

Virginity Testing and the Children's Bill

Discussion Paper

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1. Introduction

Children are one of the most vulnerable groups in society and it is the duty of parents, the family and the state to care of them and ensure a better life and future for them. The Constitution recognises the vulnerability of children and seeks to protect them by inserting children's rights in the form of section 28 in the Bill of Rights.

The entrenchment of children's rights means that cultural, social and religious practices which **harm** children must be abandoned. **But how do we determine whether a practice is harmful to a child?**

Children have the right to dignity, freedom of the person (bodily integrity), equality, and protection from abuse. But they also have the right to practice their culture and religion.

The Constitution specifically recognises in the preamble that "*South Africa belongs to all who live in it, united in our diversity*" and protects the rights of individuals and groups to practice their culture or religion in section 31 of the Bill of Rights. However, section 31 contains a proviso that cultural and religious rights may not be exercised in a manner inconsistent with any right in the Bill of Rights. We therefore need to look at each

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particular cultural, religious or social practice and do a balancing exercise to determine whether the practice infringes children's rights.

Some practices are not necessarily harmful, but they invade the child's physical space and therefore it is important that when the child is old enough, the child is given a choice as to whether or not he/she wants to participate in the practice. For instance, at the age of 14 a child can choose whether or not to be provided with medical treatment.²

Children's parents are responsible for determining what is best for their young children and for assisting their older children to make the right choices. Even if the child is very young, the child has a right to express their opinion to their parents and their parents should give due consideration to the child's opinion before making the decision for the child. When making the decision, the paramount consideration that the parent must take into account is the child's best interests³.

How do we determine:

- a) whether a practice is harmful to a child, and
- b) if the practice is not harmful, -
 - i. when does the child have the right to make the decision for him or herself,
 - ii. when should the parent make the decision on behalf of the child, and
 - iii. when should the parent assist the child to make the decision?

² Child Care Act 74 of 1983, section 39(4).

2. Cultural, religious and social practices dealt with in the Children's Bill

The Children's Bill⁴ deals with six cultural, religious and social practices that are practiced to varying degrees in South Africa:

- 1) Male circumscion⁵
- 2) Female genital mutilation⁶
- 3) Virginitv testing
- 4) Corporal punishment⁷
- 5) Marriage below the minimum age⁸
- 6) Forced marriage of children between the minimum age and the age of majority (18)⁹

It prohibits three of them:

- 1) Female genital mutilation
- 2) Virginitv testing
- 3) Marriages below the minimum age for marriage (12 for girls and 14 for boys)

The Bill provides that anyone who practices female genital mutilation or virginitv testing is guilty of an offence and liable for a penalty of a fine or imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. Where a person is convicted

³ Section 28

⁴See section 12 of B70B – 2003, as passed by the National Assembly in June 2005. The Bill is currently being considered by the second house of Parliament, the National Council of Provinces.

⁵ Section 12(5) of the Bill. Male circumscion is commonly practiced by the Xhosa , Jewish and Muslim communities.

⁶ Section 12(3) of the Bill. This practice is not practiced by indigenous South African communities but is practiced by some foreign communities within South Africa.

⁷ Section 139 of [B-2003], the section 76 Bill. Smacking of children is very common in South Africa in all communities and has cultural, religious and social roots. It has been banned in schools, the child protection system and the courts, but is still allowed within the home provided it is reasonable and does not amount to criminal assault.

⁸ Marriage of children below the minimum age of 12 for girls and 14 for boys is not allowed in terms of common law.

⁹ The practice of parents deciding that their child must get married without the child being given a say in the matter is occurring in South Africa. Girls as young as 13 are being forced into arranged marriages, normally for monetary reasons.

more than once then the penalty is a fine or imprisonment for 20 years or both a fine and imprisonment.¹⁰

The Bill regulates the other three practices in two ways: Firstly by making it clear that the child has a choice whether or not to participate in the practice or secondly by proposing an educative approach to encourage parents to use alternative methods of achieving the same end.

1) Male circumcision

The Bill gives the boy child the right to decide whether or not to be circumcised, depending on the following; the age of the boy, his level of maturity and his stage of development. A person who forces a child to be circumcised is guilty of an offence and liable to a fine or imprisonment.

2) Marriage between the minimum age and the age of majority (18)

The Bill provides that every child above the minimum age for marriage has the right to consent to be given out in marriage. This effectively prohibits forced or arranged marriages against the child's will. However, the Bill does not clarify that forced marriages are an offence and does not specify a penalty.

3) Corporal punishment

The Bill provides that parents, guardians or other people in control of children have to respect their right to physical integrity as demanded by the Constitution. It goes on to repeal the common law, customary law and all other national legislation which authorizes corporal punishment by the state. Corporal punishment cannot therefore be administered on children in child and youth care centres, partial care facilities or shelters or drop-in centres. However, the section does not ban the practice in the home and does not remove the common law defense of reasonable chastisement that a parent can raise in defense of a charge for assault.

¹⁰ Children's Bill [B70B – 2003] section 305(6) & (7).

3. Focus on Virginity testing

The banning of virginity testing has caused a controversy and traditional leaders in Kwa-Zulu Natal and the Eastern Cape have protested against the ban as an invasion of cultural rights.

This document looks at the practice of virginity testing and discusses whether it should be banned or regulated or left alone.

3.1 The origin, purpose and extent of the practice of virginity testing in South Africa.

Virginity testing is a tradition followed by some African Black communities such as the Zulu community in Kwa-Zulu Natal as well as the Xhosa population in the Eastern Cape. In the Zulu nation, the practice 'was originally intended to assure the purity of brides, it fell into disuse in many parts of the kingdom when migrant labour, forced removal and what passed for white civilization, eroded family structures' ¹¹

As part of their culture the Zulu and Swazi nations also have annually what is called Umkhosi woMhlanga –the Royal Reed Dance where girls celebrate their virginity and declare their status and the King may also choose a bride from among those maidens. Young women who wish to take part in the Reed Dance are tested for their virginity status. Only those who are virgins can participate in the ceremony, this apparently ensures that the ritual remains pure.¹² Most African leaders encouraging this tradition claim that 'it [is] an African custom for a woman to value her virginity'¹³

It is alleged that the revival of the practice of virginity testing is due to the increase in the spread of HIV/Aids.¹⁴ Virginity testing is also considered a measure to deter girls from

¹¹ Chris McGreal, "Virgin tests makes a comeback", *The Daily Mail & Guardian*, 29 September 1999.

¹² B Mthethwa 'Tradition and Modernity Collide in Virgin Debate' Sunday Times 25 September 2005.

¹³ "SA leader urges virginity tests' www.news.bbc.co.uk/2/hi/africa/3683210.stm [accessed on 18 July 2005]

¹⁴ Above n10

engaging in sexual activity before marriage and to prevent teenage pregnancy.¹⁵ The rationale is that girls will be scared to engage in sex if they know they will be tested.

Testing takes the format of girls lying on their backs on a mat and an adult woman then checks to see if the girls' hymens are still intact.¹⁶ The inspection is quick and often done with the bare hands of the testers though other testers do not make use of their hands.¹⁷ Those being examined are often between the ages of seven and twenty six.¹⁸ The test is supposedly voluntary but this is doubtful because of the ages of some of the girls who are subjected to this test and even more so the parental and societal pressure to undergo the test reduces the possibility of actual consent.

If the girl or woman passes the test then she is marked with a white clay spot on her forehead. If she is a non-virgin then a red clay spot decorates her forehead.¹⁹ The successful candidates also receive certificates and the unsuccessful candidates get counseling where necessary.²⁰ The examination can be done in the privacy of the home of the female participant by a relative or it can be celebrated as part of the custom of the participant which would then involve the slaughter of cows and homage to the monarchy.²¹

According to those involved in the practice, it is aimed primarily at celebrating culture, reducing the spread of Aids, preventing teenage pregnancy and also teaching young girls to wait until marriage before making their sexual debut.

However, those opposed to the practice, such as the Human Rights Commission, the Commission on Gender Equality and various NGOs and CBOs working with children,

¹⁵ Reuters, Johannesburg (2001), Virginty Tests on Comeback Trial in South Africa. *Jenda: A Journal of Culture and African Women Studies*: 1,1.

¹⁶ Some testers do more than just inspect the hymen they look for signs that include certain lines below girl's eyes, behind her knees and on her breasts. F Moya 'The Virginty Tester' Mail & Guardian September 23-29 2005 p11.

¹⁷ Above n14

¹⁸ id

¹⁹ Theo Nyawose and Nonhlanhla Khuzwayo, 'African indigenous knowledge in the fight against HIV/Aids and the African University of the 21st Century'. Durban Institute of Technology and University of Kwazulu-Natal.

²⁰ Above n 14.

²¹ id

are of the opinion that the practice is unconstitutional and violates the human rights of the young girls and should therefore be banned.

3.2 A human rights analysis of the practice

The Constitution²² is the supreme law²³ of our country and it is built on basic principles such as the promotion of equality and the protection of human dignity and freedom. The Bill of Rights outlines the rights of people which the Constitution seeks to promote and protect. The practice of virginity testing affects various rights of young girls and woman. It can be viewed as being a practice which has been given authority by the right to culture in section 31 of the Bill of Rights, and this would enhance its importance as a practice. On the other hand it can also be viewed as infringing fundamental rights such as the right to equality and dignity and this could negate claims regarding the practice as essential to the needs of those involved in it. So what is necessary is to balance out these rights. The best way to do this is to apply section 36 of the Constitution to the rights affected by the practice so as to uncover the possible conclusions to be reached at the end of such an exercise.

3.2.1 Arguments against the practice

Most of the rights contained in the Bill of Rights are not absolute and the Constitution does make allowance for the limitation of rights if it is done in accordance with the limitations clause (section 36 of the Constitution). Section 36 provides the criteria to examine the justification for limiting certain rights and gives factors to consider when balancing rights against each other.

The following rights are limited by the practice of virginity testing:

- the right to equality,²⁴
- the right to have ones dignity respected,²⁵

²² The Constitution of the Republic of South Africa, Act 108 of 1996

²³ Chapter 2 of the Constitution.

- the right to freedom and security of the person²⁶,
- the right to privacy,²⁷ and
- the children's rights to be protected from abuse, neglect and degradation²⁸

The right to equality:

It has been argued that since virginity testing predominantly applies to women only it violates the right to equality.²⁹ This unfairly places the duty of being sexually responsible solely on woman. Furthermore, being a virgin also has implications in negotiating the bride price (lobola) in many communities, which implies that a women's reproductive capacity has a monetary value which has the effect of objectifying women. The majority of the leaders opposing the ban are male (traditional leaders)³⁰. It may therefore be argued that, virginity testing is an ancient culture aimed at substantiating male domination and the subordination of women.

The South African Human Rights Commission (SAHRC) takes the position that the cultural practice of virginity testing 'constitutes a violation of the rights of the child and an unfair discrimination against girl-children (gender discrimination).³¹ According to the Commission on Gender Equality, the practice of virginity testing disproportionately affects women as it enhances their vulnerability in society by exposing them to dangers such as rape and other forms of abuse.³²

²⁴ Section 9

²⁵ Section 10

²⁶ Section 12

²⁷ Section 14

²⁸ Section 28(1) (d)

²⁹ The article referenced in fn10 provides an example of male virginity testing. However it is not commonly practiced, is medically impossible, and has only arisen recently in response to allegations of gender discrimination.

³⁰ Others like Zulu King Goodwill Zwelithini (who is reported to have impregnated a Swazi teenager, see W Hlongwa 'Zulu Kings' teen bride pregnant' 28 November 2004 www.news24.com.) has reacted forcefully saying that he would rather go to jail than see the end of this Zulu tradition. See, X Zulu 'Zwelithini would rather go to jail than drop virginity testing' Cape Times 12 September 2005 p5.

³¹ South African Human Rights Commission, Position Paper: Virginity Testing , July 2005 p2

The right to dignity:

The right to dignity is infringed because discovering a candidate's hymen to be disrupted in a virginity testing ceremony leads to stigmatization and mocking by other participants as well as the community. 'When a girl passes, the women clap and ululate but when someone fails, an accusing silence follows the girl, who is asked to sit in a private corner and wait for an older woman to "counsel" her'.³³ Girls with broken hymens suffer such humiliation even in light of medical evidence that a women's hymen can break accidentally and occasionally a girl is born without one.³⁴

The SAHRC agrees that the practice is undignified and argue that the girl's dignity is violated due to the fact that 'some stranger has to [publicly] invade their privacy in order to determine whether they are virgins or not'.³⁵

The right to freedom and security of the person:

This right includes the right to security in and control over your body. The Commission on Gender Equality argues that virginity testing without the informed consent of the girl violates this right.³⁶ The SAHRC finds the argument that virginity testing is done voluntarily unacceptable in light of subtle coercion by families and societies to undergo testing.³⁷ Even some political leaders encourage it.

A mere refusal to participate in a test for virginity may lead to conclusions of being deflowered and this places pressure on the girls to take part in the test. Given societal pressures to participate and also considering the ages of some of the participants it can

³² See, Commission on Gender Equality: Submission [on the Children's Bill] to the South African Parliamentary National Assembly, Portfolio Committee on Social Development. (10 August 2004) p8.

³³ 'SOUTH AFRICA: Virginity testing – absence of a small tissue becomes big issue' www.IRINnews.org 20 September 2005.

³⁴ Above n 10.

³⁵ Above n30 p3.

³⁶ Above n31 p4

³⁷ Above n30 p3

be argued this practice is not done with the informed consent of the girls, violating their right to freedom and security of the girls.

This right also includes the right not to be treated in a cruel and inhuman or degrading way. Those performing the examination do so sometimes without gloves and often unhygienically,³⁸ exposing the girl child to infections and it can be considered to be cruel and inhumane treatment.

The right to privacy:

The manner of virginity testing commonly entails a public inspection of the females vagina and this violates the right to privacy. Those who fail the test are marked and this means that the results of the test are made public. According to the Commission on Gender Equality, disclosing the girl-child's virginity status to others without their informed consent is an invasion of their privacy.³⁹

The right to be protected against maltreatment, abuse, neglect and degradation:

This right is infringed upon in light of the dangers surrounding virginity testing. Being exposed as a virgin is dangerous in light of the belief by some that sex with a virgin can cure Aids, '...police believe it is a major contributor to the rising number of child rapes'⁴⁰ 'Virgins have also become a commodity in the trade of child trafficking'⁴¹ There are also reports of participants physically harming themselves so as to fool testers and pass the test.⁴² Some girls resort to anal sex in order to pass the test.⁴³ The Commission on Gender Equality also argues that victims of sexual offences are known to suffer

³⁸ Above n 31 p9

³⁹ Above n31 p3

⁴⁰ Above n 10.

⁴¹ Above n 14. See also Above n 31 p 8.

⁴² "Some girls have reportedly pushed toothpaste or a piece of white lace dipped into tomato sauce into their vaginas to mimic a hymen. Other girls have inserted meat into their vaginas to mimic tightness" Policy Update- September 2004, "Virginity Testing: Increasing Health Risks and Violating Human Rights in the Name of HIV-Prevention"< www.siecus.org > [accessed on 19 July 2005]

⁴³ W. Hlongwa, 'Teens turn to anal sex to keep virginity', (South Africa: www.news24.com (June 26, 2004).

abandonment, rejection and violence on disclosing their identity.⁴⁴ Virginity testing is also said to operate so as to identify cases of child abuse, given what is said by the Commission the exposure would harm the child more than actually providing protection.

Further arguments being raised by organizations working with children who have been sexually abused is that the practice goes against all the messages that children are given with regards to saying no to adults touching their private parts. In order to protect children from abusers, children are consistently taught that their body is their own and that no person may touch their private parts, even if the person is an adult person with authority over them. They are taught to shout no and to run away. Virginity testing sends the opposite message and this will bring about confusion for the children and undermine the message of saying no to abuse. Furthermore, no regulations are set in place to ensure that the testers are not child abusers.

Section 36:

Applying section 36 to this practice it is obvious that the rights affected by the practice are fundamental to all human beings. The purpose for the limitation (the rationale behind the practice) is the exercise of a culture, to curb teenage pregnancy and reduce the spread of Aids. Though the two last objectives are important they can be achieved by other less restrictive means such as the current governmental Aids programmes and sex education. This argument is endorsed by the Gender Commission.⁴⁵ There is also no certainty that virginity testing in fact does curb the spread of Aids.

The following can be said in response to an argument that the practice should be left intact because it is part of the culture of those who practice it. Section 30 of the Constitution protects individual's right to participate in cultural practice of their choice but cautions that this should be done in accordance with the Bill of Rights. Section 31(2) says that cultural rights may not be exercised in a manner inconsistent with any

⁴⁴Above n 31 p8

⁴⁵ Above n 31 p9.

provision in the Bill of Rights. This is a sectional limitation on this right to participate in cultural practices. In this regard an argument raised by the South African Law Reform Commission is instructive 'Given the fact that the best interest of child principle in section 28 of the Constitution is paramount and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of the cultural or religious group'⁴⁶ A culture which is harmful is not in the best interest of children. Viewed this way the practice is in direct violation of the Constitution and the values it seeks to uphold.

Balancing these factors and considering that the practice does more harm than good it is clear that there is no justification for the infringement of these rights.

International Human Rights Law:

South Africa is part of a global nation⁴⁷ in which human rights protection is paramount, and in which the right of children to be protected against cultural practices which are harmful to them are set out. The African Charter on the Rights and Welfare of the Child provides for the protection against harmful social and cultural practices. It states in article 21 that:

"State Parties to the present Charter [of which South Africa is a party] shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

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

⁴⁶ South African Law Reform Commission Discussion Paper 103 Project 110 'Review of the Child Care Act' December 2001 p1005.

⁴⁷ South Africa is a signatory to international conventions such as the UN Convention on the Rights of the Child (1989) as well as the African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990) entered into force November 29 1999. South Africa ratified it on 7 January 2000.

The practice of virginity testing carries health implications for those being tested unhygienically. The United Nations Convention on the Rights of the Child⁴⁸ states in article 24(3) that States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. Retaining the practice could be viewed internationally as an indication of this country's dereliction of its international obligations to protect children's rights.

Thus not only does virginity testing fail to be justified under section 36 of the Constitution, South Africa's international obligations also demand for its removal.

3.2.2 Arguments in favor of the practice

This section provides a human rights argument for allowing the practice to continue.

The right to participate in and enjoy one's culture:

The Preamble of the Constitution⁴⁹ states that we are all 'united in our diversity'. Cultural practices are fundamental indicators of the diversities in which we live. Virginity testing as a culture predominantly followed by the Zulu nation is significant and essential to those practicing it. The Provincial coordinator of the Eastern Cape Traditional Leaders, Prince Langa Mavuso is reported to have said that the revival of virginity testing signals "going back to basics"⁵⁰ To do away with this tradition would mean that right to participate in the cultural practices of their choice⁵¹ and the right to enjoy one's culture⁵² would be limited for those enjoying this cultural practice.

Article 12 of the African Charter on the Rights and Welfare of the Child which states that: State Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities

⁴⁸ Ratified by South Africa on 16 June 1995.

⁴⁹ Above n 21

⁵⁰ "Virginity testing leaves medical experts uneasy" AEGIS www.aegis.com [accessed on 18 July 2005]

⁵¹ Section 30 of the Constitution.

for cultural and other activities. Article 31 of the Convention on the Rights of the Child also protects a child against interference with his/her culture.⁵³ Thus South Africa also has an international obligation to ensure the protection of cultural practices.

The right to bodily integrity which includes the right to control over your body (freedom of choice):

The girls or women subjecting themselves to these tests participate in this ritual of their own free will⁵⁴ and outlawing this practice would be an infringement of their right to freedom of choice concerning their bodies.

Section 36 application:

The rights to enjoy freely one's culture as well as the right to freedom of choice are also significant rights which have to be upheld and cannot unjustifiably be limited. One of the significant objectives of this cultural practice of virginity testing is to reduce the spread of Aids. Some people argue further that the practice also carries with it important consequences necessary for the protection of the girl-child by exposing child abuse.⁵⁵

If the law purports to do away with this practice by banning it than the extent of such limitation on the cultural rights and freedom of choice would be extreme, as banning the practice will mean that those who participate in it will be turned into criminals. Though there are clearly other ways of achieving the objective of this practice there is no prohibition against initiatives which will only advance addressing common concerns.

Taking into account how long virginity testing has been in practice, the importance of the tradition to those who participate in it, the benefits it serves not only to the communities

⁵² Section 31 of the Constitution.

⁵³ The section provides that: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

⁵⁴ Above n 15.

as a whole but to girl-children particularly and especially considering that the participants do so voluntarily, one can reach two conclusions which would have the same result. One, the practice does not infringe the child's human rights and two, if the rights of the child can be proved to be infringed that certainly such an infringement is justified. On both conclusions the practice should be allowed to continue without any change.

However to build on these conclusion one could propose that given the extent to which the children's physical integrity is invaded by this practice the law should make it clear at what age a child can choose whether or not to engage in the practice. The age of sexual consent (16) may be the appropriate age to set because at this age sexual activity is legalized and a girl is considered mature enough to consent to sexual activity.

3.2.3 Conclusion on the human rights analysis

It is instructive to consider the views of the Constitutional Court when balancing cultural rights against other rights. The Court said the following in the case of *Christian Education South Africa v Minister of Education*⁵⁶

'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious [and other cultural and linguistic] communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, whenever possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

⁵⁵ id

⁵⁶ 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para 35.

3.4. Options for the way forward

3.4.1 Ban the practice

If Parliament is of the opinion that the practice of virginity testing unjustifiably limits the rights of children then Parliament may decide to ban the practice.

3.4.2 Allow the practice to continue with no interference by the law

If Parliament is of the opinion that the practice does not limit the rights of children or alternatively that such a limitation can be justified, then Parliament may decide to leave the practice alone and not regulate it through the law.

3.4.3 Set a minimum age for the practice

If Parliament is of the opinion that the practice does not limit the rights of children or alternatively that such a limitation can be justified, but that young girls who are too young to give consent should be protected, then Parliament may decide to set a minimum age and provide for other mechanisms to guard against any harm.

These mechanisms would need to ensure that the privacy of the girls taking part in the ritual is respected. If the virginity testing is part of public ceremony then in order to protect the girl's privacy they should not be marked and certificates should be handed out in private or not be given at all.

The test should be done with the full informed consent of the girls and disclosure of the results must be authorized by her. To ensure informed consent girls should be educated about the practice itself and what exactly it entails and about its purpose and consequences. If this is done then the state, parents as well as the communities of the child would be fulfilling their duties under the African Charter as far as education is concerned.⁵⁷ Seeing that informed consent is determined by the age and maturity of

⁵⁷ Article 11 of the Charter states the following: The education of the child shall be directed to the preservation and strengthening of positive African morals, traditional values and cultures.

children it is suggested that girls under the age of 16 should not be subjected to these tests.

To protect the girl's right to physical integrity the best thing to do is to educate and qualify the examiners medically on how to properly conduct the tests. The proposed reform would in the words of the South African Law Reform Commission⁵⁸ be 'to prevent infection and injury, prohibit coercion and provide recourse for children or their care-givers who choose not to participate in such practices'.

4. Conclusion

Cultural practices established before the inception of the Constitution must now be analysed in light of the Constitution so as to see whether they can survive constitutional scrutiny. A practice such as virginity testing which supposedly does more harm than its intended positive purpose and which may result in the severe limitation of fundamental rights may possibly not survive this constitutional era in which we live.

The debate continues: Please send any comments or queries on this Discussion Paper to Prinslean on prinslean.mahery@uct.ac.za.

⁵⁸ Above n 46 p1006.