potential 'harm' associated with circumcisions.**

Some of the physical consequences that may result from circumcisions may be summarized as follows:

- (1) Haemorrhage due to the crossing of many veins in the penis, which, if left undetected, can be fatal,
- (2) Infection, since the injury caused by circumcision may be exposed to urine and faeces thus provoking infection,
- (3) Urinary infection which can be caused by the trauma of the operation,
- (4) Necrosis of the glans which is the death of body tissue due to an overly tight bandage over the wound,
- (5) Injury and loss of glans,
- (6) Excessive penile skin loss, the damage depending on the quantity of skin removed,
- (7) External deformity of the penis since the healing of the wound may result in an unpleasant external appearance,
- (8) Loss of penis which may be due to infection,
- (9) Death, depending on the severity of some of the injuries listed above.<sup>49</sup>

The problem with ritual circumcisions in South Africa is the number of fatalities resulting from botched circumcisions and the spreading of sexually transmitted

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<sup>48</sup> Author unknown, "National House of Traditional Leaders (NHTL) submissions on the Children's Bill (B 70B – 2003)" at p 1 - 2. Available online at <http://www.pmg.org.za/docs/2005/05101inh+1.htm>. Accessed on 31 August 2006.

<sup>49</sup> Nyaundi PM, "Circumcision and the rights of the Kenyan boy-child", African Human Rights Law Journal, Vol. 5 1 2005 at 176.

diseases through the use of unhygienic procedures.<sup>50</sup> Approximately 11 initiates have died since the start of the initiation season in June of 2006 in the Eastern Cape alone.<sup>51</sup> Twenty one boys, who had been kept in the mountains of Pondoland were denied food for more than three weeks, according to health department officials in the region.<sup>52</sup> It has been reported that most deaths occurred in Pondoland which were mainly caused by meningitis, dehydration, physical abuse, starvation, pneumonia, septicaemia and neglect.<sup>53</sup>

After spending weeks in the freezing cold mountains in QwaQwa, Lebusa Mamasedi returned home to Mangaung Village with gangrene.<sup>54</sup> Doctors at a regional hospital believe he had frostbite on top of infection necessitating the amputation of both feet.<sup>55</sup> Mlamli Gola, a 65 year old initiate in the Eastern Cape revealed that the hardest thing for him was the starvation.<sup>56</sup> Although he survived, 19 boys died in the Eastern Cape during the initiation season.<sup>57</sup>

The above-mentioned facts reflect the potential harmful effects of virginity testing and male circumcisions. In both practices a number of individual rights may be violated. In the case of male and infant circumcision, the child's right to bodily integrity as well as the right to equality are at risk of being infringed, since it is overwhelmingly boys that undergo circumcision as opposed to girls in South Africa. The operation of illegal initiation schools, particularly in the Eastern Cape,

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<sup>50</sup> Author unknown, " Male circumcision in Africa (Part2)" at 2. Available online at <http://www.circlist.com/rites/african> 2.html. Accessed on 8 April 2006.

<sup>51</sup> Motaung T, "Health fears as initiates trickle in to city hospitals," The Argus, Friday 30 June 2006 at 5.

<sup>52</sup> Maclennan B, "Another three die in initiation schools" at 1. Available online at <http://www.iol.co.za/index.php?set-1&click-id=13&art-id=qw1151572143977R131>. Accessed on 22 April 2006.

<sup>53</sup> Author unknown, "Circumcisions have claimed 102 lives since 1996." Cape Times, 5 October 2006 at p 6.

<sup>54</sup> Donaldson A, "Some rites and wrongs", Sunday Times, 23 July 2006 at 2.

<sup>55</sup> Ibid at 2.

<sup>56</sup> Horner B, "End of Boyhood – at 65 years old", Sunday Times, 30 July 2006, at 29.

<sup>57</sup> Ibid at 29.

exposes young boys to an array of physical injuries including starvation, frostbite, physical injury, meningitis, gangrene and in extreme cases death.

The fact that virginity testers<sup>58</sup> and those performing male circumcision in customary practice<sup>59</sup> are inadequately trained, puts boys and girls at further risk of harm. The use of blunt knives in the case of circumcisions<sup>60</sup> and the failure to wear protective gloves (see 1.2.1 above) when doing virginity inspections increases the risk of contracting HIV/AIDS. Since the virus is transmitted through bodily fluids, the use of the same gloves in the case of virginity testing and the same knife, in the case of circumcisions, may facilitate the transmission of the virus from one child to another if one of the participants are infected with the virus.

A number of human rights groups in South Africa, including the Commission on Gender Equality (CGE) as well as the South African Human Rights Commission (SAHRC), amongst others have called for a total ban on virginity testing (see 1.2.3 above.) The CGE and SAHRC are particularly concerned about the potential for human rights violations of traditional cultural practices.

The above facts reveal the potential risk of harm that children face with the use of unhygienic procedures, unqualified traditional surgeons and the hardships that initiates are subjected to. The facts stated above show that children are exposed to both physical pain or death, as well as psychological harm.<sup>61</sup>

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<sup>58</sup> Author unknown, "Commission for Gender Equality Report" - Consultative Conference on Virginity Testing, Richard's Bay, June 2000, at 20.

<sup>59</sup> Horner B, "End of Boyhood – at 65 years old", Sunday Times, 30 July 2006, at 29.

<sup>60</sup> Feni L, "Circumcision rite: 6 die, 50 rescued in first week", at p1. Available online at <http://www.dispatch.co.za/2006/06/26Easterncape/circ.html>. Accessed on 8 April 2006.

<sup>61</sup> Menage J, "Post Traumatic Stress Disorder After Genital Medical Procedures," in *Male and Female Circumcision, Medical, Legal and Ethical Considerations in Paediatric Practice*, edited by Denniston G, Mansfield Hodges F and Milos MF, Kluwer Academic/Plenum Publishers, 1999 at 215.

In the light of the potential risks to children participating in the cultural practices referred to above, chapter 2 will focus on South Africa's obligations to protect children from harm in terms of International Law. South Africa has ratified a number of international law instruments aimed at protecting children's rights to human dignity, equality and physical integrity amongst other rights. The relevant provisions aimed at protecting both culture and other individual rights will be closely examined with the aim of determining whether South Africa conforms to international law standards.



## **CHAPTER 2**

### **INTERNATIONAL LAW AND HARMFUL TRADITIONAL PRACTICES.**

#### **1.1 INTRODUCTION**

There are a number of international human rights instruments aimed at protecting the rights of children against harmful traditional practices. For the purposes of this chapter, emphasis will be placed on the provisions in the United Nations Convention on the Rights of the Child, (hereafter referred to as the CRC), the African Charter on the Rights and Welfare of the Child, (hereafter referred to as the African Children's Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In ratifying all three instruments, South Africa has committed itself to give effect to the provisions in these documents.<sup>62</sup>

Reference will also be made to General Comment No.3 by the Committee on the Rights of the Child in order to determine the impact of gender-based discrimination on women. This chapter will examine the right to health, contained in Article 24, which includes an express provision against harmful cultural practices. The CRC has four "foundation" or general principles that underpin all other children's rights<sup>63</sup>. These principles define how all the other articles should be implemented, describe how children should be related to, and form the basis of all the other provisions of the CRC.<sup>64</sup> The four general principles include, the best interest principle (Article 3), non-discrimination

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<sup>62</sup> The CRC was ratified by South Africa on 16 June 1995, the African Children's Charter on 7 January 2000 and CEDAW was ratified on 15 December 1995.

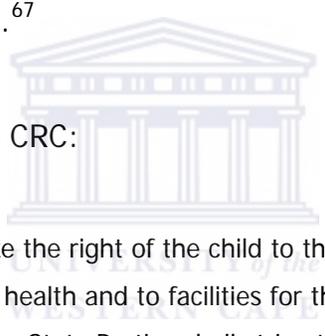
<sup>63</sup> Author unknown, "Children have rights", at p 1. Available online at <http://www.unicef.org/why/why-rights.html>. Accessed on 25 October 2006.

<sup>64</sup> Author unknown, "Child Adolescent Rights", at p1. Available online at [http://www.who.int/child-adolescent health/RIGHTS/crc-over.htm](http://www.who.int/child-adolescent-health/RIGHTS/crc-over.htm). Accessed on 25 October 2006.

(Article 2), the right to life, survival and development (Article 6) and the right to respect the views of the child (Article 12). As these principles serve as the basis against which all other values should be interpreted and implemented in the CRC, the rest of this chapter will examine the impact of harmful practices on these principles.

The CRC's health provisions are derived from the formulation of principles and definitions of the World Health Organisation (WHO) and the United Nations Children's Fund (UNICEF).<sup>65</sup> WHO contains a broad definition of health in its Constitution which views health as a state of complete physical, mental and social well-being.<sup>66</sup> This definition emphasizes the holistic nature of the Convention and links the broad definition of child development that the Convention seeks to promote.<sup>67</sup>

According to Article 24 of the CRC:

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- (1) "State parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
  - (2) (e) States Parties shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."<sup>68</sup>

Article 21 (1) of the Children's Charter provides that:

"States parties to the present Charter shall take all appropriate measures to eliminate

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<sup>65</sup> Hodgkin R and Newell P, "Implementation Handbook for the Convention on the Rights of the Child," fully revised edition, UNICEF, June 2002, at 344.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Melander G, Alfredsson G and Holmstrom L, "The Raoul Wallenberg Institute Compilation of Human Rights Instruments", 2<sup>nd</sup> revised edition, Martinus Nijhoff Publishers, at 272.

harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status."<sup>69</sup>

Furthermore, according to the preamble of the Children's Charter it is stated that:

"Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged."<sup>70</sup>

Article 24(3) was drafted because of concern over female circumcision (genital mutilation) and its potential harmful effects on women.<sup>71</sup> According to the World Health Organisation, female genital mutilation includes all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for cultural, religious or non-therapeutic reasons.<sup>72</sup> *Sunna* or circumcision, is a form of female genital mutilation characterized by the removal of the hood of the clitoris performed on a small portion of women.<sup>73</sup>

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<sup>69</sup> Author unknown, "The African Charter on the Rights and Welfare of the Child". Adopted by the Twenty-sixth Ordinary Session of the Assembly of Heads of State and Government of the OA, Addis Ababa, Ethiopia – July 1990. Available online at <http://www.anppcan.org/new/resources/international/charter.html#12,13>, at 11. Accessed on 31 August 2006.

<sup>70</sup> Ibid at 2.

<sup>71</sup> Kassan D, "Research Report on the Contradictions between the United Nations Convention on the Rights of the Child, The South African Constitution and Cultural Practices in Respect of Corporal Punishment, Early Marriages and Initiation of both Boys and Girls", Community Law Centre, University of the Western Cape, 2003 at p 30.

<sup>72</sup> Chinnian-Kester KA, "Female Genital Mutilation as a form of Violence against Women and Girls: An Analysis of the Effectiveness of International Human Rights Law", LLM Dissertation, UWC, 2005 at p 4.

<sup>73</sup> See fn 71 above at p 26.

The recommendation that the CRC should protect children from harmful cultural practices came from the *ad hoc* NGO group during the drafting of the CRC.<sup>74</sup>

A number of country representatives proposed that the provision dealing with harmful cultural practices refer specifically to the practice of female genital mutilation (FGM).<sup>75</sup> This proposal was opposed on the grounds that it would be wrong to single out one particular practice.<sup>76</sup>

The adoption of the term 'harmful traditional practices' in article 24(3) of the CRC was to "avoid highlighting any specific practice, in particular female circumcision, and to prevent any practices from being unintentionally excluded."<sup>77</sup> According to Van Bueren, although the term is broad, it is specifically descriptive to include all harmful traditional practices.<sup>78</sup>

The Committee on the Rights of the Child has expressed its concern over harmful social and cultural practices in its Concluding Observations on Initial and Second Reports from States Parties. With regard to male circumcision in South Africa, it recommended that:

"... effective measures, including training for practitioners and awareness-raising be undertaken, to ensure the health of boys and protect against unsafe medical conditions during the practice of male circumcision."<sup>79</sup>

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<sup>74</sup> See fn 65 above at p 365.

<sup>75</sup> See fn 65 above at p 365.

<sup>76</sup> *Ibid.*

<sup>77</sup> Van Bueren G, "The International Law on the Rights of the Child", International Studies in Human Rights, Vol 35, Martinus Nijhoff Publishers, 1995 at 307.

<sup>78</sup> *Ibid* at 307.

<sup>79</sup> Bekker G, "Focus on Children's Economic Rights", at p 4-5. Available online at <http://www.communitylawcentre.org.za/ser/esr2000/2000sept-children.php>. Accessed on 8 April 2006.

Concern has also been expressed at virginity testing in South Africa by the Committee, where it was stated that:

“... the State party undertake a study on virginity testing to assess its physical and psychological impact on girls. ... the Committee recommends that the State party introduce sensitization and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing ...”<sup>80</sup>

In response to the Ethiopia’s Second Country Report, the Committee recommended that:

“... the State Party continue to strengthen its current efforts to end practices of female genital mutilation, early and forced marriage and other harmful traditional practices, and recommends that the State Party take advantage of the experience gained by other countries.”<sup>81</sup> (Ethiopia 2RCO, Add. 144, paras. 64 and 65)

Similarly, in response to the Initial Country Report of Lesotho, it was recommended that the “State Party address the health risks associated with male circumcision.”<sup>82</sup> (Lesotho IRCO, Add. 147, para. 44)

The concerns of the Committee on the Rights of the Child is evident in its submissions to State Parties on the continued risks to the health of children posed by certain cultural practices. From the recommendations made by the Committee, it becomes evident that not enough is being done to protect children from harm. The potential harmful consequences of male circumcision and virginity testing has been fully addressed in chapter 1. The fact that these two

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<sup>80</sup>Author unknown, “Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000. CRC/C/15/Add.122. (Concluding Observations/Comments), United Nations Convention on the Rights of the Child at p 10. Available online at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)\(6e861f881ecalb1e8025687f005b?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)(6e861f881ecalb1e8025687f005b?Opendocument). Accessed on 24 October 2006.

<sup>81</sup> See fn 65 above at p 367.

<sup>82</sup> See fn 65 above at p 368.

practices have been expressly included in the Committee's recommendations to South Africa is indicative of the fact that not enough is being done to curb the potential health risks associated with both male circumcision and virginity testing. The Committee has emphasized the need for traditional surgeons to be properly trained and expressed the need for an evaluation of the psychological and physical impact of virginity testing.

In response to the concerns by the Committee, the South African government has introduced a number of laws aimed at regulating male circumcision in the provinces<sup>83</sup> as well as the enactment of the Children's Act<sup>84</sup> in an effort to regulate both virginity testing as well as male circumcisions nationally. For further comment on extent to which these laws protect children against harmful cultural practices, see the ensuing chapter.

It can be argued that the recommendation that virginity testing be discouraged, is an acknowledgement by the Committee of the potential harmful effects of this practice on the human dignity and equality rights of young girls. In the ensuing sections, the impact of harmful traditional practices will be examined within the ambit of the general principles in the CRC.

## **1.2 THE 'BEST INTEREST' PRINCIPLE**

The meaning of the best interest principle in international law is vague and unclear. In order to arrive at some understanding of this concept, reference will be made to various comments by academic writers and legal scholars on the topic. Firstly, according to Article 3 (1) of the CRC, the principle is described as follows:

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<sup>83</sup> These laws include the Northern Province Circumcisions Schools Act 6 of 1996, the Application of Health Standards in Traditional Circumcision Act 6 of 2001 and the Free State Initiation School Health Act 1 of 2004.

<sup>84</sup> 38 of 2005.

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."<sup>85</sup>

In Article 4 (1) of the African Children's Charter, the principle is enunciated as follows:

"In all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration."<sup>86</sup>

The principles of respect for the views of the child, the right to survival and development and the right to non-discrimination are all relevant in determining the best interests of the child.<sup>87</sup> Detrick states that the best interest principle is an "umbrella provision" which can be invoked in conjunction with other provisions of the CRC in order to clarify, justify or support a particular approach to certain issues under the Convention.<sup>88</sup> The best interest standard exceeds traditional concepts of protection and therefore all of the provisions in the CRC should be interpreted with the best interest of the child in mind.<sup>89</sup>

According to Gose,<sup>90</sup> Article 4 (1) of the African Children's Charter provides that the 'best interest' of the child shall be 'the primary consideration' while under Article 3(1) of the Convention it is only 'a primary consideration'. When interpreted in this manner, the African Children's Charter seems to maximize the

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<sup>85</sup> See fn 65 above at 39.

<sup>86</sup> Author unknown, "The African Charter on the Rights and Welfare of the Child". Available online at <http://www.anppcan.org/new/resources/international/charter.html#12,13>, at 4. Accessed on 31 August 2006.

<sup>87</sup> See fn 65 above at 42.

<sup>88</sup> Detrick S, "A Commentary on the United Nations Convention on the Rights of the Child", Martinus Nijhoff Publishers, 1999 at 92.

<sup>89</sup> Sloth-Nielsen J, "Ratification of the Convention on the Rights of the Child: Some implications for South Africa", 1995, South African Journal on Human Rights, at 409.

<sup>90</sup> Gose M, "The African Charter on the Rights and Welfare of the Child", Community Law Centre, 2002, at 25 – 26.

influence of the best interest principle in proclaiming its supremacy over other considerations.<sup>91</sup> According to Sloth-Nielsen, the reference to 'a primary consideration' is indicative of the fact that the interests of the child him or herself should also be given due consideration.<sup>92</sup> Furthermore, the intention behind the use of "primary" as opposed to "paramount" in the CRC was not to weaken the principle, but to provide the flexibility needed to give priority to other circumstances and interests so dictated.<sup>93</sup>

Although no clear guidelines are given in international law as to what the best interest principle entails, the comments made by various authors and legal scholars provide some guidance as to what should be regarded as the best interest of the child. It has been argued that even though the best interest criterion will not always be the single, overriding factor to be considered, it is however important that the child's interest must be the subject of "active consideration."<sup>94</sup>

In the South African context, the practice of virginity testing and male circumcision has the potential to violate a number of international human rights provisions aimed at protecting children. The unhygienic conditions in which the practices are carried out as well as other hardships accompanied with traditional male circumcision places children at risk of physical harm and death, in extreme cases, as explained in chapter 1. It can therefore be argued that in these circumstances, the practices mentioned above do not conform with the best interest principle enshrined in the CRC.

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<sup>91</sup> Ibid at 26.

<sup>92</sup> See fn 89 above at p 408.

<sup>93</sup> Glen Mower A, "The Convention on the Rights of the Child – International Law Support for Children", Greenwood Press, 1997, at p 24.

<sup>94</sup> See fn 65 above at p 42 - 43.

### 1.3 THE RIGHT TO NON-DISCRIMINATION

Equality and non-discrimination are positive and negative statements of the same principle.<sup>95</sup> One is treated equally when one is not discriminated against and one is discriminated against when one is not treated equally.<sup>96</sup> Discrimination, therefore, can and does prevent the realisation of all rights.<sup>97</sup>

The right to non-discrimination is contained in Article 2 (1) of the CRC and Article 3 of the African Children's Charter. In Article 2(1) of the CRC, it is stated that:

"State parties shall respect and ensure the rights set forth in the present Convention ... without discrimination of any kind, irrespective of the child's or his or her parent's ... race, colour, sex, language, religion, political or other opinion ... birth or other status."<sup>98</sup>

The phrase 'the rights set forth in this Convention' indicates that the obligation of non-discrimination applies with respect to all the rights contained in the CRC.<sup>99</sup> The scope of Article 2 is very broad and therefore not only prohibits discrimination against children on the basis of their status but also prohibits discrimination on the basis of the family's status.<sup>100</sup> Discrimination does not only occur when there is discrimination between adults but also between different groups of children.<sup>101</sup>

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<sup>95</sup> Besson S, "The Principle of Non-Discrimination in the Convention on the Rights of the Child", *The International Journal of Children's Rights*, Volume 13, No. 4, 2005 at p 434 -435.

<sup>96</sup> *Ibid* at p 435.

<sup>97</sup> Author unknown, "Children's Rights: Equal Rights? – Diversity, difference and the issue of Discrimination", Published by the International Save the Children Alliance, 2000 at p 26.

<sup>98</sup> See fn 68 above at p 263.

<sup>99</sup> See fn 95 above at p447.

<sup>100</sup> Davel CJ, "Introduction to Child Law in South Africa", Juta and Co. Ltd, 2000 at p 203.

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

The right to non-discrimination is also contained in a number of provisions in CEDAW, which is the most comprehensive international human rights document dealing with equality for women.<sup>102</sup> Article 1 of CEDAW provides as follows:

“... the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing ... the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>103</sup>

It has been argued that the value and efficacy of CEDAW in South Africa will depend on how “we give it life and meaning in using it both in the courts and in the political arena, and how we situate it within the wider political and legal struggles for equality.”<sup>104</sup> In other words the concept of equality will only be utilised to its maximum potential by infusing it with women’s concrete experiences and conditions of inequality.<sup>105</sup>

The point that girls are often the target of gender-based discrimination has been reiterated in General Comment No. 3 (2003) entitled ‘HIV/Aids and the rights of the child’ (CRC/GC/2003/1) which states the following:

“With regard to the application of the right to non-discrimination, the point is made that a particular concern is the existence of gender-based discrimination combined with

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<sup>102</sup> Author unknown, “Conference on The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW): Implementation South Africa”, Hosted by National Institute for Public Interest Law and Research Community Law Centre, Holiday Inn Garden Court Milpark, November 1993, at p 1.

<sup>103</sup> “Convention on the Elimination of All Forms of Discrimination Against Women”, Women and Rights Documentation Centre, University of the Western Cape at p 1.

<sup>104</sup> See fn 102 above at p 2.

<sup>105</sup> Ibid.

taboos or negative or judgmental attitudes to sexual activity of girls, as this can limit their access to preventative measures and other services (para 6)."<sup>106</sup>

It is submitted that in South Africa, there is a close link between HIV/AIDS and harmful cultural practices. As explained in chapter 1, the use of the same pair of gloves in the case of virginity testing and the same knife, in the case of circumcisions facilitates the spreading of sexually transmitted diseases as the HIV virus is transmitted through bodily fluids and can therefore be passed on from one infected person to another. In South Africa, the practice of virginity testing is predominantly practiced upon young girls. As such, the burden of sexual responsibility falls squarely on the shoulders of girls to the exclusion of boys. The comment contained in General Comment No. 3 above therefore highlights the potential harmful impact of gender-based discrimination on the human rights of girl children.

Traditional practices violate international law if they are prejudicial to the health of children and/or are discriminatory to the child on the basis of gender or any other status.<sup>107</sup> It is further stated that traditional practices have to be evaluated according to whether they conflict with any other provisions or rights in the CRC.<sup>108</sup>

In response to South Africa's Initial Country Report, the Committee on the Rights of the Child recommended that South Africa maximize its efforts to ensure the implementation of the principle of non-discrimination in article 2 of the CRC,

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<sup>106</sup> Sloth-Nielsen J, "Of Newborns and Nubiles: Some Critical Challenges to Children's Rights in Africa in the Era of HIV/Aids," *The International Journal of Children's Rights*, 13: 73-85, 2005 at p 74.

<sup>107</sup> Van Bueren G, "Children's Rights: Balancing Traditional Values and Cultural Plurality" in *Children's Rights and Traditional Values*, edited by Douglas G & Sebba L, Ashgate Publishing Company, 1998, at 19.

<sup>108</sup> *Ibid* at 19.

specifically with regard to vulnerable groups.<sup>109</sup> It is submitted that women, like children, constitute a vulnerable group in society and as such, they deserve the protection of the law. It can therefore be argued that the practice of virginity testing has the potential to not only violate the right to non-discrimination, but other fundamental human rights guaranteed in international law.

#### **1.4 THE RIGHT TO SURVIVAL AND DEVELOPMENT**

The phrase 'inherent right to life' cannot be interpreted in a restrictive manner, and the protection of this right requires that States adopt positive measures.<sup>110</sup> According to the *Manual on Human Rights Reporting*,<sup>111</sup> positive measures taken by states include increasing life expectancy, combating diseases, providing adequate nutritious food and clean drinking water.<sup>112</sup>

The right to survival and development is contained in Article 6 of the CRC and Article 5 of the Children's Charter. The text of Article 6 of the CRC reads as follows:

- (1) "States Parties recognize that every child has the inherent right to life.
- (2) States Parties shall ensure to the maximum extent possible the survival and development of the child."<sup>113</sup>

In referring to Article 6 (1), the following comment was made in Hodgson:

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<sup>109</sup> Author unknown, "Socio-economic rights project", A Review of International Developments, Community Law Centre, University of the Western Cape, at p3. Available online at <http://www.communitylawcentre.org.za/ser/esr2000/2000sept-children.php>. Accessed on 8 April 2006.

<sup>110</sup> See fn 65 above at p 97.

<sup>111</sup> 1997, at p424.

<sup>112</sup> See fn 65 above at p 97.

<sup>113</sup> See fn 68 above at 264.

"The right to life is the most basic, the most fundamental, the most primordial and supreme right which human beings are entitled to have and without which the protection of all other rights becomes meaningless or less effective."<sup>114</sup>

In contrast to the CRC Article 5 (1) of the African Children's Charter includes a second sentence which states that the right to life should be protected by law.<sup>115</sup> This additional sentence could be interpreted as a special obligation on States to pass laws that treats every act a person commits which violates a child's right to life as a criminal offence.<sup>116</sup>

According to Kaime, the duty on the state to ensure the survival and development of the child to the maximum extent possible emphasizes the need to guarantee correlated rights that ensure the enjoyment of the right to life.<sup>117</sup> The rights associated with the right to life includes the right to enjoy the highest attainable standard of health and the right to water, food and an adequate standard of living.<sup>118</sup> This view is supported by Van Bueren who maintains that the right to survival is a dynamic concept, the codification of which represents an acknowledgement that individual rights such as the right to health cannot be protected in isolation.<sup>119</sup>

Furthermore, in order to encourage the effective implementation of this right, the Committee on the Rights of the Child made the following recommendations with regard to South Africa's Initial Country Report:

<sup>114</sup> Hodgson D, "The Child's Right to Life, Survival and Development", *The International Journal of Children's Rights*, Vol. 2, No. 4, 1994, at p 372.

<sup>115</sup> See fn 90 at p 42.

<sup>116</sup> *Ibid* at p 42-43.

<sup>117</sup> Kaime T, "The Convention on the Rights of the Child and cultural legitimacy of children's rights in Africa: Some reflections," *African Human Rights Law Journal*, Vol 5, No. 2, Juta and Co. Ltd, 2005, at 232.

<sup>118</sup> *Ibid* at 232. See also fn 112 above at p 383 where it is stated that 'survival is concerned with those minimum requirements or basic needs which must be met to sustain human life or, to avoid death from preventable causes. To this list might be added safe drinking water, adequate shelter, clothing and sanitation facilities.'

<sup>119</sup> Van Bueren G, "The International Law on the Rights of the Child", *International Studies in Human Rights*, Vol.35, Kluwer Academic Publishers, 1995, at 293.

- (1) that appropriate resources be allocated toward the development of comprehensive programmes and policies to improve the situation of the health of children in rural areas in particular and;
- (2) that training programmes for youth on reproductive health and HIV/AIDS be centred around the acquisition of life skills and competencies that are essential to the development of youth.<sup>120</sup>

The reality in South Africa when traditional circumcisions are performed, are the high incidences of reported deaths due to botched circumcisions. Also of concern are the potential health risks which children face during the initiation period which may include starvation, cold, gangrene, physical abuse and pneumonia, amongst other diseases. The use of unhygienic equipment also increases the risk of contracting sexually transmitted diseases. Similarly, in the case of virginity testing, the use of the same pair of gloves facilitates the spreading of sexually transmitted diseases. There is also the risk of contracting HIV/Aids since girls whose status becomes known to the public are often the target of sexual abuse and rape.

In the light of the above-mentioned reality, it can be argued that male circumcisions and virginity testing carried out in the conditions set out above have the potential to violate the right to survival and development as outlined in the CRC and African Children's Charter. Although attempts had been made on the part of the Department of Health to reduce the potential health hazards at initiation schools<sup>121</sup>, recent newspaper reports reveal the shocking incidences of deaths and disease at some initiation schools.

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<sup>120</sup> See fn 109 above.

<sup>121</sup> In an article in *The Argus* of 30 June 2006 entitled "Health fears trickle in to city hospitals", it was reported that plans for a formal initiation school in the Western Cape have been pending since 2002. According to the Cultural Affairs and Sport MEC what was needed was a site which would contain data of all traditional surgeons in order to ensure that they work hand in glove with the Health Department to ensure that health risks are eliminated. In the *Sunday Times* dated 30 July 2006 in an article entitled, "End of Boyhood – at 65 years old" on page 35, it was

## 1.5 THE RIGHT TO RESPECT FOR THE VIEWS OF THE CHILD

The CRC is explicit about listening to the views of the child. Elements of participation can be found throughout the provisions enumerated in the CRC.<sup>122</sup> This is why children's right to participation is considered to be a 'cluster of rights'.<sup>123</sup> Their right to participation is spelled out in Articles 12 through 15 and contains the right to freedom of thought, conscience and religion, freedom of association and freedom of expression.<sup>124</sup> Article 12, which is the provision in the CRC that guarantees the protection of the right to respect the views of the child, is stated as follows:

1. " States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." <sup>125</sup>

In addition, Article 17, which contains the right of access to information as well as Article 31 which states that governments should promote the rights of children to participate fully in cultural and artistic life should be included in this 'cluster of rights'.<sup>126</sup> This right can therefore be seen as a general principle of 'fundamental importance' to the implementation of all aspects of the CRC.<sup>127</sup>

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stated that a new curriculum had been designed for initiation schools. This curriculum would serve as a handbook aimed at saving the lives of the initiates.

<sup>122</sup> Ang F et al, "Participation Rights in the UN Convention on the Rights of the Child," in *Participation Rights of Children*, Intersentia, 2006 at p 9.

<sup>123</sup> Ibid.

<sup>124</sup> Auriat N, Miljeteig P and Chalwa L, "Identifying Best Practices in Children's Participation" at p 2. Available online at <http://www.unesco.org/most/pla42-intro.htm>. Accessed on 24 October 2006.

<sup>125</sup> Melander G, Alfredsson G & Holstrom L, "The Raoul Wallenberg Institute Compilation of Human Rights Instruments", second revised edition, Martinus Nijhoff Publishers, at 265.

<sup>126</sup> See fn 97 above at p 2.

<sup>127</sup> Author unknown, "Promoting Children's Meaningful and Ethical Participation in the UN Global Study on Violence against Children" – A short guide for members of the NGO Advisory Panel and others, September 2003, Save the Children at p 7. Available online at

Children are therefore seen as active holders of rights and individuals whose views should be given serious consideration<sup>128</sup>. This right should be ensured even in situations where children are able to form an opinion and are yet unable to communicate them, or when a child is not yet fully mature or has not attained a particular older age, since his or her views should be given consideration 'in accordance with the age and maturity of the child ...'<sup>129</sup> This view is further supported by Pugh and Selleck who state the following;

"Listening to very young children does not necessarily mean taking all their utterances at face value, but it does mean observing the nuances of how they exhibit stress, or curiosity or anxiety, or pleasure in a manner which is congruent to their maturity. It does not imply that their views carry more weight than the powers of wise and loving adults over the outcome of any decision making process but it does require that their views are respected."<sup>130</sup>

According to Van Bueren, the CRC seeks to change adult and child cultures by creating a more accessible and child-centred culture.<sup>131</sup> The vision of a child as an autonomous being is at odds with the cultural perception where children are viewed as dependant on parents to nurture and protect them.<sup>132</sup> Van Bueren states that before a culture of listening to children can develop, adults will have to relinquish some of their own power.<sup>133</sup>

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<http://www.savethechildren.net/alliance/resources/chpart-childrenviolence.doc>. Accessed 24 October 2006.

<sup>128</sup> Ibid.

<sup>129</sup> See fn 65 above at p 164.

<sup>130</sup> Pugh G and Selleck DR, "Listening To and Communicating With Young Children", in *The Voice of the Child: A Handbook For Professionals*, edited by Davie R, Upington G and Varma V, Falmer Press, 1996, at p 121.

<sup>131</sup> Van Bueren G, "The United Nations Convention on the Rights of the Child: An evolutionary revolution", in CJ Davel (ed) *Introduction to Child Law in South Africa*, 2000, at p 205.

<sup>132</sup> Nyaundi P, "Circumcision and the rights of the Kenyan boy-child" *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, at 179. See also fn 95 at p 23.

<sup>133</sup> See fn 123 above.

Furthermore, it is stated that if children are provided with information relevant to their age and understanding, they will be able to make reasonable decisions for themselves.<sup>134</sup> Children will only be able to make informed choices if they have access to information about what they want for themselves.<sup>135</sup> In its concluding observations on South Africa's Initial Country Report, the Committee on the Rights of the Child made the following submissions;

" ... the Committee remains concerned that professional groups, children, parents and the public at large are generally not sufficiently aware of the Convention and the rights-based approach enshrined therein. The Committee recommends that greater effort be made to ensure that the provisions of the Convention are widely known and understood by adults and children alike, in both rural and urban areas. In this regard, it encourages the State party to reinforce its efforts to make the Convention available in local languages and to promote and disseminate its principles and provisions through the use of inter alia, traditional methods of communication ...."<sup>136</sup>

The above submissions indicate the importance of the child's right of participation in all matters affecting children. In order to facilitate the free and voluntary participation of children, the Committee on the Rights of the Child emphasized the need for awareness raising around the provisions of the CRC as an important tool in making children aware of their rights. Barratt states that the inclusion of the right in the CRC of the child to participate in decision-making is "an extremely significant development in children's rights law because it

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<sup>134</sup> Franklin A and Sloper P, "Listening and responding? Children's participation in health care within England," the International Journal of Children's Rights, Vol. 13, No. 1-2, 2005, p 275.

<sup>135</sup> Ibid at 277.

<sup>136</sup> Author unknown, "Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000. CRC/C/15/Add.122. (Concluding Observations/Comments), United Nations Convention on the Rights of the Child at p 5. Available online at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)\(6e861f881e8025687f005b?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)(6e861f881e8025687f005b?Opendocument). Accessed on 24 October 2006.

recognizes the child as a full human being, with integrity and personality and with the ability to participate fully in society."<sup>137</sup>

In chapter 1 the potential harmful consequences of both virginity testing as well as male circumcision were discussed in detail. It is not clear to what extent the views of children themselves have been considered around policies and legislation aimed at protecting children from harmful traditional practices in South Africa. From the response by the Committee on the Rights of the Child to South Africa's Initial Report in 2000 it can be argued that not enough awareness raising around the provisions of the CRC had taken place at the time of publication of the Report. It is also uncertain how much awareness raising has taken place since the publication of the Report.

It can therefore be concluded that if children are not sufficiently informed of their rights, they would not be able to participate fully in matters affecting them. What is questionable in the South African context is the voluntariness of children's participation in cultural practices. The inclusion of the word 'freely' in Article 12 is indicative of the fact that he or she should not suffer any 'pressure, constraint or influence that might prevent such expression.'<sup>138</sup> It can therefore be submitted that the pressure put on children to participate in traditional ceremonies would hamper their 'free' expression on the potential health hazards often associated with traditional cultural practices.

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<sup>137</sup> Barrat A, "The Best Interest of the Child", in *The Fate of the Child – Legal Decisions on Children in the New South Africa*, edited by Burman S, Juta Publishers, 1<sup>st</sup> edition, 2003, at 149.

<sup>138</sup> See fn 102 above at p 164.

In the ensuing chapter, the rights of children to be protected from harmful traditional cultural practices will be examined within the ambit of the South African Constitution. The limitations on the right to culture and religion will be examined more closely in order to determine the constitutional requirements on the exercise of these rights.



## **CHAPTER 3**

### **THE RIGHT TO CULTURE AND RELIGION VERSUS HUMAN RIGHTS**

#### **1.1 INTRODUCTION**

Those opposing harmful cultural practices do so on the basis that these practices infringe a number of fundamental human rights contained in both international law as well as the South African Constitution.<sup>139</sup> Proponents of virginity testing claim that the practice is part of their culture<sup>140</sup> and those who support male and infant circumcision find their justification in religion<sup>141</sup> and culture, in the case of the Xhosas.<sup>142</sup> The dilemma facing human rights groups and legal scholars, are that those who support traditional practices rely on the provisions in international law instruments aimed at the protection of the right to culture and religion as well as the right to religion and culture in the Constitution to sustain their beliefs.

As there are a number of rights competing against each other, this chapter will focus on harmful practices within the framework of the South African Constitution. The right to culture and religion, contained in sections 15, 30 and 31 of the Constitution, will be closely examined in order to determine what the constitutional requirements are with regard to the exercise of these rights in relation to other fundamental rights in the Constitution. The chapter will also focus on section 36 of the Constitution which is the yardstick used by the courts to determine whether an infringement of a fundamental right can be justified in an open and democratic society.

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<sup>139</sup> Scorgie F, *Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention*, *African Studies* (University of Cambridge) 61 1 2002 at 57.

<sup>140</sup> Lafraniere S, "Women's Rights Movement in Africa Emerges." Available online at [http://www.taipetimes.com/News/feat/archives/2006/01/2003286981\\_at](http://www.taipetimes.com/News/feat/archives/2006/01/2003286981_at) 3. Accessed on 8 April 2006.

<sup>141</sup> See 2.1 in chapter 1.

<sup>142</sup> Author unknown, "Male Circumcision in Africa – Part 2", at p 3. Available online at <http://www.circlist.com/rites/african2.html>. Accessed on 8 April 2006.

## **1.2 The right to culture**

As mentioned above, this right is contained in both sections 30 and 31 of the Constitution. Section 30 is stated as follows:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

Section 31 provides as follows:

- (1) “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
  - (a) to enjoy their culture, practice their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with an provision of the Bill of Rights.”

Both purposive and textual interpretations of section 30 confirm that the right to culture is an individual right as opposed to an unqualified communitarian provision.<sup>143</sup> “The individualistic phrasing of the section 30 right made it unclear whether it could ground claims for the protection of cultural ... communities.”<sup>144</sup> The inclusion of section 31 in the Bill of Rights now does the work of protecting communal interests in culture and religion.<sup>145</sup>

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<sup>143</sup> Haysom N and Cachalia F, “Language and Culture”, in South African Constitutional Law, The Bill of Rights, 2<sup>nd</sup> ed., Butterworths, issue 2, 2005 at chapter 25 p 11.

<sup>144</sup> De Waal J, Currie I and Erasmus G, “The Bill of Rights Handbook”, fifth edition, Juta and Co. Ltd, 2005 at p 636.

<sup>145</sup> Ibid.

The rights to culture contained in section 31 is of a 'hybrid' nature since they are individual rights on the one hand, like all other provisions in Chapter 2, and they recognize collective interests.<sup>146</sup>

This view is supported by Devenish<sup>147</sup> where it is stated that:

"The rights to language and culture are articulated in section 31 as individual rights that inhere in every person, and are not expressed as group or ethnic rights. However, these rights are by their very nature group oriented, since individuals share their language and culture with other persons constituting a group or community. ... Therefore individuals do not exist and operate in a cultural, linguistic or religious vacuum and their rights do not exist in *abstracto*."<sup>148</sup>

What is of extreme significance in both sections 30 and 31 is the built-in limitations clause stating that these rights may not infringe any other fundamental rights in the Bill of Rights. While the Bill of Rights is supportive of group and communal rights, it places these provisions in the context of a list of rights aimed at guaranteeing individual freedom and equality.<sup>149</sup> The right to culture contained in section 31 is qualified by section 31(2) by stipulating that it is subject to other rights contained in chapter 2, in particular, it is subject to the right to equality.<sup>150</sup>

Where there is conflict between the individual interest and communal interest, the individual's rights will prevail because section 31(2) constitutes an internal

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<sup>146</sup> See fn 143 above at p 18.

<sup>147</sup> Devenish GE, "A Commentary on the South African Bill of Rights", Butterworths Publishers, 1999 at p 422.

<sup>148</sup> See also Davis D et al, "Fundamental Rights in the Constitution – Commentary and Cases", Juta and Co. Ltd., 1997, at p 291.

<sup>149</sup> See fn 144 above at p 634.

<sup>150</sup> See fn 147 above.

limitation on the rights contained in section 31(1).<sup>151</sup> With regard to the potential conflict between the right to culture and other fundamental rights, the court in *Mabuza v Mbatha* 2003 (7) BCLR 743 (C ) made the following submission;

“... any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. ... The courts have a constitutional obligation to develop African Customary Law particularly given the historical background referred to above. Furthermore, ... when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.”<sup>152</sup>

In this case, the plaintiff, in a divorce action sought a court order declaring section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 in conflict with the constitution on the grounds that it violated the right to equality as contained in section 9. Furthermore, the plaintiff sought a declaration that the customary marriage between the parties be regarded as a marriage in community of property. According to section 7(1) of the Recognition of Customary Marriages Act referred to above, the proprietary consequences of a customary marriage entered into prior to the commencement of this Act continue to be governed by customary law<sup>153</sup>.

The determination of the constitutional validity of section 7(1) of the Act was left for later determination in terms of an order made in terms of Rule 33(4) of the Uniform Rules of the Court<sup>154</sup>. The court however, emphasized the need for customary law to develop in conformity with the values in the Constitution<sup>155</sup>. In

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<sup>151</sup> See fn 143 above at p 21. See also Matshekga JN, “Quo vadis? A discussion of the universalism-relativism debate in the light of male circumcision in South Africa” in SA Public Law, Vol 18, No. 1, 2003, University of South Africa, at p 401.

<sup>152</sup> paras 30 -31.

<sup>153</sup> See Editor’s Summary on p 743.

<sup>154</sup> Ibid.

<sup>155</sup> para 31. See also *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005(1) BCLR 1 (CC) at para 41 where the following was stated:

granting a decree of divorce, the court ordered the division of estate as if it were a marriage in community of property, without expressly making an order to such an effect.

From the above decision as well as the case of *Bhe and Others*<sup>156</sup>, it can be argued that where customary law conflicts with a provision in the Constitution, the role of the court is not simply to confirm a conflict by invoking section 31, but to develop customary law so that it becomes congruent with the values in the Constitution.<sup>157</sup> Customary law comprises the written and unwritten rules which have developed from the customs and traditions of communities, they have to be known to the communities, followed by the communities and be enforceable (able to be carried out).<sup>158</sup> Both virginity testing as well as traditional male circumcision can be categorized as customary law practices as both practices comply with the above-mentioned criteria.

Even if the right to culture survives the internal limitation clause of section 31 and is found to have been violated, the violation may still be justified in terms of section 36 of the Constitution.<sup>159</sup> The most important test, in practice, is proportionality or a balancing of interests.<sup>160</sup>

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" ... the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided that the particular rules or provisions are not in conflict with the Constitution."

<sup>156</sup> See fn 155 above.

<sup>157</sup> See fn 143 above at 22.

<sup>158</sup> Author unknown, "Aids Law Project of South Africa," at p 1. Available online at <http://www.alp.org.za>. Accessed on 24 October 2006.

<sup>159</sup> Bennet TW, "Customary Law in South Africa," Juta and Co. Ltd., 2004 at p 95.

<sup>160</sup> Ibid at p 95.

### **1.2.1 The application of section 36 of the Constitution.**

In a case where the right to culture is under constitutional scrutiny, a court will have to look at the cultural practice, its significance to the community concerned and the potential rights that it is alleged to infringe. Culture can be construed to mean the freedom, akin to a freedom of expression, to perform or practice the arts and sciences.<sup>161</sup> Culture may also denote a people's entire store of knowledge and artifacts, especially beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.<sup>162</sup>

Section 31 therefore guarantees individuals both the right to stay in a cultural group or to leave it.<sup>163</sup> The right to a cultural life protects the collective strength of those whose choices might otherwise be in jeopardy at the hands of the majority.<sup>164</sup> Canada's Chief Justice Dickson made the following submission with regard to associational freedom in *Alberta Union of Provincial Employees v Attorney-General of Alberta* (1987) 28 CPR 305:

"Association has always been the means through which political, cultural and racial minorities , religious groups and workers have sought to obtain their purposes and fulfillment of their aspirations. It has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and perhaps conflict."<sup>165</sup>

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<sup>161</sup> Bennet TW, "Human Rights and African Customary Law under the South African Constitution", Juta and Co. Ltd, 2004 at p 79.

<sup>162</sup> Ibid.

<sup>163</sup> Davis D et al, "Fundamental Rights in the Constitution – Commentary and Cases", Juta and Co. Ltd., 1997, at p 284.

<sup>164</sup> See fn 143 above at p 12.

<sup>165</sup> See fn 163 above at p 286.

In South Africa, proponents of virginity testing as well as traditional male circumcision find their justification for the practice in the right to practice their culture.<sup>166</sup> Even though the right to culture is protected in sections 30 and 31 of the Constitution, section 36 is a reminder that no right contained in the Bill of Rights is absolute. In order to determine whether one right unjustifiably infringes on another, there has to be a careful balancing of rights with regard to the provisions contained in section 36 of the Constitution.<sup>167</sup> According to Haysom and Cachalia, where there is a clash between the protection of cultural rights and ordinary statutes that seek to regulate cultural life in a way that impinges on cultural practices, then a careful balance between the two has to be struck.<sup>168</sup> It is stated further that:

“... on the one hand, a balance will have to be struck by measuring the centrality of the practice within the ensemble of cultural practices which constitute the culture and on the one hand, the compelling social interest requiring limitation and the extent of the burden.”<sup>169</sup>

In the case of *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC), the right to religion and culture came into conflict with a statute

<sup>166</sup> Author unknown, “National House of Traditional Leaders (NHTL) submissions on the Children’s Bill (B 70B – 2003)” at p 2. Available online at <http://www.pmg.org.za/docs/2005/05101lnh+1.htm>. Accessed on 31 August 2006. See also, “Children’s Bill: Deliberations, Social Development Portfolio Committee,” 18 February 2005 at p 1. Available online at <http://www.pmg.org.za/viewminute.php?id=5504>. Accessed on 31 October 2006.

<sup>167</sup> The provisions of section 36 are stated as follows:

- (1) “The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including;
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose, and;
  - (e) less restrictive means to achieve the purpose.
- (1) Except as provided in section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>168</sup> See fn 143 above at p 16.

<sup>169</sup> Ibid.

prohibiting corporal punishment in schools. Section 10 of the South African Schools Act 84 of 1996 prohibited the administration of corporal punishment to pupils at school. It was contended by the appellants (a voluntary association representing independent schools), that the prohibition violated their rights to religion and culture as guaranteed in the Constitution.

When applying the section 36 analysis, the court referred to the decision of *S v Manamela* 2000 (5) BCLR 491 (CC), where it was stated;

“In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected ...”<sup>170</sup>

Furthermore, it was held that the State was under a Constitutional obligation to take measures to diminish the amount of public and private violence in society, with the aim of protecting children from maltreatment, abuse and degradation.<sup>171</sup> The court acknowledged that, by ratifying the Convention on the Rights of the Child, it undertook to take appropriate measures to protect children from violence and abuse.<sup>172</sup> In handing down judgment it was held that the prohibition of corporal punishment in schools was justifiable largely because the rights of children to dignity and freedom of security outweighed the rights of parents to culture and religion.<sup>173</sup>

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<sup>170</sup> para 31.

<sup>171</sup> para 40.

<sup>172</sup> Ibid.

<sup>173</sup> paras 41,43 and 47

The decision in the *Christian Education* case above is indicative of the Constitutional Court's commitment to uphold the dignity of children as a vulnerable group and to protect children from practices which have the potential to violate their dignity. It is therefore submitted that cultural practices which have the potential to harm children will not pass Constitutional scrutiny. Furthermore, it can be argued that the potential harm caused by traditional practices such as male circumcision and virginity testing far outweigh the benefits put forward by proponents of these practices as explained in chapter 1. What strengthens this point of view further is the current escalation in violence and abuse against children and women in South Africa.

### 1.5.1 **The right to religion.**

Proponents of infant and male circumcision find their justification for the practice in religion and culture.<sup>174</sup> With every circumcision performed on an infant or adult male there are potential physical risks to the well-being of the individual concerned.<sup>175</sup> It is this potential for harm that concerns human rights groups and legal scholars in both the international and national law arena.

The right to religion is contained in both sections 15 and 31 of the Constitution.<sup>176</sup> The most persuasive authority with respect to religious freedom

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<sup>174</sup> See 2.1 in chapter 1.

<sup>175</sup> See 2.2 in chapter 1.

<sup>176</sup> Section 15 states the following:

- (1) "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."
- (2) Religious observances may be conducted at state or state-aided institutions, provided that –
  - (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary."

is found in the application of the First Amendment to the United States Constitution.<sup>177</sup> In summarizing the First Amendment, it was stated that;

“... Congress shall make no law respecting an establishment of a religion or prohibiting the free exercise of a religion.”<sup>178</sup>

Two cognate concepts are contained in this clause, namely, the ‘disestablishment’ clause and the ‘free exercise’ clause.<sup>179</sup> The former protects individuals from religious coercion by the state and the latter gives individuals the right to hold, propagate and act on religious beliefs.<sup>180</sup> In essence, the clause against the establishment of religion by law was intended to erect a wall separating Church and State.<sup>181</sup> What this means is that the State should not be seen to favour one religion over another.

In commenting on the closeness in content between section 31 of the Constitution and article 27 of the International Covenant on Civil and Political Rights, the Human Rights Committee made the following submission:

“... The s31 right requires for its exercise the existence of an identifiable community practicing a particular culture or religion or speaking a particular language. Therefore, if as a result of state action or inaction, that community loses its identity, if it is absorbed without trace into the majority population, the individual right of participation in a cultural or linguistic community will be harmed. Section 31 therefore certainly requires non interference with a community's initiatives to develop and preserve its culture. In addition, it is likely that it requires positive measures by the state in support of

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<sup>177</sup> See fn 147 above at p 164.

<sup>178</sup> Davis D, “Religion, Belief and Opinion”, in South African Constitutional Law, The Bill of Rights, 2<sup>nd</sup> ed., Butterworths, issue 2, 2005 at chapter 10 p 2.

<sup>179</sup> Ibid.

<sup>180</sup> See fn 147 above at p 165.

<sup>181</sup> See fn 178 above.

vulnerable or disadvantaged cultural, religious and linguistic communities that do not have the resources for such initiatives.”<sup>182</sup>

From the above submission it can be argued that vulnerable groups require special protection in the light of our recent apartheid history. It is for this reason that the court in the case of *Prince v President of the Law Society of the Cape of Good Hope & others*, 2002 (2) SA 794 (CC), emphasized the importance of contextualizing the balancing exercise required by the limitations clause in the Constitution.<sup>183</sup>

In the *Prince* case, the constitutionality of section 4(4) of the Drugs and Drug Trafficking Act 140 of 1992 came into question. This case arose out of the failure of the Cape Law Society to register a candidate attorney, Prince, a Rastafarian who asserted his right to smoke dagga in breach of the relevant drug laws. According to Prince, the smoking of dagga was a central tenet of his religion and culture as a Rastafarian.

In this case, although it was found that the right to religion of Prince had been infringed, it was held that such an infringement was justifiable on the basis that no meaningful exemption could be carved out for ritual dagga use. The majority in this case relied heavily on the state's evidence that even limited dagga smoking could lead to broader drug use in the country and greater narcotics trafficking in the country.<sup>184</sup> Unlike the majority decision, the dissenting judgments of Sachs J and Ncgobo J are extremely useful in that the court went

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<sup>182</sup> Henrard K, “The Accommodation of Religious Diversity in South Africa against the background of the centrality of the Equality Principle in the New Constitutional Dispensation”, in *Journal of African Law*, Vol 45, No.1, 2001 at p 68.

<sup>183</sup> Para 151.

<sup>184</sup> Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M and Bishop M, “Constitutional Law of South Africa,” 2<sup>nd</sup> edition, Juta and Co. Ltd., 2005 at p 36.

into an in-depth analysis of the importance of ritual dagga smoking in the Rastafarian community as well as the historical significance of the ritual.<sup>185</sup>

In the dissenting judgment of Sachs J, the following submissions were made with regard to the centrality of the practicing of religion:

“The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality.... South African Rastafari find themselves in the peculiar position of being the diaspora of the diaspora, physically on African soil but as reliant as their brethren abroad on the use of dagga as the instrument for achieving an Afro-centred religious connection with creation. Prohibit the use of dagga and the mystical connection is destroyed. ...”<sup>186</sup>

Again, as is the case with the right to culture, the right to religion, although protected in terms of section 15 and 31 of the Constitution, is subject to the limitations clause. The above submission by Sachs is particularly relevant in South Africa, where the right to religion and culture will have to be evaluated within the social context in South Africa. The right to practice male circumcision for religious purposes will have to be examined in the context where violence and the maltreatment of children are an everyday experience in South Africa.<sup>187</sup>

Although the limitation clause of section 36 is an effective way of resolving conflict between the right to religion and other fundamental rights, the courts prefer to limit the scope of the right before resorting to the application of section 36.<sup>188</sup> The effect is to show that not every practice claiming to be an exercise of the right to religion is treated as such by the courts.<sup>189</sup> A three pronged test is used to restrict the scope of the right by employing the following techniques:

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<sup>185</sup> Paras 145, 152 and 153.

<sup>186</sup> Paras 151- 152.

<sup>187</sup> See *Christian Education South Africa v Minister of Education* 2000 (10) BCLR (CC) at para 40.

<sup>188</sup> See fn 144 above at p 341.

<sup>189</sup> *Ibid* at p 341.

- (1) the first is to question the sincerity of the applicant's belief;
- (2) then to determine whether the practice in question is a 'central tenet' of the religion; and
- (3) with the use of a contextual interpretation, the courts will not protect any practices excluded under section 15 that are specifically excluded from protection elsewhere in the Constitution.<sup>190</sup>

The Court in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) avoided this three-pronged approach and chose to resolve the case under the limitation clause. After an extensive examination of the obligations of the state to protect children from abuse and maltreatment as well as South Africa's international obligations to protect children from harm, the following submission was made by the court;

"As the court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion."<sup>191</sup>

The requirement that the limitation needs to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", highlights the high importance attributed to equality by the post-apartheid constitution.<sup>192</sup> The elevated status of the right to equality was clearly reflected in the case of *Pillay v KwaZulu-Natal MEC of Education and Others* 2006 (10) BCLR 1237 (N). In this case, the appellant, the mother of a Hindu girl attending a public school, challenged the constitutionality of the school's code of conduct adopted by the school's governing body which prohibited the wearing of nose

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<sup>190</sup> Ibid at p 341.

<sup>191</sup> Para 41.

<sup>192</sup> See fn 182 above at p 55.

studs. The appellant in this case argued that the wearing of a nose stud was an established tradition in her family as well as Indian culture and that her daughter did not wear a nose stud as a fashion statement.<sup>193</sup> In its finding that the decision of the governing body unreasonably and unjustifiably infringed the right of the appellant's daughter to culture and religion, the court made the following submission;

"A ban against the wearing of a nose stud undermines the value of religious and cultural symbols and sends learners the message that religious beliefs and cultural practices do not merit the same protection as other rights and freedoms. If the school accommodates appellant's daughter and allows her to wear the nose stud it would demonstrate the importance that our society attaches to protecting religious and cultural rights or freedoms and to showing respect for its minorities." <sup>194</sup>

The minority decision in the *Prince* case above as well as the decision of the court in *Pillay* discussed above are two examples of the commitment to protect the rights of vulnerable groups in society. In the *Christian Education* case the court emphasized the cultural context where children as vulnerable groups in society rely on the state to put in place measures aimed at preventing abuse, violence and maltreatment of children. As such, the Constitutional Court has provided guidance to other courts that where culture and religion have the potential to harm the rights of children, the rights of children to be protected should prevail.

In my opinion the potential harmful consequences of virginity testing which has been discussed in great detail in chapter 1 of this paper far outweigh the benefits as proposed by those in favour of the practice. The practice has the potential to infringe a number of fundamental rights of girl children including the right to non-discrimination, physical integrity, dignity and privacy. As such, it is

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<sup>193</sup> para 7.

<sup>194</sup> para 35.

submitted that the practice should be discouraged. It can be further argued, judging from the decisions in the *Pillay, Prince* and *Christian Education* cases that virginity testing will not pass constitutional scrutiny.

In the case of traditional male circumcisions it is submitted that when the practice is carried out in unhygienic conditions, coupled with other hardships such as starvation, frostbite, gangrene and other health related hazards, the potential for harm to the male child far outweighs the benefits put forward by those who support the practice. Under these conditions, traditional male circumcisions has the potential to infringe the right to bodily integrity and in severe cases such as death, the right to life is also infringed. It is therefore submitted, that under these conditions, traditional male circumcisions will not pass constitutional scrutiny.

Although each and every circumcision carried out on a male child carries the risk of physical injury, there is a difference between circumcisions carried out for cultural reasons and religious reasons. Recent reports in the media indicate that many traditional circumcisions are carried out in unhygienic conditions and by untrained personnel. Religious circumcisions are for the most part carried out by a medical practitioner, in the case of Muslims and a *mohel* in the case of Jews. As such, the cases of botched circumcisions in Jews and Muslims are not as widespread as is the case with traditional male circumcisions. It is therefore submitted that male circumcisions carried out for religious purposes should be carried out strictly according to the requirements of the particular religion, in order to protect children from botched circumcisions and other health related injuries accompanied by unhygienic circumcisions.

The following chapter will examine the provisions of the Children's Act 38 of 2005 with the aim of determining whether the provisions go far enough in protecting children against harmful traditional practices as required by international law as well as the Constitution. A detailed analysis of the provisions relating to virginity testing and male circumcision will be undertaken in order to determine how far the public submissions were accommodated in the final draft of the Act.

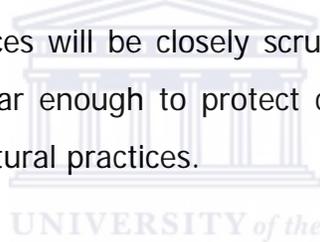


## **CHAPTER 4**

### **HARMFUL CULTURAL PRACTICES AND THE CHILDREN'S ACT.**

#### **1.1 INTRODUCTION.**

The parliamentary debate around harmful cultural practices in the Children's Bill [B70 – 2003] (hereafter referred to as the Children's Bill) before it was enacted, was a lengthy process involving submissions from a number of stakeholders. This chapter will examine the extent to which the submissions made was accommodated for in the final Children's Act 38 of 2005 (hereafter referred to as the Children's Act) that emerged, and whether the provisions relating to harmful cultural practices in the Act conform to international as well as Constitutional law principles. The requirement of 'consent' and the right of refusal of a child to participate in cultural practices will be closely scrutinized in order to determine whether the provisions go far enough to protect children against the potential harmful consequences of cultural practices.



#### **1.2 The parliamentary process on the Children's Bill.**

After 5 years of research and consultation, the South African Law Reform Commission (SALRC) drafted the Children's Bill which was designed to replace the Child Care Act of 1983.<sup>195</sup> According to experts in the field of children's rights, the Child Care Act of 1983 which was enacted under the apartheid era government, was not written from a child rights perspective and did not take into account key concepts such as equality and the best interests of the child.<sup>196</sup>

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<sup>195</sup> Proudlock P, "Children's Bill – last chance to comment" in Children First, January/February 2004, Community Law Centre, University of the Western Cape at p 27.

<sup>196</sup> Scorgie F, "A battle won? The prohibition of virginity testing in the Children's Bill", in Agenda No. 68, 2006 at p 26 in footnote 3.

After listening to submissions in August 2004 from 30 children's sector organizations, including two groups of children, which highlighted a number of gaps in the delivery of services to children, the Portfolio Committee on Social Development spent the next 6 months calling for inputs, gathering information and deliberating on the clauses in the Children's Bill.<sup>197</sup> On the 12<sup>th</sup> and 13<sup>th</sup> of April 2004, experts from academia, the Children's Bill Working Group, Traditional Leaders and the Justice Department were requested to give expert advice on how to resolve contentious areas in the Bill.<sup>198</sup> Virginity testing and male circumcision were included in the issues that needed to be discussed at this workshop.<sup>199</sup> A revised version of the Bill was prepared and then passed by the National Assembly in June 2005.<sup>200</sup>

### **1.2.1 Amendments proposed by the National Assembly.**

The National Assembly (NA) effected a number of changes to clause 12 of the Bill in June 2005.<sup>201</sup> When the Bill went back to the National Council of Provinces (NCOP), a number of amendments were proposed in response to the proposals by the NA. These amendments will be discussed in the ensuing section.

<sup>197</sup> Proudlock P, "No Second-Best Law for Children" at p 3. Available online at <http://www.childrenfirst.org.za/shownews?modecontent&id=24772&refto=4742>. Accessed on 5 October 2006.

<sup>198</sup> Ibid at p 3.

<sup>199</sup> Ibid at p 3.

<sup>200</sup> See fn 196 above at p 23.

<sup>201</sup> See Jamieson L and Proudlock P, "Children's Bill Progress Update: Report on amendments made by the Portfolio Committee on Social Development", at p 11. Available online at <http://web.uct.ac.za/depts/ci/plr/pdf/progress/27June2005doc>. Accessed on 10 October 2006.

The following changes were proposed:

- "12(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to the well-being, health or dignity of the child.
- (4) Virginity testing has been banned outright,
  - (5) Every male child has the right to refuse circumcision.
  - (6) Any person who performs FMG, virginity testing, or circumcision where consent was refused, is guilty of an offence as is the person who is obliged to protect the child from abuse."

### **1.2.2 Amendments proposed by the NCOP.**

It was recommended that;

- (1) circumcision of male children for cultural reasons be restricted to boys over the age of 16 years;
- (2) Above the age of 16 circumcision may only occur with the consent of the child and after counselling;
- (3) virginity testing is restricted to girls over the age of 16 years;
- (4) Above the age of 16 virginity testing can only be carried out with the consent of the child and after counseling;
- (5) The results of virginity testing should not be made public and;
- (6) The body of the child should not be marked.<sup>202</sup>

The proposals by the NCOP were then accepted by the NA in December 2005.<sup>203</sup> With the enactment of the Bill, the above recommendations by the NCOP in December 2005, were retained in section 12 of the final Children's Act 38 of 2005.

### **1.2.3 Submissions on harmful practices in the Children's Bill.**

In October 2005 during the public hearings on the Children's Bill by the Select Committee on Social Services, the National House of Traditional Leaders (NHTL) expressed concern about section 12 of the Bill relating to social, cultural and

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<sup>202</sup> Ibid.

<sup>203</sup> Jamieson L and Proudlock P, "Children's Bill Progress Update", 13 March 2006 at p 3. Available online at <http://web.uct.ac.za/depts/ci/plr/progress/GeneralUpdate13March2006>. Accessed 10 October 2006.

religious practices.<sup>204</sup> The following comments were made with regard to the practice of virginity testing:<sup>205</sup>

"We are vehemently opposed to a clause which prohibits virginity testing. This clause has been inserted by those who either have no knowledge of our culture or are simply harbouring prejudice and hatred against our culture. Ever since this Bill was publicized by media ... the most vocal critics being women and girls themselves. Should parliament pass this outrageous legislation with such offensive clause it runs a risk of not being respected by our communities and they are determined to defy it. The Bill of Rights recognises the rights of persons to participate in cultural practices of their own choice. Surely any clause in the Bill which denies our communities to exercise their cultural rights is not consistent with the Constitution."<sup>206</sup>

With regard to male circumcision, it was held that the Bill did not provide a definition of the word "circumcision" and that there were various forms of female circumcision which in the view of traditional leaders were good customary practices that should be promoted and not prohibited.<sup>207</sup>

<sup>204</sup> Author unknown, "National House of Traditional Leaders (NHTL) submissions on the Children's Bill (B 70B – 2003)" at p 2. Available online at <http://www.pmg.org.za/docs/2005/05101lnh+1.htm>. Accessed on 31 August 2006.

<sup>205</sup> Section 12(4), (5), (6) and (7) relates to the practice of virginity testing. These sections state the following:

- 12(4) "Virginity testing of children under the age of 16 is prohibited.  
 (5) Virginity testing of children older than 16 may only be performed?  
 (a) if the child has given consent to the testing in the prescribed manner;  
 (b) after proper counselling of the child; and  
 (c) in the manner prescribed.  
 (6) The results of a virginity test may not be disclosed without the consent of the child.  
 (7) The body of a child who has undergone virginity testing may not be marked."

<sup>206</sup> See fn 204 above at p 2.

<sup>207</sup> Ibid. The provisions in the Bill relating to male circumcision are contained in sections 12 (8) – (10). These provisions state the following:

- 12(8) "Circumcision of male children under the age of 16 is prohibited except when –  
 (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or  
 (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.  
 (9) Circumcision of male children older than 16 may only be performed –  
 (a) if the child has given consent to the circumcision in the prescribed manner;  
 (b) after proper counselling of the child; and  
 (c) in the manner prescribed.

The National Organisation on Circumcision Information Resource Centres (NOCIRC-SA) in its submissions on harmful cultural practices in October 2005 proposed a minimum age of 18 for traditional circumcisions with informed, signed consent which can only be given by adults.<sup>208</sup> In support of this proposal, reference was made to the precedent set by the Application of Health Standards in Traditional Circumcision Act (Eastern Cape) No. 6 of 2001 which contain a number of provisions aimed at preventing unhygienic circumcisions.<sup>209</sup> It was recommended that this provincial Act be updated and applied nationally.<sup>210</sup>

Thembisile Toyiya, a social worker in the Department of Social Development in the Eastern Cape, made the following comments on virginity testing during the public hearings in October 2005:

"The female participants' right to equality is infringed by this practice being predominantly applicable to women only. This unfairly places the responsibility of being sexually active on women. ... Failing virginity tests leads to stigmatization and mocking by other participants as well as the community. This is undignified as the girls are humiliated in the process. ... The pressure by the community to take part in this ritual also infringes the participant's right to bodily integrity."<sup>211</sup>

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(10) Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision."

<sup>208</sup> Author unknown, "Submissions by National Organisation on Circumcision Information Resource Centres" at p 2. Available online at <http://www.pmg.org.za/docs/2005/051011nocircsa.htm>. Accessed on 7 September 2006.

<sup>209</sup> Section 4 of the Act provides that circumcisions may not be performed without the written permission of the medical officer designated for the area in which the circumcision is to be performed. Section 5 states that permission to hold a circumcision school or treat initiates have to be obtained from a medical officer designated for the area in which the circumcision school is to be held. Annexure A of the Act contains conditions for obtaining permission to perform circumcision and Annexure B contains conditions for obtaining permission for holding a circumcision school or for treating initiates. Annexure C contains a consent form to be signed by a parent or guardian in cases where initiates are under the age of 21.

<sup>210</sup> See fn 208 above at p 2.

<sup>211</sup> Toyiya T, "Submission on the Children's Bill [B70B – 2003]" at p 1. Available online at <http://www.org.za/docs/2005/05101toyiya.doc>. Accessed on 31 August 2006.

Outside of the debate in parliament itself, the following comments were made by traditional leaders and virginity testers:

In response to a proposed ban on virginity testing in the Children's Bill, Patekile Holomisa, president of the Congress of Traditional Leaders had the following to say;

" ... There are laws that are passed that do not necessarily have an impact on the lives of people. I imagine this will be one of those."<sup>212</sup>

According to Nomagugu Ngobese, a Zulu virginity tester in Pietermaritzburg the following submission was made in response to the proposed ban by the government:

"This is none of the government's business ... People are devaluing our things, but we are not going to quit. They must come and imprison me if they like, because this has helped our children."<sup>213</sup>

Furthermore, in its Review on the Child Care Act of 1983, the South African Law Reform Commission, although not opposed to male circumcision, had recommended that a male child's right to refuse circumcision should be recognised as well as a child's right to refuse virginity testing for cultural reasons.<sup>214</sup> In addition, the right of a male child not to be subjected to unhygienic circumcisions as well as the right not to be subjected to unhygienic virginity testing should be stressed in the new children's statute.<sup>215</sup>

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<sup>212</sup> Lafraniere S, "Women's Rights Movement in Africa Emerges". Available online at [http://www.taipetimes.com/News/feat/archives/2006/01/2003286981\\_at\\_2](http://www.taipetimes.com/News/feat/archives/2006/01/2003286981_at_2). Accessed on 8 April 2006.

<sup>213</sup> Ibid, p 3-4.

<sup>214</sup> "South African Law Commission Report on the Review of the Child Care Act", Project 110, December 2002 at p 282.

<sup>215</sup> Ibid at p 282.

The submissions made by human rights activists during the public hearings on the Children's Bill during October 2005 which has been discussed above, as well as the recommendations by the South African Law Commission in its Review on the Child Care Act reflect the need for legislation which aims to protect children against cultural practices which are unhygienic. What is disturbing from the submissions that were made by traditional leaders outside of the debate in parliament was that they would openly defy the new Children's Act. This places all children who participate in traditional cultural ceremonies at risk of the potential harm associated with certain practices.

### **1.3 HARMFUL TRADITIONAL PRACTICES AND THE CHILDREN'S ACT**

#### **1.3.1 The requirement of 'consent'**

According to section 12(5) of the Children's Act, virginity testing of a child older than 16 may only be performed with her consent and according to section 12(9) a child over the age of 16 may consent to male circumcision. The issue of consent in practice becomes problematic in the light of the extreme pressure on young children to partake in traditional practices.

According to Johannes Makhoba, a 15 year old initiate at a traditional Sotho initiation school on the East Rand, he was one of 50 initiates that were saved by the police after 5 had died during an initiation ceremony.<sup>216</sup> Makhoba and others who attended the initiation were treated at Heidelberg hospital for botched circumcisions.<sup>217</sup> Asked why he and his friends did not escape of their own volition, he answered, "If we tried to get out, they would have killed us."<sup>218</sup> The

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<sup>216</sup> Author unknown, South African Press Association, Johannesburg, 26 June 2002, 'They wanted us to eat his heart.' Available online at <http://www.cirp.org/news/sapa06-26-02/>. Accessed on 8 April 2006.

<sup>217</sup> Ibid, p1.

<sup>218</sup> Ibid, p1.

'they' who threatened to kill them referred to by Makhoba were the fellow initiates at the circumcision school.

In another similar incident, 5 accused appeared in the Khayelitsha magistrate's court during the week of the 2<sup>nd</sup> of April 2005 for forcefully circumcising a 45-year old man.<sup>219</sup> According to Xhosa culture, people who had passed the age of initiation could be forcefully circumcised as a way of rehabilitation.<sup>220</sup> Before a Xhosa boy is considered to be a man by other members of his tribe, he has to go through the initiation of the *Khwetha*, or circumcision lodge when he is approximately 16 years old, otherwise he would still be considered a boy.<sup>221</sup>

In the case of virginity testing, testers used fear as their primary weapon in their fight against the loss of sexual chastity.<sup>222</sup> The fear of shaming one's family and failing the test had caused young girls to do things that put their health in further danger.<sup>223</sup> Since it was well known that virginity testers looked for something resembling a white veil (an indication of an intact hymen) in the vaginal canal, some girls resorted to inserting toothpaste or freshly cut meat into their vaginas to make the vagina appear 'tight', and so mimic the white veil effect.<sup>224</sup>

Press reports in the Sunday Times of 17 May 1998 and Saturday Independent of 13 June 1998 depicted girls and boys as young as six years of age being pressurised to partake in virginity testing conducted by teachers at schools in

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<sup>219</sup> Author unknown, "Wife held after husband's forced circumcision" – originally published on page 4 of The Saturday Argus on April 2, 2005. Available online at <http://www.circumstitions.com/News17.html.p9> Accessed on 8 April 2006.

<sup>220</sup> Ibid, p 9.

<sup>221</sup> Author unknown, "Circumcision practices around the world" at 1. Available online at <http://www.circumcisioninfo.com/circ-world.html#cworld3>. Accessed on 27 August 2006.

<sup>222</sup> Leclerc-Madlala S, "Protecting Girlhood? Virginity Revivals in the Era of AIDS," in Agenda 56, 2003, at 21.

<sup>223</sup> Ibid at p 21.

<sup>224</sup> Ibid at p 21.

Osizweni in KwaZulu – Natal.<sup>225</sup> This had caused an outrage against the practice of virginity testing by gender activists.<sup>226</sup>

According to Aldeeb Abu-Sahlieh ;

“...Age in itself is not a guarantee of informed consent. For example, an 18- year old woman who lives in a traditional milieu has little possibility to refuse a circumcision if this milieu feels this practice is part of its convictions and traditions. ... Also, if a person converts to Islam or Judaism, it is possible to visualize a religious environment that emits spiritual threats to uncircumcised persons, thus invalidating free consent.”<sup>227</sup>

The above submissions clearly call into question the voluntary nature of the initiation process as well as virginity testing. In the light of the extreme peer pressure on children to partake in traditional cultural ceremonies, the provision that children can refuse circumcision is also called into question. The fact that an age limit of 16 has been set for both cultural practices is in no way a guarantee that younger girls will not be exposed to virginity testing. The above facts show that girls as young as six years of age are being tested. What puts children at further risk of harm are the public submissions made by traditional leaders that they will defy the Children’s Act.

The establishment of the age threshold of 16 years was the result of a compromise between the National Assembly and National Council of Provinces after a reopening of the debate after the initial proposed banning of virginity testing by the National Assembly.<sup>228</sup> The spokesperson for the National House of Traditional Leaders, Sibusiso Nkosi, had expressed the dissatisfaction of

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<sup>225</sup> Maharaj A, “Virginity testing: a matter of abuse or prevention?”, Agenda 41 1999 at 96.

<sup>226</sup> Ibid, p 96.

<sup>227</sup> Aldeeb Abu Sahlieh SA “Male and Female Circumcision, Among Jews, Christians and Muslims, Religious, Medical, Social and Legal Debate” foreword by Marilyn Fayre Milos, Shangri-La Publications at 346.

<sup>228</sup> See fn 203 above at p 4.

traditional leaders with the prescribed age of consent for virginity testing.<sup>229</sup> They were concerned that the Bill allows children of 12 years old to purchase condoms and contraceptives but yet they can only consent to virginity testing at age 16<sup>230</sup>.

Most Xhosa initiates undergo circumcision when they are around the age of 16 according to tradition.<sup>231</sup> The compromise on the prescribed age of consent for circumcision of males therefore favours the interests of traditionalists. An amendment to clause 12 was proposed by the National Council of Provinces to the effect that medical and religious circumcisions be allowed at any age<sup>232</sup>. Since male circumcisions for religious purposes are often carried out when boys are just a few days old as prescribed in both Jewish and Muslim law, it would have been conceivably difficult for parliament to put an age threshold on circumcisions for religious purposes.

The above facts reflect the pressure on children to participate in cultural practices. The established age threshold of 16 is no guarantee that younger children will not be forced to participate in virginity testing and traditional male circumcision. As such, it is submitted that the Children's Act does not go far enough in protecting children from the potential risks involved with virginity testing and traditional male circumcision. Other provisions contained in section 12 such as the requirement that the child's body should not be marked and that the results of tests should not be disclosed without the child's consent are also called into question in the light of the comments by testers and traditional

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<sup>229</sup> Gallagher C, "Bill puts clamp on virginity testing", at p 2. Available online at <http://www.int.iol.co.za/index.php?set-id=1&click-id=13&art-id=vn2005122409152>. Accessed on 27 August 2006.

<sup>230</sup> Ibid.

<sup>231</sup> Author unknown, "Ritual Teen Circumcision and Pre-Marital Sex Go Hand in Hand in Africa", in *Male Circumcision in Africa – Part 2* at p 2. Available online at <http://www.circlist.com/rites/african2.html>. Accessed on 8 April 2006. Also see footnote 221 above.

<sup>232</sup> See fn 203 above.

leaders that they will defy the new Children's statute. If traditional communities are encouraged by their leaders to defy the Children's Act, the consequences for children would be severe. Girl children will be stigmatized by the symbolic marking of their bodies after they had been tested as well as exposed to sexual abuse and rape by those who believe that sex with a virgin can cure HIV/Aids.

The ensuing chapter will focus on recommendations aimed at regulating the practice of male circumcision for cultural reasons in particular in order to create a safer environment in which the practice can be carried out for children. Recommendations will centre around proposals for legislative amendments to the current Children's Act as well as provincial legislation dealing with circumcisions. Recommendations will also focus on the role played by non-governmental organizations, society in general as well as the National Health Department and provincial departments in creating a safer climate in which circumcisions can be carried out. Proposals with regard to virginity testing will mostly centre around ways in which the practice could be discouraged, as recommended by the United Nations Committee on the Rights of the Child.

## **CHAPTER 5: RECOMMENDATIONS.**

The potential risk of physical injuries and deaths associated with circumcisions have been discussed in detail in the preceding chapters. In response to these concerns, the South African Human Rights Commission together with the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the National House of Traditional Leaders have decided to host National Public Hearings on initiation schools.<sup>233</sup> The decision to host the hearings had emanated from the Traditional Initiation Schools Conference and the South African Human Rights Commission workshop on initiation schools held in May 2004.<sup>234</sup>

The hearings will focus on issues pertaining to the death and injury of initiates and contain the following terms of reference:

- (1) To determine the cause of the high number of fatalities and penile amputees in initiation schools,
- (2) To assess whether the current legislative framework and policy provisions relating to initiation schools are sufficient to address the current crises as well as the minimum age required for initiates,
- (3) To investigate the high number of deaths and other human rights violations associated with initiation schools and whether any convictions had taken place,

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<sup>233</sup> Author unknown, "Terms of Reference of Public Hearings on Initiation Schools," at p 4. Available online at <http://www.pmg.org.za/gazette/060922initiationpdf>. Accessed 10 October 2006.

<sup>234</sup> Ibid at p 3.

- (4) To determine what measures should be taken against traditional surgeons who contravene the law,
- (5) To explore the role of parents in supporting initiates and what support structures had been put in place for families who had lost their children,
- (6) To identify the role of government departments such as the Department of Health, Safety and Security as well as chapter 9 institutions such as the South African Human Rights Committee and the National House of Traditional Leaders.<sup>235</sup>

The public hearings had commenced in September of 2006 and was set to be finalized within a 12 day period.<sup>236</sup> Furthermore the coordinating committee in charge of the proceedings was given a 12 month period within which to submit a report after the finalization of the hearings.<sup>237</sup>

The efforts by the South African Human Rights Commission and National House of Traditional Leaders is an indication of the commitment by human rights activists to ensure that male circumcisions occur in an environment where the safety and physical health of children are given priority. As stated in the preceding chapter, it is my submission that the Children's Act does not provide children with adequate protection against harmful cultural practices.

The Application of Health Standards in Traditional Circumcisions Act of 2001 contain a number of provisions aimed at creating a safer environment in which initiations can occur. This Act was promulgated by the Eastern Cape

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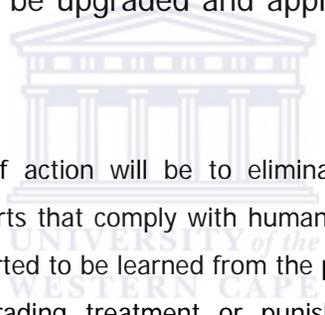
<sup>235</sup> Ibid at p 5.

<sup>236</sup> Author unknown, "Initiation deaths: Hearings set for September." Available online at <http://www.mg.co.za>, at p 1. Accessed on 14 November 2006.

<sup>237</sup> See fn 233 above at p 3.

Government in an effort to ensure the safety of initiates.<sup>238</sup> According to the Act a person wishing to operate an initiation school requires the written permission of a medical officer, a medical officer is also allowed to prohibit the use of a surgical instrument which in his or her professional opinion is unsuitable to carry out the procedure.<sup>239</sup> Furthermore if an initiate is below age 21, his parent or parents are obliged to fill in a consent form.<sup>240</sup> The penalty for operating an illegal initiation school is a fine of R 1000 or a term of imprisonment of no less than 6 months.<sup>241</sup>

It is therefore recommended that the Act be used as a starting point in which to address the current crisis facing initiation schools. This view is supported by the National Organisation on Circumcision Information Resource Centres who maintain that the Act should be upgraded and applied nationally.<sup>242</sup> According to Matshekga:



“An appropriate course of action will be to eliminate the negative elements of the practice and retain the parts that comply with human rights standards ... We can teach children the lessons purported to be learned from the practice without subjecting them to cruel, inhuman and degrading treatment or punishment that serves no legitimate purpose. The surgical procedure should be performed in a healthy environment and by qualified persons.”<sup>243</sup>

With regard to religious circumcisions it is recommended that they are performed strictly according to the rules of the particular religion concerned. Also, it is important in the case of infant circumcisions that the parents or the guardians

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<sup>238</sup> See fn 233 above at p 3.

<sup>239</sup> Section 5.

<sup>240</sup> Section 7.

<sup>241</sup> Section 9.

<sup>242</sup> Author unknown, “Submissions by National Organisation on Circumcision Information Centres.” Available online at <http://www.pmg.org.za/docs/2005/051011nocircsa.htm>. Accessed on 7 September 2006.

<sup>243</sup> Matshekga JN, “Quo Vadis? A discussion of the universalism-relativism debate in the light of male circumcision in South Africa,” SA Public Law Vol 18, No. 1, 2003 at p 402.

concerned are informed by doctors prior to the procedure of the possible risks involved so as to make an informed decision.

The practice of virginity testing has been actively discouraged by the Committee on the Rights of the Child.<sup>244</sup> The Committee has also recommended that traditional attitudes be changed through awareness-raising and sensitization programmes for practitioners and the general public.<sup>245</sup> With reference to the above submissions it is proposed that virginity testing be totally prohibited as the potential harmful consequences of the practice outweighs the benefits. It is submitted that the Children's Act does not offer young girls adequate protection against harmful cultural practices.

According to Leclerc-Madlala, the solution to HIV/Aids will not be found in a return to culture.<sup>246</sup> The solution will be found in transforming culture and more particularly the patriarchal mind-set and all the symbolic imagery that perpetuates the practice.<sup>247</sup> In support of the above submission, the education of the general public as well as children about the potential risks involved in virginity testing is of absolute importance. Children and society at large should also be educated about the rights contained in the United Nations Convention on the Rights of the Child so that cultural practices are not carried out in contravention of international law.

The Commission on Gender Equality is of the view that less restrictive means of combating HIV/Aids need to be explored instead of virginity testing.<sup>248</sup> Less

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<sup>244</sup> Hodgkin R and Newell P, "Implementation Handbook for the Convention on the Rights of the Child," fully revised edition, UNICEF, June 2002, at 368.

<sup>245</sup> Ibid.

<sup>246</sup> Leclerc-Madlala S, "Protecting Girlhood? Virginity Revivals in the Era of AIDS," in Agenda 56, 2003.

<sup>247</sup> Ibid.

<sup>248</sup> Author unknown, "Report by Commission on Gender Equality – Submission to the Select Committee on Social Services, Children's Bill [B70B – 2003]", 1 October 2005. Available online at

restrictive means include educating and empowering children to make informed choices with regard to their sexuality.<sup>249</sup> This view is supported by Smith where it was stated that:

“The problem with laws and regulations, particularly in the case of a deep-rooted practice, is that, without clear enforcement mechanisms and without support of education and information, no clear effects can be expected. ... Laws can play an effective role alongside information and education.”<sup>250</sup>

It is argued that virginity should not just focus on the sexual organ but the entire body and social environment.<sup>251</sup> The integrity, empowerment, decision-making, personal health, education and shelter of the child should be emphasized instead of the stigmatization and embarrassment often accompanied by virginity tests.<sup>252</sup>

Having ratified the United Nations Convention on the Rights of the Child as well as other international law treaties aimed at protecting the human rights of children it is recommended that virginity testing be prohibited as required by international law.

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<http://www.cge.org.za/userfiles/documents/select-committee-1oct05.doc>. Accessed on 22 April 2006.

<sup>249</sup> Ibid.

<sup>250</sup> Smith J, “Male Circumcision and the Rights of the Child”. Available online at <http://www.cirp.org/library/legal/smith>. Accessed on 8 April 2006 at p 11.

<sup>251</sup> Author unknown, “Virginity testing and Girl Child Sexual Abuse,” – Girl Child Network Trust, October 4, 2002. Available online at <http://www.kubatana.net/html/archive/gen/02/004gcn.asp?-sector=GEN>. Accessed on 10 October 2006 at p 1.

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## **CHAPTER 6: CONCLUSION**

With regard to virginity testing it is submitted that the practice has the potential to violate a number of fundamental human rights in both the Constitution and international law. The practice is degrading and humiliating and perpetuates gender inequality by placing the burden of sexual responsibility on the shoulders of girls to the exclusion of boys. It is submitted that virginity testing cannot be justified and therefore it should be totally prohibited.

The practice of traditional male circumcision when carried out in unhygienic conditions have the potential to violate a number of rights of boy children in both international and Constitutional law. The practice of traditional male circumcision require effective legislation that can be applied nationally in all the provinces. There has to be collaboration between all stakeholders including non-governmental organizations, human rights groups, the Department of Safety and Security as well as the Health Department to ensure that circumcisions are carried out in an environment that does not endanger the lives of children. Furthermore, traditional surgeons should be properly trained and use hygienic equipment when carrying out circumcisions.

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