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## The human rights implications of virginity testing in South Africa

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### Abstract

This article examines the historical context of virginity testing in Southern Africa with a focus on South Africa. It then examines the arguments often adduced in justifying the introduction of this practice. The two major arguments to support the reintroduction of virginity testing, namely, that it helps in reducing the spread of HIV and in preserving societal moral values are critically examined. Thereafter, the article discusses how the ever contentious debate between universalists and relativists applies to virginity testing. The last part of the article then considers the human rights implications of virginity testing.

### Introduction

In many parts of the world, particularly Africa, women have continued to experience human rights violations based on their gender. Gender inequality remains the norms in most part of Africa as women are relegated to subordinate roles. In many parts of Africa, women are still poorly represented in political and economic spheres of life (Hausman et al., 2012). In particular, cultural and religious practices have continued to limit women's enjoyment of their fundamental rights and freedoms. One of such practices is virginity testing, which is prevalent in southern part of Africa. Virginity testing often involves a gynaecological examination to determine whether or not the hymen in unmarried young women is intact. It is often carried out among girls and young women between the ages of 7 and 26 (Women's Legal Centre, 2010). In some communities in Southern Africa, virginity tests are often conducted either by an elderly female community woman or a group of elderly women. This is often carried out in traditional public ceremonies accompanied by pomp or pageantry. The recent reintroduction of virginity testing has been justified as a means of curbing the widespread of HIV in the Southern African region.

Recent statistics indicate that the HIV prevalence in this subregion is among the highest in the world. Indeed, South Africa with about 6 million people living with HIV is regarded as the country home to the largest number of people with the epidemic in the world (UNAIDS, 2014). In addition, Swaziland with about 26% of the population living with HIV is said to have the highest HIV prevalence in the world (UNAIDS, 2012). Moreover, HIV-related deaths seem to be very high in the subregion when compared to other parts of the world. Crucially, the HIV/AIDS pandemic is exacerbating maternal mortality and impacting negatively on life expectancy in many parts of southern Africa (Khama et al., 2006). This has

necessitated the need for moral purification among the people. Therefore, it is in this context that the reintroduction of virginity testing as a cultural practice must be understood. However, this age-long cultural practice has raised concerns among women's rights activists regarding its potential threat to women's fundamental rights and freedoms.

Against this background, this article examines the historical context of virginity testing in Southern Africa with a particular focus on South Africa. It then examines the arguments often adduced in justifying the reintroduction of this practice. Essentially, two major arguments to support the reintroduction of virginity testing are that it helps in reducing the spread of HIV and in preserving societal moral values, particularly among girls. Also, the article discusses how the ever contentious debate between universalists and relativists applies to virginity testing. The last part of the article then considers the human rights implications of virginity testing noting that it can potentially reinforce the subordination of women.

The historical context of virginity testing in Southern Africa Virginity testing (known in Zulu language as *ukuhlolwakwezintombi*) is a practice that has been in existence since the precolonial period. It was very commonly practiced among Zulu households during that period. Virginity testing was originally intended to ascertain the chastity of a bride in order to assist the family of the bride to determine the amount of bride price to be paid by a prospective suitor (George, 2008). It was believed to have been started by two women who brought together girls and women from urban and peri-urban areas to public sites for testing (Scorgie, 2002). The women-Andile Gumede and Nomagugu Ngobese-initially worked independently but had a common purpose of encouraging like-minded women and girls to participate in a movement that would promote premarital chastity among young girls in the province with a view to reinstating female virginity (*ubuntombi*) (Scorgie, 2002). They had claimed that the fading practice can only be revived if testing was incorporated into the corpus of households, thereby making it unnecessary for public ceremonies. Since the return to democratic rule in South Africa, 1994, the practice has spread to other province such as Mpumalanga and other countries, such as Zimbabwe and Swaziland. As presently practiced, virginity testing often involves a 3-day ceremony in honour of *Nomkhubulwana*, a once prominent Zulu goddess (Scorgie, 2002). Some observers of the revived rituals in honour of *Nomkhubulwana* in KwaZulu-Natal in the mid-90s described the deity as 'female principle, immortal virgin, mother and protector of all Zulu girls and source of growth and creation' (Scorgie, 2002: 57). According to Kendall (1998), the positive attributes of the deity portray it as an important source of healing in an environment where violence and other social ills are rife. Often the ceremonies accompanying virginity testing include well-rehearsed dancing steps and singing and dancing competition. However, controversy surrounding the testing part of the ceremony has tended to overshadow this aspect of the practice (Scorgie, 2002).

The procedure for testing involves the lining up of girls in a row, who then lie on their backs on mats spread out on the ground. The girls are then made to part their legs so that

the 'tester' can peer through their legs in order to ascertain their virginity. Sometimes before this conclusion is reached, the tester might need to insert her hands into the labia of the girls (George, 2008). This is to ensure that the hymen is intact and has not been tampered with (still covered by a piece of flesh, which confirms that the girl is still a virgin). As the tester confirms the virginity of each girl, the crowd (usually made up of women) cheers and ululates in felicitation. Thereafter, those girls who 'pass' the test are awarded certificates and a smearing of white clay on the forehead to confirm their success at the 'test' (Leclerc-Madlala, 2001). For those girls who 'fail' the test, they are usually pulled aside and interrogated individually to ascertain what really went wrong. Questions are asked to ascertain which boy 'stole' their virginity, whether it was with their consent or they were sexually abused. Although, it may be argued that the procedure is not set out to ridicule any girl, the public nature of it including the award of certificates to those who pass makes it difficult for the girls who fail to escape the stigma. Sometimes girls who fail the test are often referred to as the 'rotten potatoes' that must be kept away from others so that they do not 'spoil the bunch' (Women's Legal Centre, 2010). Commenting on this issue, Scorgie (2002: 58) asserts as follows:

For in many ways, the point of the testing is to render visible what has, until then, remained invisible: it is intended precisely to both confirm and display to others evidence of the girls' (im)morality and (im)purity. Girls who fail the test cannot, therefore, escape notice. Every element of the procedure, then, from the setting up of criteria for passing or failing, to the issuing of certificates and other visual symbols of success, collectively adds to the *creation* of virgins as a distinct social and conceptual category.

As earlier noted, the original purpose of virginity testing was to ascertain the suitability of a girl for marriage (Women's Legal Centre, 2010). In present times, it would seem that it is used to stress the importance of abstinence for girls. It has been argued that traditionally the practice placed high spiritual value on virginity, which is often instilled by precepts from older women (IRIN News, 2005). It should be noted that virginity testing is not peculiar to South Africa but is widely practiced across Africa and beyond including countries such as China, India and Turkey (Lasco, 2002). For instance, it is believed that women in Turkish prisons are often subjected to compulsory, involuntary virginity testing immediately after incarceration, and again prior to release, under the pretext that virginity testing protects female prisoners (IRIN News, 2005). Equally, it is believed that women detained for political offences have been targeted for virginity testing in accordance with Turkish antiterrorism laws. In some extreme situations, Turkish police have been accused of forcing women to submit to virginity testing under the pretext of investigating prostitution, thus, leading to a situation where the police are made to detain women they view as immoral, accusing them of prostitution (IRIN News, 2005).

### **Arguments in favour of virginity testing**

There are two main arguments that have been canvassed in support of virginity testing – the need for moral purification and HIV prevention. Proponents of virginity testing have argued that this cultural practice is necessary in order to maintain the moral values of a society. It is

believed that virginity testing serves not only as a means of ascertaining the chastity of a girl but also ensures that girls guard their virginity jealously. Indeed, Leclerc-Madlala (2001) has argued that many rural women among marginalized groups in South Africa view virginity testing as the only way to restore the lost cultural values of chastity before marriage, modesty, self-respect and pride. The argument goes that when young girls are aware that their virginity will be subjected to scrutiny they tend to keep away from engaging in premarital sex which may make them lose their virginity. This argument is reinforced by the fact that girls who are found to have lost their virginity are often exposed to ridicule and shame. However, this argument would seem to reinforce gender stereotyping. It would seem that the whole essence of virginity testing is to preserve a culture that celebrates chastity before marriage. In other words, a woman needs to preserve herself for her husband. Cook and Cussack (2010) have explained that gender stereotypes relate to social and cultural construction of men and women as a result of difference in physical, biological, sexual and social functions. They may be regarded as 'the conventions that underwrite the social practice of gender'. In essence, 'gender stereotype' is a broad term that refers to a 'structured act of beliefs about the personal attributes of men and women'. As discussed below, 'gender stereotypes' can lead to discriminatory practices and thereby undermine women's fundamental rights and freedoms.

Generally, virginity testing tends to emphasize on abstinence before marriage for girls, which underplays the importance of sex education for girls. This poses a serious challenge in the sense that it sends the wrong signals that virginity testing will always guarantee abstinence from sex before marriage. The truth, however, is that unless girls are taught about the importance of sex education, they are unlikely to take control of their bodies and make informed decisions about their sexual behaviour. Moreover, there have been allegations of corruption and improper conduct among the testers. For instance, there have been situations where girls who were certified as virgins gave birth few months after (George, 2008). Thus, casting doubt on the integrity of the system and reinforcing the fact that the practice is not free from manipulation or corruption.

The second purported justification for virginity testing, which is slightly linked to the first, is that it helps in reducing the spread of HIV. Proponents of virginity testing have argued that by frequently ascertaining the chastity of girls, there is great likelihood that they will abstain from sexual acts and thereby avoid HIV and other sexually transmitted infections. This argument was cited by the government of Swaziland when it reintroduced the practice in 2001. The monarch King Mswati III had argued that given the high prevalence of HIV in the country, the need for virginity testing and abstinence-only before marriage is crucial to combating the spread of the epidemic (Sexuality Information and Education Council of the United States, 2005).

However, there is little or no evidence to show that virginity testing does minimize the risk of HIV infection among girls. Rather, studies have shown that virgins have become targets of older men who erroneously believe that sex with a virgin can cure HIV or prevent sexually transmitted infections (Meel, 2003). This has resulted in rape and sexual abuse of young girls

in most parts of Southern Africa (Mswela, 2009). Moreover, public identification as a virgin may in fact increase the risk of sexual abuse and HIV infection. Young girls may be unwilling to report sexual abuse due to the shame and stigma of losing their virginity. Also, the argument about virginity testing as a means of reducing the spread of HIV tends to overlook the important fact that one of the causes of HIV is the power imbalance and gender inequality that persist in many African societies. Indeed, it remains unclear how a cultural practice that may further perpetuate gender inequality can help in reducing the spread of HIV. This is a clear indication that there is a need for awareness campaign programmes to educate the public, community leaders and policymakers about the impact of cultural practices for the enjoyment of women's rights.

### **Cultural relativism versus rights universalism**

The debate on virginity testing touches on the plural nature of the South African society. South African law accommodates the operation of statutory law alongside customary law. In addition, the Constitution in section 30 guarantees all individuals the right to culture. Also, section 31 of the Constitution recognizes the right of persons belonging to a cultural, religious or linguistic community to enjoy their culture, practise their religion and use their language, thus making the right an individual as well as a community entitlement. Proponents of virginity testing have tended to rely on these provisions of the Constitution to justify the continued retention of the practice. However, it should be noted that sections 30 and 31 of the Constitution include an explicit reference to other rights by means of a so-called internal limitation clause (Mswela, 2009). Bennett (2004) has noted that this internal limitation section, which provides that the right to culture cannot be implemented in a way incompatible with any provision of the Bill of Rights, would prevent communities from engaging in harmful cultural practices and would seem to curb the oppressive characteristics of some cultural traditions. Indeed, in *Bhe and Others v. Magistrate Khayelitsha*<sup>1</sup> the Constitutional Court has noted that the primogeniture cultural practice is inconsistent with the constitutional values and principles, since it undermines women's rights to equality and dignity.

In addition to the constitutional provisions, it should be noted that South Africa is a party to a number of international and regional human rights instruments such as the Convention on Elimination of All forms of Discrimination against Women<sup>2</sup> (UN, 1980) and the Protocol to the African Charter on the Rights of Women (AU, 2003).<sup>3</sup> These human rights instruments impose obligations on the South African government to respect, protect and fulfil women's rights. This will include taking steps and measures to address cultural practices that may be inimical to the physical and mental well-being of women and girls.

One may argue that the debate about universalism and relativism has been minimized by virtue of the constitutional provisions in sections 30 and 31, the truth remains that this debate still rages in the country, particularly when one considers the heated debate that ensued regarding virginity testing and female genital mutilation during the drafting of the Children's Act. The watered down provisions of the Children's Act on these practices is an

evidence of the challenges of applying human rights to cultural practices (Kassan and Mahery, 2009).

The debate over the need to retain virginity testing as a cultural practice vis-a-vis its human rights implications has evoked the familiar argument about cultural relativism and rights universalism. This debate centres on the view that the professed universalism of human rights is nothing more than Western ideology, which fails to accommodate diversities in cultures of the people of the world (Steiner and Alston, 1996). It is further noted that in a world as diverse as ours, it is misleading to hold a universal notion of human rights (Zechenter, 1997). In other words, no outside value should supersede local culture. As seen from above, proponents of virginity testing have argued that this practice serves as a means of preserving moral values of a society. It is argued that this practice has existed for a long time and has served as a means of passage from being a girl to becoming a responsible wife. Therefore, those who oppose or condemn the practice would seem to miss the point and fail to appreciate its cultural importance. Cultural relativists have further argued that it is unacceptable and insulting to deride and condemn other people's culture as a human rights violation even where there is clear evidence of rights infringements. (Lewis, 1995). According to cultural relativists, different societies share different historical development and heritage. Therefore, the fact that what obtains in Africa does not accord with practices in the Western world is seen as insufficient to regard it as 'barbaric'.

Contrary to universalists, cultural relativists have emphasized that it is erroneous to always view culture from a negative perspective. Rather, there are many benefits of culture to every society. It is further argued that culture is a vital part of African people as it symbolizes cohesion, sacredness, unity, togetherness, morality and spirituality (Cobbah, 1987; Ibhawoh, 2007). For instance, Tamale (2008) has argued that there are aspects of African cultures that are positive and that have great potential to improve the living conditions of women. Whilst she admits that like every other culture, there are some negative aspects of African culture, however, she reasons that it is erroneous to condemn in totality every aspect of African culture and regard it as a threat to enjoyment of women's rights. She echoes Moharty's (1988) concerns about the cynicism of Western scholars and some of their African counterparts towards African culture. Tamale (2008) submits that such arguments are not only dangerous but are also myopic and tend to 'create an extremely restrictive means by which African women challenge domination'.

Furthermore, Gunning (1992) has cautioned that Western scholars should be tolerant, respectful and willing to engage in order to have a better understanding of these cultures. She argues further that it is unfair and amounts to an act of 'arrogant perception' to hastily condemn and deride other people's cultures without understanding the basis for such cultures. In Gunning's (1992) view, the mere fact that a cultural practice such as female genital mutilation/cutting may not be acceptable to others should not necessarily lead to the condemnation of the practice. In support of her argument, she noted that there are some practices in other parts of the world including the West that may not be appealing to other people. For instance, she mentioned foot binding among the Chinese and plastic

surgery (particularly breast surgery) in the West. Oba (2008) has echoed this position when he argued that the barrage of criticisms and condemnations of Female Genital Cutting/Mutilation (FGC/M), mostly by Western commentators as human rights violation, is not only misleading but also unwarranted.

On the other hand, proponents of universalism argue that the notion of human rights applies to all human beings regardless of race, colour, ethnic origin or social class (Reichert, 2003; Reichert and McCommick, 1998). This position is reinforced by the international community during the Vienna Programme of Action where it was agreed that all human rights are universal, interdependent, interrelated and indivisible (UN, 1993).<sup>4</sup> Universalists further argue that human rights' principles and standards tend to advance human dignity. Therefore, regardless of culture or location, all human beings are entitled to be treated with dignity (Obiora, 1997). In essence, the need to respect the dignity of all human beings transcends geographical boundaries and cultural barriers. A leading voice in this regard, Donnelly (1984) has argued that the universality of human rights derives from its universal application to all human beings across the world. He notes that cultural relativism suffers from 'logical contradictions' for failing to recognize this unassailable fact. In order to buttress his argument, Donnelly (1984: 403) asks: 'If human rights are based on human nature, on the simple fact that one is a human being, and if human nature is universal, then how can human rights be relative in any fundamental way?'

Reichert (2006) also argues that the principles and standards contained in human rights instruments were developed with inputs from diverse countries (including developing countries from the South) and as such the argument that human rights are Western thoughts and ideas are unfounded. She notes that whilst everyone is entitled to practice their cultures, this should not validate cultural practices that may cause physical, emotional or mental harm to others.

An-Na'im (1992: 3) has attempted to strike a balance between adherence to culture and application of human rights standards. Whilst affirming the existing international human rights standards, he argues that there is a need to 'enhance their cultural legitimacy, particularly through internal dialogue that is aimed at developing interpretations of human rights in light of local norms and standards'. He argues further that in the long run, any interpretation or application of human rights in any society must necessarily reflect the cultural norms of that society. Whilst this is no doubt a nuanced approach to the debate, however, it remains uncertain how this balance can be successfully achieved particularly in an environment like Africa with entrenched patriarchal tradition. Indeed, this can be a bit problematic and may lead to uncertainty in the protection of human rights. This merely reinforces the point that the tension between culture and human rights is not simplistic. Indeed, Cowan et al. (2001) have proposed a critical approach to both rights, conceived as framed within larger relations of power and knowledge, and culture, understood as contested and contestable, with also agency and indeterminacy. They further draw attention to the ways (i) rights are both enabling and constraining; (ii) rights are productive (of

subjectivities, of social relations and even of the very identity and cultures they claim merely to recognize and (iii) their pursuit and achievements involve unintended consequences. Thus, they suggest that investigations into rights processes and theorization of them must recognize their ambiguous, contradictory, contingent and unpredictable dimension.

Some examples in African countries where attempts have been made to balance constitutional guarantees with cultural practices have merely undermined human rights of disadvantaged and vulnerable groups. For example, in *Magaya v Magaya*,<sup>5</sup> the applicants brought an action challenging a customary practice that merely permits a male child to inherit from his parents. The applicants had argued that this cultural practice is discriminatory and in violation of section 23(1) of the then Zimbabwean Constitution of 1979. The Zimbabwean Supreme Court held that the equality provision in section 23(1) is subject to African customary law recognized in section 23(3) and therefore there is nothing discriminatory about the cultural practice that allows only a male child to inherit from his parents. This case has been rightly criticized for its simplistic interpretation of the constitutional provision on equality (Women and Law in Southern Africa Trust, 2001).

### **Riechert's guidelines on universalism and relativism**

As a way of striking a balance between the arguments of universalists and cultural relativists, Riechert (2006) has proposed three important guidelines as follows:

1. Examine closely the origin of the cultural practice and the rationale for such practice.
2. Examine the important decision makers that determine the norms of the culture practice and
3. Analyse the cultural practice from a human rights perspective.

If these guidelines are applied to virginity testing, it becomes apparent that this practice may likely interfere with recognized and acceptable human rights principles and standards. As stated above, virginity testing is an age-long practice, which is carried out to preserve moral values in society and maintain chastity among girls. It is believed that this will greatly reduce the risk of HIV, sexually transmitted infections or even unwanted pregnancy. In other words, the practice is aimed at discouraging girls from asserting their sexual autonomy or engaging in premarital sex. This preserves the virginity of a girl and ensures that she is not 'defiled' before marriage to her future husband although the prior sexual experience of the husband is not questioned. In essence, its focus is all about satisfying the patriarchal demands of men. Moreover, studies have shown that in many parts of Southern Africa, virgins have become targets of sexual abuse including rape, by older men based on a superstitious belief that sex with virgins may cure HIV. There is scanty evidence to show that girls who undergo virginity testing are also counselled about HIV infection. Thus, rather than protecting young girls from HIV, virginity testing may indeed be exposing them to infection. Moreover, studies have shown that young people tend to engage in oral or anal



sex in order to preserve their 'virginity' (Bersamin et al., 2007; Haglund, 2003; Hlongwa, 2004). This clearly exposes the argument that virginity testing dissuades girls from engaging in premarital sexual activities or protects them from HIV.

With regard to the second guideline, it may be argued that men rather than women are in most parts of Africa responsible for determining what constitute culture. Whilst it is noted that older women act as testers in the case of virginity testing, it can be argued that they are merely carrying out a 'duty imposed' on them by tradition. This position is bolstered by the fact that the main purpose of virginity testing is to preserve a girl for her future husband. Historically, in many parts of Africa, with a few exceptions, men were the decision-makers and custodians of culture and tradition. In addition, they were responsible for the day to day running of the affairs of the people. This patriarchal nature of African societies tends to assign women secondary and inferior roles such as 'homemakers' and 'child-bearers' (Eboh, 1998). Women were hardly involved in decision-making processes where crucial decisions were made. This clearly underlines the undemocratic nature of African traditional setting. Even where decisions are made collectively, the composition of the decision-making body is more likely to be dominated by men, with few women occupying political positions across the region (Hausman et al., 2012).

The third of the guidelines that Riechert (2006) proposes is to examine the relationship between human rights and the cultural practice in question. If a cultural practice seems to be manifestly inconsistent with human rights principles and standards, then it does not deserve to be retained. Virginity testing raises human rights challenges as it infringes women's rights to dignity, non-discrimination and autonomy. It should be noted that the Commission on Gender and Equality organized a consultative forum on virginity testing and its implications for human rights among different stakeholders including testers, women activists and policymakers (Commission on Gender Equality, 2000). At that forum, it was recognized that virginity testing can play important role in addressing teenage pregnancy, spread of HIV/AIDS and sexually transmitted infections. However, concerns were raised that the practice may undermine certain human rights such as rights to dignity, non-discrimination and equality, privacy, security of person and the best interests of the child.

### **Human rights implications of virginity testing**

As stated above, virginity testing may have implications for the enjoyment of women's fundamental rights and freedoms. The article focuses mainly on the implications of this cultural practice on the enjoyment of women's interrelating rights to autonomy, non-discrimination and dignity. This discussion is explored further below.

#### ***The right to autonomy***

Whilst the right to autonomy is not explicitly provided in most human rights instruments, it is intrinsically linked to other rights such as liberty, privacy and bodily integrity. Virginity testing is an invasion of the privacy of a woman. As described above to ascertain the virginity of a girl, the tester will have to deep her hands or fingers into the private part of a girl. This interferes with the sexual autonomy of a girl and her right to bodily integrity.

International human rights instruments such as the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights<sup>6</sup> contain provisions protecting the right to privacy and bodily integrity. The right to privacy has been described as the right to be left alone in solicitude. This imposes obligation on the state to refrain from taking any action that may amount to an invasion of an individual's home, correspondence or body. The Human Rights Committee (1988) in its General Comment 16 has noted that states have the obligations 'not to engage in interferences inconsistent with Article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons'. In medical parlance, the right to privacy implies non-consensual medical treatment or experimentation.

Regional human rights instruments such as the African Women's Protocol recognize the rights to security of persons of women and girls. In addition, Article 14 of the Women's Protocol guarantees a woman's rights to sexual and reproductive health. It can be argued that this provision affirms the right to sexual autonomy of women and girls.<sup>7</sup> In some national constitutions such as section 12 of the South African Constitution, the right to security of persons, including reproductive autonomy, of every individual is guaranteed. This implies that women and girls have total control of their bodies and that any form of testing or invasive practice will amount a violation of the right to reproductive autonomy. In *Christian Lawyers Association v. National Ministers of Health and Others*,<sup>8</sup> a High Court while interpreting the provision of the Choice on Termination of Pregnancy Act explained that a girl under 16 can exercise the right to abortion without parental consent in accordance with section 12 of the South Africa Constitution. Implicit in this decision is that any attempt to limit the right of a woman or a girl to control her body will amount to a violation of the right to sexual autonomy. This argument is reinforced when it is considered that the purpose of this practice is to discourage young girls from becoming sexually active.

Moreover, given that some of the girls who undergo virginity testing are children under 18, this raises concerns about the violation of the rights and welfare of the child. The issue of capacity to consent may arise as well as the principle of the best interests of the child. The UN Committee on the Convention on the Rights of the Child (2000), in one of its Concluding Observations to South Africa, has expressed concern that virginity testing threatens the health, affects the self-esteem and violates the privacy of girls. The Committee thus recommends to the South African government to embark on public awareness and sensitization programmes in order to discourage the practice of virginity testing in line with Articles 16 and 23 of the Convention (UN Committee on the Rights of the Child, 2000).

However, an alternative argument is that given that some of the girls who participate in virginity testing 'willingly' submit to the test, the issue of violation of right to autonomy may not arise. Indeed, it is believed that some of the girls travelled from afar to participate in this practice and the accompanying ceremony. When interviewed, these girls have expressed support for the practice and advocated its retention (Mdletshe, 2010). This

clearly indicates the issues a cultural practice such as virginity testing may raise. However, given that virginity testing is a cultural practice imposed on women and taking into consideration the isolation or ridicule girls who do not participate may encounter, it is debatable to conclude that girls willingly submit or consent to the ceremony. It may seem unconvincing to argue that participation in the practice is a matter of choice for the girls. Rather, it is nothing more than trying to comply with what tradition requires of them. In other words, they are merely trying to fulfil an expectation the society requires of them and failure to do so will result in some negative consequences.

### ***Right to equality and non-discrimination***

The mere fact that men are not subjected to similar practice raises the issue of non-discrimination and gender inequality. The right to equality and non-discrimination is guaranteed in virtually all human right instruments. Article 1 of CEDAW defines discrimination broadly to include any:

distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying 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.<sup>9</sup>

In addition, Article 5 prohibits cultural practices that may undermine the rights and freedoms of women. The African Women's Protocol in Articles 2 and 5 has echoed the provisions of CEDAW. Article 2 of the Protocol urges states parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory to women.<sup>10</sup> On the other hand, Article 5 enjoins African governments to 'prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards'.<sup>11</sup> The non-discrimination provisions in CEDAW and the African Women's Protocol reflect the substantive notion of equality.

The notion of substantive equality underpins the foundational value of the South African Constitution. This is encapsulated in section 9 of the Constitution. This section prohibits discrimination on various grounds including sex, gender, pregnancy, age, sexual orientation and race. The provision of the Constitution has further been given effect by the Promotion of Equality and the Prevention of Unfair Discrimination Act, which prohibits discrimination on various grounds including gender. Specifically, section 8 of PEPUDA provides thus:

No person may unfairly discriminate against any person on the ground of gender – . . .  
(d) including any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.<sup>12</sup>

Given that virginity testing is targeted at girls, it no doubt raises the issue of discrimination on grounds of gender. The essence of this practice is to guard a girl's virginity and prepare her for marriage. This would seem to further perpetuate stereotypes and discriminatory practices against girls and women. It reinforces the belief that girls are expected to be sexually passive whilst boys can freely express their sexual desires any time they wish. Leclerc-Madlala (2001: 543) has observed that the fundamental thought behind virginity testing is to control women's sexuality. She noted further:

The popular perception of the modern young woman as someone who is assertive and active in pursuing her sexual interests in a manner similar to a man is a perception of transgression, an over-stepping of accepted morality. Placed beyond the culturally conceived boundaries of patriarchal control, the modern woman is characterized as out of control, a notion that reverberates through the local discourse on contemporary women, their sexual behaviour, and the HIV/AIDS epidemic.

She concludes by noting that virginity testing provides another site for further dividing women and entrenching gender inequality. As noted earlier, virginity testing would see to qualify as a form of gender stereotype. Cook and Cussack have identified three main ways how a law, policy or practice can discriminate against women on the basis of gender stereotype. These include, if the law, policy or practice leads to a difference in treatment; if the law, policy or practice impairs or nullifies a woman from enjoying her human rights or fundamental freedoms and if the application, enforcement or perpetuation of a gender stereotype in law, policy or practice is unjustifiable.

From the foregoing, any law, policy or practice that fails to treat similar interests of men and women in the same way may be said to create a form of distinction between men and women in contravention of Article 1 of CEDAW. In *Bhe* case, the Constitutional Court found that a cultural practice that makes a distinction between a male and female child in the context of inheritance rights was not only discriminatory but also contravened the equality clause in section 9 of the Constitution. Such a distinction was based on a gender stereotype that is unjustifiable.

Also, when a law, policy or practice imposes undue limitations or burdens on the enjoyment of women's rights, it will amount to restrictions of women's rights in contravention of Article 1 of CEDAW. Cultural practices such as virginity testing may impose undue burden on women and prevent them from fully exercising and enjoying their fundamental rights guaranteed in CEDAW. It should be noted that the rights to equality and non-discrimination obligate states to refrain from adopting laws, policies or practices that lead to distinctions, exclusions or restrictions on the basis of gender stereotypes (Cook and Cussack, 2010). According to Article 2 (a) of CEDAW, states are obligated to eliminate gender stereotypes in order to achieve substantive equality under the Convention. In essence, a state must not only ensure de jure (formal) equality but also de facto (substantive) equality. Consequently, it is imperative that a state adopts an expansive approach in determining

whether a gender stereotype has impaired or nullified a woman's fundamental right or freedom.

Proponents of virginity testing have argued that for preservations of traditions and traditional roles, this practice, far from being discriminatory, rather protects vulnerable women and girls from sexual abuse in society (Holomisa, 2005). In response to this, Ndashe (2005) has argued that such arguments are not only misleading and confusing but also perpetuate patriarchy and discrimination against women contrary to the constitutional provision on equality. Albertyn (2009) has noted that though the Constitution has attempted to balance the conflict between culture and equality by recognizing cultural identity and cultural diversity, however, this provision must be implemented as long as it does not undermine the foundational principle of substantive equality entrenched in the Constitution. The Human Rights Committee (2000) in its General Comment 28 has noted that states should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant (on Civil and Political Rights) rights.

The CEDAW Committee, on a number of occasions, has called on states to take necessary measures with a view to eliminating cultural practices and stereotypes that continue to perpetuate discrimination against women. In its General Recommendation 31 (2014: para 7) on harmful practices, the Committee notes that harmful cultural practices, including virginity testing, are 'grounded in discrimination based on sex, gender and age, among other things, and have often been justified by invoking socio cultural and religious customs and values, in addition to misconceptions relating to some disadvantaged groups of women and children'. Similarly, the UN General Assembly (2002) in its resolution on 'Traditional or customary practices affecting the health of women and girls' has urged states parties to CEDAW and the CRC to take appropriate steps and measures including the adoption and implementation of legislation, policies and programmes that prohibit traditional or customary practices affecting the health of women and girls and to prosecute the perpetrators of such practices.<sup>13</sup>

### ***The right to dignity***

Girls who fail virginity testing are exposed to ridicule, opprobrium, rejection or isolation. This may result in physical and psychological trauma for the girls, thereby leading to a violation of the right to dignity of women and girls. The right to dignity presupposes that every individual must be treated with utmost respect. The preamble to the Universal Declaration of Human Rights declares that 'inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...' Article 1 further provides that all human beings are born free and equal in dignity and rights.<sup>14</sup>

At the regional level, Article 5 of the African Charter (OAU, 1986) and Article 3 of the African Women's Protocol guarantee the right to dignity.<sup>15</sup> Article 3 of the Protocol provides that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.<sup>16</sup> The concept of dignity requires that every human being must be treated in such a way that his/her humanity is not degraded or debased. It has been argued that dignity is closely connected to humanity, freedom and equality (Dupre, 2011).

Dignity may be described as a state, quality or manner worthy of esteem or respect and by (extension) self-respect (Social Care Institute for Excellence, 2001). The notion of dignity is an intrinsic part of every human being, which is not subject to variation or modification. Dignity is how people feel, think and behave in relation to the worth or value of themselves or others. Glensy (2011) has argued that the basis of dignity lies in the autonomy of self and a self-worth that is reflected in every human being's rights to individual self-determination. Consequently, the right to dignity is universal and unfringeable by the state or private parties. It should be noted that a violation of the right to dignity not only affects the victim but the society as a whole, in that it questions how we choose to relate with others (Dupre, 2011).

Subjecting young girls to virginity testing and the attendant consequences such as shame, violence and rejection that may result from this practice diminish the worth of these girls. This in turn may undermine the right to dignity of women and girls. The CEDAW Committee in its General Recommendation 19 has noted that traditional practices or stereotypes by which women are regarded as inferior to men may further perpetuate widespread practices involving violence or coercion, such as family violence and other forms of abuses (CEDAW Committee, 1992). This may in turn deprive women of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. Also, during the Beijing Declaration, the international community enjoined governments across the world to 'Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women' (FWCW, 1995). In one of her reports, the former UN Special Rapporteur on violence against women, Radhika Coomaraswamy (2003) has expressly condemned forcible virginity testing. In relation to the practice in Turkey, she notes that 'forcibly subjecting detainees to so-called virginity tests is an egregious form of gender-based violence constituting torture or cruel, inhuman or degrading treatment'.<sup>17</sup> Therefore, she calls on the government to ensure that appropriate measures are taken to abolish the practice.

It should be noted that section 12(4) of the Children's Act prohibits virginity testing of children under the age of sixteen, and certain conditions are specified in terms of which virginity testing may be performed on children above that age.<sup>18</sup> In this regard, section 12 (5) of the Children's Act provides that a child above 16 may participate in virginity testing if it has given consent in the prescribed manner after having been properly counselled. This provision has drawn the ire of some human rights advocates who contend that it may

likely weaken the protection of children's rights in the context of harmful cultural practices such as virginity testing. Indeed, the CEDAW Committee (2011) in one of its Concluding Observations to the government of South Africa has expressed serious concern regarding a provision in the Children's Act 2005, which allows virginity testing for girls above 16 years old. The Committee is further concerned about the practice for girls aged 13 as this may infringe on the girls' right to physical and mental integrity and further expose them to increased risks of sexual violence (CEDAW Committee, 2011, para. 22). The Committee, thus calls on the South African government to amend the provision of the Children's Act:

with the aim to prohibit virginity tests for the girl-child irrespective of their age and to design and implement effective education campaigns to combat traditional and family pressures on girls and women in favour of this practice in order to comply with its international obligations. (CEDAW Committee, 2011, para. 23)

Despite the human rights challenges raised by virginity testing, it is interesting to note that there is no judicial pronouncement on it yet in Southern Africa. In 2011, an Egyptian court declared virginity testing of an arrested accused woman as humiliating and a gross violation of human rights. It thus ordered the military to desist from such practice. This clearly reinforces the fact that virginity testing does compromise the human rights of girls and women (Kirkpatrick, 2011).

### **Conclusion**

This article has shown the challenges associated with virginity testing as a cultural practice in Southern Africa. In particular, the article examines the tension between cultural relativists and rights universalists with regard to the application of virginity testing in Southern Africa. Whilst proponents of virginity testing have argued that the practice is necessary to maintain society's values and reduce the further spread of HIV, opponents, it is clear opponents of this practice argue that HIV prevention can be achieved by other means that do not infringe on the rights of women, as guaranteed by international human rights instruments and national constitutions. It will also be important that the embarks on awareness campaign programmes on the human rights implications of virginity testing.

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## Notes

1. *Bhe and Others v. Magistrate Khayelitsha* [2005] (1) BCLR 1 (CC).
2. Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/ 180 UN GAOR 34th Session Supp No 46 UN Doc A/34/46 1980. This instrument was ratified on 15 December 1995.
3. The Protocol to the African Charter on the Rights of Women Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November, 2005.
4. Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 Chapter III.
5. *Magaya v Magaya* [1999] ICHRL 14 (16 February 1999).
6. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N GAOR, Supp. NO. 16 at 52, U.N DOC.A/6316 (1966), 999 U.N.T.S. 171, 174 (entered into force on 23 March 1976) (hereinafter ICCPR) Article 17.
7. Art 14 of the Protocol to the African Charter on the Rights of Women Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November 2005.
8. *Christian Lawyers Association v. National Ministers of Health and Others* [2004] 10 BCLR 1086.
9. Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/ 180 UN GAOR 34th Session Supp No. 46 UN Doc A/34/46 1980. This instrument was ratified on 15 December 1995.
10. The Protocol to the African Charter on the Rights of Women Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November 2005.
11. Ibid.
12. Act No. 4 of 2000.
13. UN General Assembly 2002, Resolution on Traditional or customary practices affecting the health of women and girls, A/RES/56/128, 30 January 2002.
14. Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10) December 1948) Article 12.
15. African Charter on Human and Peoples' Rights O.A.U. Doc.CAB/LEG/67/3/Rev.5 Adopted by the Organization of African Unity, 27 June 1981, entered into force 21 October 1986.
16. Ibid.
17. Ibid.
18. Children's Act 38 of 2005.



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