

Virginity testing: a crime, a delict or a genuine cultural tradition?

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1 Introduction: the revival of a traditional cultural practice

All the indigenous cultures of Southern Africa placed a high value on female virginity,¹ and, in order to protect this bargaining chip in marriage negotiations, young girls were obliged to undergo regular virginity inspections.² During the early part of the twentieth century, the practice fell into disuse, due largely to the erosion of family structures through migrant labour, forced removals and Western influences.³ Over the last twenty years or so, however, the inspections have been resumed, mainly, it seems, in order to reinstate the importance of pre-marital chastity.⁴

In the past, virginity testing was usually performed by mothers or senior kinswomen within the confines of the family,⁵ but, in recent years, it has become a major public ritual.⁶ In the Zulu kingdom, for instance, it is now mainly associated with two major national festivals, the First Fruits' Festival (*Nomkhubulwane*)⁷ and the Royal Reed Dance (*umKhosi womhlanga*). The latter is an occasion when young

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¹ May *Virginity Testing Towards Outlawing the Cultural Practice that Violates our Daughters* (2003 thesis UWC) 7-11.

² Although such inspections have attracted particular attention in the KwaZulu-Natal province of South Africa, the procedure is not unique to the cultures of this country. Kelly *Performing Virginity and Testing Chastity in the Middle Ages* (2000) ix.

³ Mahery *Virginity Testing and the Children's Bill*, Discussion Paper, 11 October 2005, Children's Institute, University of Cape Town, available at <http://www.ci.org.za/site/frames.asp?section=publications> (22-01-2009) 5.

⁴ Scorgie "Virginity testing and the politics of sexual responsibility: implications for AIDS intervention" 2002 *African Studies* 1 57.

⁵ Van der Vliet "Growing up in traditional society" in Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (1974) 236-237. Leclerc-Madlala "Virginity testing: managing sexuality in a maturing HIV/AIDS epidemic" 2001 *Medical Anthropology Quarterly* (Special Issue "The contributions of medical anthropology to anthropology and beyond") 533 539 reports that some virginity testers claim that "they would like to educate all mothers to be able to inspect their daughters themselves. One tester firmly stated that mothers should start checking daughters as soon as possible around the age of two or three and to do so on a daily basis. She stated, 'Just as you wash her body and comb her hair, you can check if she's still 'clean' down there.'"

⁶ George "Virginity testing and South Africa's HIV/AIDS crisis: Beyond rights universalism and cultural relativism toward health capabilities" 2008 *California Law Review* 1447 1455; Le Roux *Harmful Traditional Practices, (Male Circumcision and Virginity Testing of Girls) and the Legal Rights of Children* (2006 thesis UWC) 2 and May (n 1) 2. Various other cultures in Southern Africa, including the Shona and Pondo, used to encourage virginity inspections, but the practice died out or was discontinued. See Holleman *Shona Customary Law* (1952) 83. Apparently, the girls refused to submit, and the tests "made trouble", because a finding that a girl had lost her virginity could cause a quarrel with the mother – Hunter *Reaction to Conquest Effects of contact with Europeans on the Pondo of South Africa* (1961) 183.

⁷ May (n 1) 6 and Leclerc-Madlala (n 5) 538.

girls may celebrate their chastity before the king, who is then free to choose a bride from amongst their number.⁸

Traditional leaders, eager to promote the virtues of female virginity, are encouraging girls to participate in the inspection procedure. No lesser person than president Jacob Zuma himself declared that, “[g]irls knew that their virginity was their family’s treasure”.⁹ Indeed, such is the popularity of virginity testing that it is being revived in areas outside Zululand.¹⁰

The tests now take place in many different settings, ranging from family homes, to schools, to community centres and public stadiums.¹¹ Some girls are inspected on a regular basis,¹² while others are inspected only annually at such ceremonies as the Royal Reed Dance. On these occasions, the subjects must lie on straw mats, spread their legs, and then pull back their labia to allow adult women to check whether their hymens are intact. The inspection is quick, and is often performed bare-handed by the testers (none of whom have medical qualifications).¹³

In some instances, the testers classify the girls according to a three grade system, ‘A’, ‘B’ or ‘C’. While the ‘A’ grade indicates a girl who has passed, the ‘B’ indicates a girl who may have had intercourse once or twice, and may have been sexually abused. The ‘C’ grade obviously denotes a fail.¹⁴ These grades are awarded according to various physical signs, including the size of the opening of the vagina, its wetness, the pinkness of the labia, evidence of an intact hymen, the firmness of the breasts, abdomen and muscles behind the knees, and whether the girl’s eyes have “known men”.¹⁵

If a girl passes the test, she is then marked with a white clay spot on her forehead. If she fails, she receives a red spot.¹⁶ The successful candidates are given certificates, and, in theory at least, those who failed are given counselling.¹⁷

Candidates for the test are anywhere between the ages of seven and twenty-six.¹⁸ Ostensibly, they participate voluntarily, but it is doubtful whether consent is always freely given. Some of the girls are obviously too young to make up their own minds, and many, no doubt, submit under parental and social pressure.

⁸ Because only virgins may take part in the Reed Dance, their status must be established before they are entitled to participate. May (n 1) 6 and Mahery (n 3) 5.

⁹ See the article “SA leader urges virginity tests” <http://news.bbc.co.uk/2/hi/africa/3683210.stm> (19-01-2009) where Zuma endorsed the practice on the basis that it is an African custom for a woman to value her virginity. See, too, Tyali “Zuma takes a stand on virginity testing” *Mail & Guardian Online* (23-09-2004) <http://www.mg.co.za/article/2004-09-23-zumatakes-a-stand-on-virginity-testing> (1-06-2009).

¹⁰ George (n 6) 1459 citing “Activists challenge girls’ virginity testing” *Independent* (17-07-2003).

¹¹ May (n 1) 6 and Leclerc-Madlala (n 5) 538.

¹² May (n 1) 6 and Leclerc-Madlala (n 5) 539.

¹³ May (n 1) 6.

¹⁴ See Leclerc-Madlala (n 5) 539-40.

¹⁵ May (n 1) 6-7. An intact hymen, however, is obviously an unreliable indicator of chastity: Le Roux (n 6) 14. Also see Leclerc-Madlala (n 5) 540 who notes: “Here, biomedical ‘reality’ and scientific ‘truth’ are of little import. What the testers look at and look for as evidence of virginity is framed within folk constructs of the body and ethno medical beliefs of health and illness. This indigenous knowledge is a knowledge that is largely articulated through metaphor and symbolic representation.”

¹⁶ Le Roux (n 6) 15 and Mahery (n 3) 6.

¹⁷ Le Roux (n 6) 15; Leclerc-Madlala (n 5) 538 and Mahery (n 3) 6.

¹⁸ Mahery (n 3) 6. In some instances, the girls being tested are as young as five years old – Leclerc-Madlala (n 5) 537.

Because of the probable lack of consent, virginity inspections have given widespread cause for concern about the violation of fundamental human rights.¹⁹ The South African commission on gender equality and the South African commission on human rights, for instance, called for a total ban on the procedure, arguing that it discriminates against women and violates their rights to dignity and personal security.²⁰

2 *Statutory regulation and criminal offences*

In response to these calls, parliament took action.²¹ Hence, section 12 of the Children's Act²² provides that:

- “(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.”

From these provisions, it appears that a girl may be tested only if she is over the age of 16 and gives her consent in the prescribed manner.

In spite of these safeguards, the Children's Act has certain significant omissions: it gives no indication what is meant by the “prescribed manner”; it does not define “consent”²³ and no mention is made of whether virginity testing is prohibited when conducted in domestic (as opposed to public) settings. The only evidence we have that any of these issues were officially considered is a meeting of the select committee on social services (department of social development), which was held to debate amended regulations to the act.²⁴ At this gathering, members discussed “consent” and the “prescribed manner” in which virginity tests were to be performed.

A set of regulations did not in fact ensue from this meeting, but the select committee seems to have contemplated making the following protocols mandatory: completion of a consent form, to be signed by both the persons conducting and receiving the test; conducting the tests in private hygienic circumstances on an individual basis; sterilising all equipment, and using sterilised surgical gloves; permitting only women to perform the test, and only when satisfied that the girls are over 16 years

¹⁹ UN Committee on the Rights of the Child “Concluding observations of the committee on the rights of the child: South Africa” (22 Feb 2000) 33 UN Doc CRC/C/15/Add 122.

²⁰ South African Government Information “Virginity testing”, issued by the Commission for Gender Equality, <http://www.info.gov.za/speeches/2008/08091713451001.htm> (22-01-2009). See further Le Roux (n 6) 17 and Mahery (n 3) 6-7.

²¹ For the history of this legislation, see George (n 6) 1478 ff.

²² 38 of 2005.

²³ In s 129, however, the act provides that, from the age of 12, children may consent to medical treatment, provided that they are of sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment. Because virginity testing can hardly be said to constitute medical treatment, this provision is inapplicable.

²⁴ Held on 11 Nov 2008. A summary of this meeting and the recorded audio file can be found on the Parliamentary Monitoring Group webpage <http://www.pmg.org.za/report/20081111-children%E2%80%99s-act-amended-regulations-briefing-department-social-develop> (4-02-2009). The discussion concerning virginity testing can be heard on the audio file from (time) 1:07:50.

of age,²⁵ paying due regard to the girls' bodily integrity. Any breach of such regulations would have amounted to an offence under the act.

While requirements such as these attempt to enforce basic health and human rights standards, they are being openly ignored by traditional leaders and those responsible for the inspection procedure.²⁶ Hence, the tests are still being performed. In many cases, the girls are below the age of 16,²⁷ sometimes as young as five,²⁸ and the girls are often marked as passing or failing,²⁹ probably without the provision of proper counselling facilities for those who fail.

The organisers of the events, however, would have cause to revise their attitudes if they become aware that they may face charges of rape, as opposed to a lesser offence of contravening a statutory regulation on child welfare.³⁰ The charge of rape is made possible by the Criminal Law (Sexual Offences and Related Matters) Amendment Act (here abbreviated to the Sexual Offences Act),³¹ which recently repealed the common-law crime of rape, and replaced it with a much expanded offence.

The new offence is contained in section 3, which provides that any person who unlawfully and intentionally commits an act of sexual penetration with another person, without the latter's consent, is guilty of rape. Virginity testing might well be included in this provision, because the examination entailed would probably fall within the definition of "sexual penetration". Under the new act, this phrase is defined to include: "any act which causes penetration to any extent whatsoever by – ... (b) any other part of the body of one person ... into or beyond the genital organs or anus of another person ..."³²

In addition to broadening the definition of rape, the Sexual Offences Act provides a detailed definition of what is meant by the victim's consent, thereby dramatically restricting a time-honoured defence to rape charges. The act provides that, "where [the complainant] is incapable in law of appreciating the nature of the sexual act, including where [the complainant] is, at the time of the commission of such sexual act – ... a child below the age of 12 years ..."³³ she does not voluntarily or without coercion agree to an act of sexual penetration (as contemplated in section 3). In consequence, a girl under 12 years of age is presumed to be incapable of consenting to genital penetration, and, if subjected to virginity testing, could be said to have been raped.

In addition, of course, the test would violate section 12(4) of the Children's Act, but the latter offence would attract a lesser penalty.

The Sexual Offences Act has further special provisions dealing with girls over the age of 12 and under the age of 16. Because members of this group are still deemed to be "children" for the purposes of the act,³⁴ virginity testing on them

²⁵ According to the discussion, proof of age in the form of an identification document or a sworn affidavit by the girl's guardian would be required.

²⁶ Le Roux (n 6) 65 cites, *eg*, inkosi Patekile Holomisa, president of the congress of traditional leaders of South Africa, who declared that: "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."

²⁷ Mahery (n 3) 6.

²⁸ Leclerc-Madlala (n 5) 537.

²⁹ Le Roux (n 6) 15 and Mahery (n 3) 6.

³⁰ S 305 of the Children's Act provides that a person who contravenes the prohibitions set out in s 12(4), (6) or (7) or fails to comply with s 12(5) is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.

³¹ 32 of 2007.

³² s 1(1).

³³ s 1(3)(d)(iv).

³⁴ s 1(1) defines the term "child" as "a person 12 years or older but under the age of 16".

could also amount to a crime under section 15(1). The latter section provides that any person who sexually penetrates a child is, notwithstanding the child's consent, guilty of statutory rape.³⁵

It may be argued that certain testing methods do not constitute "sexual penetration", but, even so, a less invasive act may constitute a "sexual assault". This action is defined in the Sexual Offences Act³⁶ as the unlawful and intentional sexual violation of a complainant without that person's consent.³⁷ The act further defines "sexual violation" to include: "direct or indirect contact between the genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or any object."³⁸ Moreover, special provision is made for the crime of consensual sexual violation – statutory sexual assault – which occurs where a child between the ages of 12 and 16 consents to an act of sexual violation.³⁹

In summary, a vaginal inspection of a girl below the age of 16 is a violation of the Children's Act, carrying a criminal penalty. It may, in addition, amount to a more serious crime: rape, statutory rape, sexual assault or statutory sexual assault.

Depending upon the nature of the investigation and the validity of the victim's consent, tests performed on persons over the age of 16 may also be regarded as rape or sexual assault. In this regard, the Sexual Offences Act, unlike the Children's Act, defines "consent" as any "voluntary or uncoerced agreement".⁴⁰ The definition continues to provide that consent will be absent when a complainant submits or is subjected to a sexual act through "the use of force or intimidation",⁴¹ or, significantly in the case of virginity testing, "where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act".⁴²

It follows that an apparent consent to undergo testing will very likely fail to meet the requirements of this definition, because the girl in question complied out of fear of a traditional authority or the social stigma of abstaining.⁴³ What is more, if she was not given the required pre-test counselling, she would not be fully aware of the prejudice she might suffer. Thus, any consent given may, more properly, be treated as mere "submission". As the courts have earlier cautioned, although consent may be inferred from a victim's conduct (rather than words), absence of resistance does not necessarily mean consent. Fear may drive the victim into a state of passivity, which then means no more than "the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realizes is useless".⁴⁴

Notwithstanding this attempt to protect victims from what often used to be a successful defence of consent, the burden of proving lack of consent will fall on the state. In other words, if the victim simply submitted, thereby giving an appar-

³⁵ The act is criminalised, because underage persons are not yet old enough to appreciate the implications of sexual acts – Snyman *Criminal Law* (2008) 393.

³⁶ s 5 (1).

³⁷ The definition of "consent", which is discussed in more detail below, is of course critical in this context.

³⁸ s 1(1).

³⁹ s 16(1).

⁴⁰ s 1(2). Note that, in terms of s 1(3)(d)(iv), a child below 12 cannot consent to an act of sexual assault.

⁴¹ s 1(3)(a)(i).

⁴² s 1(3)(b).

⁴³ *Le Roux* (n 6) 66, *May* (n 1) 41 and *Mahery* (n 3) 9-10.

⁴⁴ *R v Swiggelaar* 1950 1 PH H61 (AD) 110-111. The common law on this topic has now, of course, been superseded by s 1(2) and (3) of the Sexual Offences Act. See Snyman (n 35) 363.

ent consent to the sexual act, the state must prove that her consent was involuntary or coerced, and, given the standard of proof in criminal cases, this is a heavy burden.⁴⁵

The children's and sexual offences acts leave one critical question unanswered: do they apply in domestic situations? In other words, is a mother prohibited from conducting a vaginal examination of her own daughter? From one point of view, such a practice might be seen as a serious invasion of bodily integrity and personal privacy, while, from another, it might seem to be no more than a normal duty of responsible parenting. Culture is the determining factor.⁴⁶

A justification of cultural tradition, however, may well founder on the growing sense of concern about the abuse of women and children by family members,⁴⁷ and, for that reason, the need to extend the reach of public law into the family domain.⁴⁸ In *Masiya v Director of Public Prosecutions, Pretoria*, for instance, the constitutional court observed:

“Although the great majority of females, for the most part in rural South Africa, remain trapped in cultural patterns of sex-based hierarchy, there is and has been a gradual movement towards recognition of a female as the survivor of rape rather than other antiquated interests or societal morals being at the core of the definition. The focus is on the breach of ‘a more specific right such as the right to bodily integrity’ and security of the person and the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context.”⁴⁹

While it could be argued, on the one hand, that an accused mother will probably lack the intention necessary to constitute the crime of raping her daughter, it must be remembered that *dolus eventualis* suffices. On the other hand, the prosecution might have difficulty in establishing the further requirement of the accused's knowledge of unlawfulness, because this element of the crime rests on an awareness of the daughter's consent. The state would have to show that the mother was aware that her daughter did not consent.

In this regard, however, vaginal inspection of a girl below the age of 12 could be deemed rape or sexual assault, because the girl could not legally consent to any sexual act. And, even if the girl were between the ages of 12 and 16 years, an offence would be committed, since an adult who engages in sexual acts in these circumstances commits statutory rape notwithstanding the child's consent.

The interpretation of these enactments must, of course, be guided by the bill of rights,⁵⁰ and, in this case, the following provisions will no doubt be decisive. Section 12(2) provides: “[e]veryone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body ...” Even more important is section 28(2). This provides: “[a] child's best interests are of paramount importance in every matter concerning the child.”⁵¹

⁴⁵ Note, however, that the cautionary rule requiring corroboration of a woman's evidence is no longer required (*S v J* 1998 2 SA 984 (SCA)).

⁴⁶ See par 5 below.

⁴⁷ See Sigsworth “Gender-based violence in transition” in *Concept Paper for the Centre for the Study of Violence and Reconciliation* (2008) 11; Van der Hoven “Domestic violence in South Africa” 2001 *Acta Criminologica* 14 and Curran and Bonthuys “Customary law and domestic violence in rural South African communities” 2005 *SAJHR* 607 ff.

⁴⁸ In this regard, see the Domestic Violence Act 116 of 1998, particularly the preamble.

⁴⁹ 2007 5 SA 30 (CC) par 25.

⁵⁰ s 39(2) of the Constitution of the Republic of South Africa Act, 1996.

⁵¹ Note that, for purposes of s 28, s (3) provides that “child” means a person under the age of 18 years.

3 *Suit in delict: more about consent*

Apart from prosecution under the criminal law, virginity testing might also occasion a suit in delict.⁵² The most obvious form of injury would be a sexually transmitted disease: inspections are often performed bare-handed, and, even when gloves are worn, the same pair may be used to examine up to 600 girls at a time.⁵³ Otherwise, the plaintiff could claim damages for an *iniuria*, on the ground that the defendant had wrongfully and intentionally injured her dignity and reputation.

Whether or not the action lies for patrimonial loss or for *iniuria*, the woman would be required to bring the suit when she became aware of the harm she had suffered. If she were still underage, an appropriate guardian would have to act on her behalf.⁵⁴

In the event of a delictual action, the two critical issues are wrongfulness and the defence of *volenti non fit iniuria*. Wrongfulness is fully dealt with in the section below, which considers the constitutional implications of virginity testing, and possible objections to the legislation regulating it.⁵⁵ Here, it need only be noted:

“Any intentional act which involves the likelihood of bodily harm to another and which is not recognised by modern usage as a normal and acceptable practice of society is forbidden by law and is in no way dependent upon the absence of consent on the part of the victim.”⁵⁶

Consent poses a separate problem. A successful plea of *volenti non fit iniuria* has six requirements. First, the consent must not be *contra bonos mores*.⁵⁷ In so far as virginity testing contravenes the Children’s Act and the Sexual Offences Act, any possible consent could be deemed *contra bonos mores*. Secondly, whatever injury is suffered must fall within the limits of the consent given. Thirdly, the person concerned must subjectively consent to the act, and, fourthly, she must be capable of doing so, *ie*, must be intellectually mature enough to appreciate the implications of the act in question. Given the age of some of the girls undergoing virginity testing, this requirement will probably not be met.

Fifthly, the consent must be given freely or voluntarily. Whenever girls are coerced into doing something to their prejudice, their consent is invalid. The coercion need not be physical: moral, social and economic factors may also amount to the compulsion that negates volition.⁵⁸ In the case of virginity inspections, social pres-

⁵² under the common law. It is most unlikely that a suit would lie under customary law, although determining whether the common or customary law applied (or indeed the common-law of crime) would be far from easy – Bennett *Application of Customary Law in Southern Africa The Conflict of Personal Laws* (1985) 75 and 107.

⁵³ Le Roux (n 6) 14-15. Also see Leclerc-Madlala (n 5) 538. Furthermore, “[s]ince 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” – Le Roux (n 6) 15.

⁵⁴ Presumably, to be determined by customary law – Bennett (n 52) 115.

⁵⁵ An interesting comparison, in this respect, would be the ruling of a Canadian court in *Thomas v Norris* 1992 2 CNLR 139 (BCSC).

⁵⁶ *S v Sikunyana* 1961 3 SA 549 (E) 551H-552A. As far as criminal liability is concerned, “acceptable practice of South African society” has never been determined by African norms. *R v Matomana* 1938 EDL 128 131, *eg*, held that it would be contrary to public interests to excuse a death resulting from stick fighting on the ground of consent.

⁵⁷ See, *eg*, *Matomana’s* case and *Phiri v R* 1963 R&N 395 (SR).

⁵⁸ Neethling, Potgieter and Visser *The Law of Delict* (2006) 92 and Van der Walt and Midgley *Delict* (1997) 115 par 89. See, *eg*, *R v McCoy* 1953 2 SA 4 (SR) 11.

sure could well constitute coercion in the sense that girls might be intimidated by both their peers and authority figures.⁵⁹

“It is, for example, difficult (and unacceptable in terms of cultural values) to envisage the daughter of a staunch traditionalist challenging her father by refusing to be subjected to have her virginity tested. Moreover, a girl who refuses to submit to the practice risks being ostracized and stigmatized by the community she lives in as a non-virgin, and social pressure often results in the girls ‘volunteering’ to undergo the process.”⁶⁰

Finally, the person consenting must realise and have full knowledge of the extent of any (possible) prejudice. Even if a virginity test does not result in physical harm, the violation of the individual’s rights to dignity, equality, security of the person and privacy⁶¹ may cause harm of an emotional or psychological nature.⁶² Public exposure, for instance, could be experienced as degrading or humiliating, and failure of the test might well result in the girl suffering substantial social prejudice. If she is given a “C” grade, she could be deemed to have brought shame to her family, and her parents may be required to pay a fine for tainting the community.⁶³

The girls are highly unlikely to be aware of all the possible consequences. While the Children’s Act requires pre-examination counselling, it gives no indication what this counselling entails. In any event, we have no evidence of the regular provision of such facilities, although they are apparently available in some instances for those who fail the test.⁶⁴

4 *Culture and the constitution*

Proponents of virginity testing defend it on the ground that it is a cultural tradition, which is a common justification for practices that deviate from general social norms.⁶⁵ Until the new constitutional dispensation, such an argument would have lacked a solid normative basis in South African law,⁶⁶ but now defendants in delictual actions or accused persons charged with offences under the Children’s Act and

⁵⁹ Le Roux (n 6) 66, May (n 1) 41 and Mahery (n 3) 9-10.

⁶⁰ May (n 1) 41.

⁶¹ The constitution protects dignity under s 10, equality under s 9, security of the person under s 12(2) and privacy under s 14.

⁶² Le Roux (n 6) 15 and Mahery (n 3) 10-11. As George (n 6) 1475 says: “Most relevant to the testing debate is the protection of informational privacy regarding chastity status. As presently practiced, virginity testing makes a public spectacle of private, personal, and intimate matters.”

⁶³ May (n 1) 7 and Leclerc-Madlala (n 5) 539.

⁶⁴ Le Roux (n 6) 15, Mahery (n 3) 6 and Leclerc-Madlala (n 5) 538.

⁶⁵ Hence, it was held in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) that, although the customs and habits of a certain group may seem unusual and threatening to the wider society, the state is obliged to tolerate divergence from the norm. In democratic states, the majority can always enforce its interests through the legislative process, but minorities need special protection. See, too, *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) par 22.

⁶⁶ Indeed, African cultural traditions have featured only occasionally in delictual or criminal cases. See, eg, the *Matomana* case (n 56) 131, which concerned stick fighting, and the following cases which concerned *ukutwala* (a mock abduction as a preliminary to marriage) and rape: *R v Swartbooi* 1916 EDL 170; *R v Mane* 1948 1 SA 196 (E) and *R v Sita* 1954 4 SA 20 (E) 22. In the latter case, the court held that custom cannot override the common law of crime, no matter whether the custom is legal or illegal.

Sexual Offences Act may claim the special protection offered by section 30 and 31 of the bill of rights,⁶⁷ otherwise known as the “cultural defence”.⁶⁸

Indeed, virginity inspections enjoy substantial support in communities where the procedures are regularly undertaken. Traditional rulers have objected to the interference by government and other outsiders with their subjects’ right to pursue cultural traditions.⁶⁹ For such advocates of the testing procedures, the legislation protecting women’s and children’s rights is a violation of their right to freedom of cultural expression.⁷⁰

Section 30 of the constitution provides: “Everyone has the right to use the language and to participate in the cultural life of their choice ...”, and section 31(1) provides: “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 ...”. The second clause of section 30 and section 31(2), however, carry on to stipulate that the rights in question may not be exercised “in a manner inconsistent with any provision of the Bill of Rights”. This so-called internal limitation clause means that the freedom to enjoy a culture of choice may not be exercised at the expense of any other provision in the bill of rights.⁷¹

Hence, before challenging the legality of the children’s and sexual offences acts for violating sections 30 and 31, parties arguing for the freedom of culture must, in principle, establish whether the practice in question passes the internal limitation clauses. Here, they would immediately be met with the charge that virginity inspections infringe the rights to dignity,⁷² security of the person⁷³ and equality,⁷⁴ and, further, that “[a] child’s best interests are of paramount importance in every matter concerning the child”.⁷⁵ The most obvious violation is of the right to equality:⁷⁶

⁶⁷ Note that South Africa is party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which it ratified on 21 Dec 2006.

⁶⁸ This defence has a bearing on the lawfulness of the crime, the accused’s capacity, *mens rea* and sentencing. See Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 312.

⁶⁹ See George (n 6) 1483 and Moya “The virginity tester” *Mail & Guardian Online* (23-09-2005) <http://www.mg.co.za/article/2005-09-23-the-virginity-tester> (1-06-2009).

⁷⁰ See, for instance, Vincent “Virginity testing in South Africa: Re-traditioning the postcolony” 2006 *Culture, Health & Sexuality* 17 18.

⁷¹ This clause was designed to prevent particular communities from “privatising” offensive practices and to exclude the oppressive features of domestic relationships within cultural communities: *Christian Education* case (n 65) par 26. The view of the constitutional court is consistent with that taken by the International Committee on Human Rights (General Comment No 23 on art 27 of the Covenant on Civil and Political Rights) and Principle 1 (Respect for human rights and fundamental freedoms) of art 2 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁷² s 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

⁷³ s 12(2): “Everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”

⁷⁴ s 9(1): “Everyone is equal before the law and has the right to equal protection and benefit of the law.” s 9(2): “Equality includes the full and equal enjoyment of all rights and freedoms.”

⁷⁵ s 28(2): “A child’s best interests are of paramount importance in every matter concerning the child.” For purposes of this section, s 28(3) provides that “child” means a person under the age of 18 years.

⁷⁶ See George (n 6) 1470 ff.

by insisting that women, not men, remain chaste before marriage, virginity testing clearly discriminates against women.⁷⁷

In addition to the internal limitation inquiry under sections 30 and 31, however, if laws or practices infringing the bill of rights are to be considered constitutionally acceptable, they must meet the detailed criteria laid down in section 36(1) of the constitution, the limitations clause.⁷⁸ These criteria may be summarised as follows. In the first place, the law or practice in question must be of general application (*ie*, sufficiently clear and accessible),⁷⁹ and it must apply equally to all, and must not be arbitrary in its application.⁸⁰ The children's and sexual offences acts obviously meet these requirements.

In the second place, the law or practice must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This means that the rule or practice must serve a constitutionally acceptable purpose,⁸¹ and that a balance must be struck between the extent to which it infringes the constitutional rights and the benefits it is designed to achieve.⁸² Although section 36(1) lists the factors to be taken into account when considering reasonableness and justifiability, there is no standard test.⁸³ The inquiry depends on the circumstances of each case.

If we consider, for the moment, an argument defending virginity testing on the ground that it is an established cultural practice, we would need to ask whether it is worthwhile and important in a constitutional democracy.⁸⁴ This question demands proof of an underlying connection between the practice and its purpose,⁸⁵ such that the practice aptly serves that purpose.⁸⁶ The purpose must then be weighed against the infringement of other rights.⁸⁷ In other words, the benefits must outweigh the costs.⁸⁸

⁷⁷ Apparently, boys can also be subjected to virginity testing (presumably on the basis of ethno-medical beliefs). If this is done, the select committee on social services (n 24) said that "virginity tests done on males must be done by males". See Bridgraj "Much ado about virginity" *Mail & Guardian* (22-09-1998).

⁷⁸ "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, 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."

⁷⁹ Such that those who are affected by its application know what is relevant to the exercise of their powers or in what circumstances they are entitled to seek relief from an adverse decision. *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC).

⁸⁰ Currie and De Waal *The Bill of Rights Handbook* (2005) 169.

⁸¹ Currie and De Waal (n 80) 177.

⁸² See *S v Bhulwana; S v Gwadiiso* 1996 1 SA 388 (CC): "In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be" (par 18).

⁸³ Thus, as Currie and De Waal (n 80) 178 note, the five "relevant factors" are not a checklist or an exhaustive catalogue of what must be considered in the limitation inquiry.

⁸⁴ *S v Makwanyane* 1995 3 SA 391 (CC) par 185.

⁸⁵ Currie and De Waal (n 80) 182.

⁸⁶ According to Currie and De Waal (n 80) 183, if the law or practice only marginally contributes to achieving its purpose, it cannot be adequate justification for an infringement of fundamental rights.

⁸⁷ *S v Manamela* 2000 3 SA 1 (CC) par 34. See Le Roux (n 6) 44-58.

⁸⁸ Currie and De Waal (n 80) 183-184. This issue is further discussed in the conclusion to this article.

A limitation inquiry, similar to one that would be required for virginity testing, arose in *Christian Education South Africa v Minister of Education*.⁸⁹ Here, the applicant argued that a statutory provision prohibiting corporal punishment violated the religious and cultural freedoms of certain Christian communities, because chastisement whether by cane, ruler, strap or paddle was a vital element of Christian life. The court *a quo* dismissed the argument on the ground that corporal punishment, even if exercised as a result of religious belief, was inconsistent with the bill of rights, in particular the right to dignity and the freedom from degrading punishment.

While the high court disposed of the applicants' claim on the basis of the internal limitation clause in section 31(2) alone, the constitutional court proceeded directly to a section 36 limitations inquiry.⁹⁰ It found that, whilst the right to culture had been limited by legislation banning corporal punishment, this limitation was reasonable and justifiable,⁹¹ largely because of the need to protect children's rights to dignity, freedom and security of the person.⁹² On balance, these rights outweighed those of the parents (especially in light of the fact that parents would still be able to discipline their children by using physical means of chastisement in the home).⁹³

A comparable situation is posed by virginity testing, except that the proponents argue, in addition to culture, a variety of social benefits: that virginity testing helps to teach young girls the value of chastity before marriage;⁹⁴ that it contributes to the prevention of teenage pregnancy; and that it can be used to detect children who have been sexually abused by adults. Most important, however, is the claim that, by promoting chastity, virginity testing inhibits the spread of HIV/AIDS.⁹⁵

A contrary argument would be that the groups concerned also have access to equivalent, medically supervised tests that operate within the terms of the constitution. After all, both the state and private organisations have made these forms of testing for HIV/AIDS freely available, usually accompanied by counselling services.⁹⁶ Given this answer to the claim of social benefits, together with the range of rights infringed, any challenge to the validity of the children's and sexual offences acts would be most unlikely to succeed.

In any event, a more probable suit would be a challenge to the constitutionality of the practice of virginity testing on the ground that it violates a number of sections in the constitution, not to mention at least three international conventions aimed at protecting women and children against harmful cultural practices: the United Nations Convention on the Rights of the Child (CRC),⁹⁷ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁹⁸ and the African Char-

⁸⁹ 1999 4 SA 1092 (SEC).

⁹⁰ *Christian Education* case (n 65).

⁹¹ *Christian Education* case (n 65) par 52.

⁹² *Christian Education* case (n 65) par 41, 43 and 47.

⁹³ *Christian Education* case (n 65) par 38 and 51.

⁹⁴ Thereby maintaining their *lobolo* value: Mahery (n 3) 6 and May (n 1) 2.

⁹⁵ Le Roux (n 6) 13 and May (n 1) 2.

⁹⁶ For example, the HIV Testing Week (held between 3 and 8 Nov 2008) provided free testing and counselling services at government and non-governmental organization sites in various parts of the country. See http://www.sagoodnews.co.za/health_and_hiv_aids/get_tested_during_hivtestin-gweek.html (9-02-2009).

⁹⁷ Ratified by South Africa on 16 June 1995. Under art 24(2)(e), "States Parties shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children".

⁹⁸ Ratified by South Africa on 15 Dec 1995.

ter on the Rights and Welfare of the Child.⁹⁹ Article 21(1) of the latter, for instance, provides:

“States parties to the present Charter shall take all appropriate measures to eliminate 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.”

While the international instruments are binding on the South African state only in its relations with other states, they do indicate a general trend in thinking: that the individual is not to be sacrificed to the group’s right to pursue a cultural practice.¹⁰⁰ South African constitutional jurisprudence supports this argument: although everyone is free to practise a culture of choice, this freedom does not imply that individuals are obliged to follow suit. In other words, the individual is free to choose.¹⁰¹

O’Regan J’s minority judgment in *MEC for Education, KwaZulu-Natal v Pillay*¹⁰² gave an even keener edge to this line of thinking. The learned Judge said that sections 30 and 31 of the bill of rights protect not so much the right of groups to practise their cultures, but rather the rights of individuals within communities. In other words, cultural rights are “associative rights exercised by individual human beings and are not rights that attach to groups”.¹⁰³

In disputes about individual and group rights, children are a special case. While they, too, are entitled to enjoy a cultural tradition,¹⁰⁴ they are in no position to participate in discussions about their options. They must simply accept whatever society and their families present to them. However, in this, as in all other situations where they are unable to exercise freedom of choice, the courts must ensure protection of their best interests, a principle that is enshrined in section 28(2) of the bill of rights. It follows that no child may be compelled to undergo vaginal inspections against her will, and that the various age restrictions provided in the Children’s and Sexual Offences Acts must be strictly applied as presumptive devices to indicate when children are capable of expressing an informed consent.

5 Conclusion: reconceiving arguments of rights and culture

From the existing constitutional jurisprudence in South Africa, it is clear that anyone wanting to contest the validity of provisions in the Sexual Offences Act or the

⁹⁹ Ratified by South African on 7 Jan 2000. It is noteworthy that the preamble of the charter provides 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.”

¹⁰⁰ Such was the ruling in the *Thomas* case (n 55) 160. See the discussion by Isaac “Individual versus collective rights: Aboriginal people and the significance of *Thomas v Norris*” 1992 *Manitoba LJ* 618 ff.

¹⁰¹ *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) par 66.

¹⁰² (n 101).

¹⁰³ *Pillay* case (n 101) par 150. O’Regan J went on (par 157) to explain that culture gives meaning to the lives of individuals, thereby contributing to the fulfilment of the overall goals of human dignity and the “unity and solidarity amongst all who live in our diverse society”.

¹⁰⁴ a 30 of the Children’s Rights Convention provides: “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 practise his or her own religion, or to use his or her own language.”

Children's Act dealing with virginity testing would have a well-nigh impossible case to argue. Traditionalist advocates of testing, however, have declared that they have no intention of abandoning the practice.¹⁰⁵ Hence, the dispute has settled into a familiar trench warfare of cultural relativism versus human rights universalism.

George contends that, if it were conceded that neither culture nor rights are as rigid as their protagonists would have us believe, a more productive dialogue might ensue. As she says, the parties have drawn the wrong battle lines.¹⁰⁶ By adopting such intransigent views, they present the problem as virginity testing itself, thereby determining the form of the debate and the possible solutions. Either abolish the practice or capitulate to culture.¹⁰⁷

The greater problem, however, is an urgent need to devise a new, more adaptive approach to public health, especially, of course HIV/AIDS. George argues that the human rights campaigners fail to appreciate the fact that cultural practices may afford valuable opportunities for positive change, while traditionalists fail to see that maintaining a tradition is less important than preventing the spread of disease.¹⁰⁸ If the parties were willing to strip away the cultural rhetoric surrounding virginity testing, and treat it as a simple public health measure, a useful "self-help solution [might appear] where there are limited options for South African women and girls to successfully avoid infection and obtain treatment for infection".¹⁰⁹

If the issue were reconceived in this way, rights activists would have to interpret rights more broadly and shift their attention to the state's duty to combat a serious epidemic. This change of perspective would entail paying more attention to the right to health.¹¹⁰ Until now, the rights lobby has focused on first-generation civil and political rights, without sufficient regard to the, as yet, undeveloped second-generation rights (which include health).¹¹¹

If a reasonable compromise is to be reached with the proponents of cultural tradition, however, then the latter will, in their turn, have to reconsider the idea of culture. This is a much more complex problem. In their arguments in favour of virginity testing, traditionalists mobilise two persistent, but misleading, conceptions of culture.

The first is to treat culture as a discrete system of practices, beliefs and norms that sprang from some type of primordial *Volksgeist*, with the implication that culture

¹⁰⁵ In the face of concerted opposition of this nature, legal anthropology has shown repeatedly that such legislative bans are seldom effective. George (n 6) 1484 and 1486 (n 228) citing Merry "Global human rights and local social movements in a legally plural world" 1997 *Can J L & Soc* 247 249-250 and 268-269 discussing the problems of enforcing laws prohibiting spousal abuse in traditional culture.

¹⁰⁶ George (n 6) 1482.

¹⁰⁷ George (n 6) 1450.

¹⁰⁸ George (n 6) 1487 ff bases her argument on the philosophies of pragmatism and capabilities theory. The latter concentrates on the individual freedoms needed to achieve fulfilment in general, and the capabilities to function in particular. Because the theory accepts the importance of context, it accommodates arguments of culture. Pragmatism, of course, rejects principles for their own sake, directing attention instead to the actual consequences of given courses of action.

¹⁰⁹ George (n 6) 1483-1484.

¹¹⁰ Contained in s 27 of the constitution. Subsection 1 guarantees the right "to have access to ... health care services, including reproductive health care". Subsection 2 obliges the government to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of ... these rights".

¹¹¹ See George (n 6) 1451.

somehow preceded and determined the physical world.¹¹² The second is to explain or justify cultural practices in terms of functionalism, a theory about human behaviour which assumes that each item of culture contributes to the well-being of the overall society.¹¹³ According to this line of thinking, those conducting the virginity tests advance various utilitarian justifications, primarily the argument that the tests help to prevent the spread of HIV/AIDS.

The essentialist idea of culture, however, was long ago refuted in scholarly circles. Far from being an integrated system determining current attitudes and behaviours, culture is now accepted as being a social construct, whose main purpose is rhetorical: a means whereby a group can establish its identity and thus distinguish itself from other groups.¹¹⁴ Hence, in the academic literature, culture is now regarded as a repertoire of assorted practices and discourses that people generate through disputes over signs and meanings.¹¹⁵

This view has been accepted by the constitutional court in its judgments on customary law, which is a typical product of culture. The court has indicated that it will give effect to only the “living” version of customary law, one that “has evolved and developed to meet the changing needs of the community”.¹¹⁶ Accordingly, in *Shilubana v Nwamitwa*,¹¹⁷ Van der Westhuizen J stressed the idea that communities are free to change their customary laws in response to new social problems. Cultural traditions should not be regarded as static and systematically integrated, but, rather, as contradictory, contested and dynamic.¹¹⁸ It follows that the “courts, as outsiders, must seek to avoid imposing a false internal coherence and unity on a particular cultural community”.¹¹⁹

The functionalist/utilitarian argument in support of culture, however, has even more obvious attractions than the essentialist. Any practice which can combat HIV/AIDS – at no cost to the state – has clear appeal in a country which is struggling with a rampant epidemic (bearing in mind that most of those infected are female).¹²⁰

¹¹² See the discussion by Fishbayn “Litigating the right to culture: Family law in the new South Africa” 1999 *International Journal of Law, Policy & The Family* 147 159. See, too, Chanock “‘Culture’ and human rights: Orientalising, occidentalising and authenticity” in Mamdani (ed) *Beyond Rights Talk and Culture Talk* (2000) 21 ff.

¹¹³ Kaplan and Manners *Culture Theory* (1972) 60-63.

¹¹⁴ All cultures are inherently oppositional, and consciousness of difference arises whenever two or more social groups are driven into close interaction. See Roosens *Creating Ethnicity The Process of Ethnogenesis* (1989) 12.

¹¹⁵ Merry “Law, culture and cultural appropriation” 1998 *Yale Journal of Law & Humanities* 575 577.

¹¹⁶ *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) par 53. See, too, *Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) 197 and Langa DCJ, in *Bhe v Magistrate Khavelitsha* 2005 1 SA 580 (CC) par 81 and 153.

¹¹⁷ 2007 5 SA 620 (CC) par 54.

¹¹⁸ *Shilubana* case (n 117) 154. See, too, Merry (n 115) 580, who notes that a cultural tradition is dynamic (not static), indeterminate (not bounded), contested (not consensual), an instrument of power (not democratic), and, above all, negotiated and constructed through human action. Following this line of thinking, O’Regan J in the *Pillay* case (n 101) par 152 said: “It is also important to remember that cultural, religious and linguistic communities are not static communities that can be captured in constitutional amber and preserved from change. Our constitutional understanding of culture needs to recognise that these communities, like all human communities, are dynamic. It is tempting as an observer to seek to impose coherence and unity on communities that are not, in the lived experience of those who are members of those communities, entirely unified.”

¹¹⁹ *Pillay* case (n 101) par 153.

¹²⁰ George (n 6) 1447 1448-9 citing a Joint UN Programme on HIV/AIDS, *AIDS Epidemic Update December 2006*, 11, UNAIDS/06.29E (Dec 2006) <http://www.unaids.org/en/KnowledgeCentre/HIVData/EpiUpdate/EpiUpdArchive/2006> (19-10-2009) which noted that 56% of those suffering from HIV in South Africa are female.

Such justifications, however, are inherently problematic. How are we to determine the “success” of virginity testing? On the one hand, we have no reliable evidence substantiating the traditionalists’ claim, and, on the other, the virginity inspections have certain harmful results, such as the provision of targets for men because it is widely believed that intercourse with a virgin cures the HIV virus.¹²¹ Thus, when measured against factual outcomes, the functionalist line of reasoning is seldom likely to be conclusive.

Nevertheless, arguments of cultural tradition have an obvious emotive appeal. Indeed, they generally serve a more abstract purpose than the production of measurable social benefits.¹²² As with essentialism, the constitutional court is moving towards a more sceptical view of the functionalist approach. In the *Pillay* case,¹²³ a case concerning the wearing of a nose stud – and thus difficult to justify as something contributing to the welfare of the social group – O’Regan J said that culture serves to give meaning to the lives of individuals, thereby helping to fulfil the overall goals of human dignity and the “unity and solidarity amongst all who live in our diverse society”.

Implicit in the current understanding of culture, and distinguishing it from the past conception, are two key elements: human action and choice.¹²⁴ A focus on these elements, as opposed to the old impasse between rights and culture, may open new and more productive avenues of inquiry.

The first such inquiry would be into the perpetrator(s) of a cultural practice and the group that benefits most. In the *Pillay* case,¹²⁵ O’Regan J suggested this type of approach, when she said that sections 30 and 31 of the constitution contemplate only associative practices, not those designed to suit the interests of certain persons or groups at particular times. Thus, we must ask “whether a particular asserted practice is shared within the broader community, or portion of it, and therefore properly understood as a cultural practice rather than a personal habit or preference ...”¹²⁶ The second inquiry, which is linked to the first, is choice. If culture is to retain its legitimacy, it must rest on a history of democratic participation.

When we pursue these inquiries in the context of virginity testing, it appears that the tradition was revived largely due to the efforts of two women: Andile Gumede and Nomagugu Ngobese. Evidently, they began by organising small gatherings of teenage girls for public testing, with a view to persuading like-minded people to participate in a movement that would re-instate the symbolic importance of vir-

¹²¹ Le Roux (n 6) 15 and Meel “The myth of child rape as a cure for HIV/AIDS in Transkei: A case report” 2003 *Medical Science Law* 85. In addition, the inspections have led to commercialisation and corruption. Parashar “Where angels fear to tread” *Mail & Guardian Online* (6-08-2004) and Leclerc-Madlala (n 5). On the negative consequences of virginity testing, see George (n 6) 1460-64.

¹²² As far as the constitution is concerned, support for culture is designed to maintain social diversity. This principle was enshrined in the interim constitution of 1993, which obliged those responsible for drafting the final act to protect South Africa’s diverse cultures: constitutional principle XI, contained in sch 4, as read with s 71(1)(a) of the interim constitution. Moreover, as the *Christian Education* case (n 65) par 25 held, because the majority in democratic states can always enforce its interests through the legislative process, minority cultural and religious groups need special protection.

¹²³ *Pillay* case (n 101) par 157.

¹²⁴ Although the fact of human selection and creation often leads to an accusation that a culture is not genuine, culture cannot be dismissed as false or inauthentic merely because its incidents are deliberately made or chosen: Roosens (n 114) 155. Even so, as Roosens (156) says, culture is never a completely arbitrary construct. It is always scripted from a minimum of incontestable facts.

¹²⁵ *Pillay* case (n 101) par 144.

¹²⁶ *Pillay* case (n 101) par 154.

ginity.¹²⁷ Given the fact that many families in South Africa now lack responsible parents to head households – a situation that is being constantly exacerbated by the HIV/AIDS epidemic – grandmothers and elderly women have had to bear the brunt of child-rearing.¹²⁸ Hence, it is hardly surprising that these matriarchs are most in favour of the tradition.¹²⁹

Does it follow, however, that the courts must accept whatever a litigant (or group of litigants) proposes as a constitutionally protected activity? In other words, how are we to determine whether a culture deserves constitutional protection? If the argument of freedom of culture is reduced to no more than a rhetorical justification for whatever activity suits the interests of a particular group at a particular time – which is the direction in which the academic literature might lead – we will have no means of deciding whether sections 30 and 31 of the constitution can legitimately be invoked.

One of the most obvious guarantees of legitimacy is compliance with South Africa's new constitutional order, notably, in the case of culture, democratic participation.¹³⁰ In this respect, tradition is an important ally, since the legitimacy of any system of custom rests on community involvement.¹³¹ Tradition is a *social* phenomenon, requiring the participation of a given community. Unlike a habit, or even a custom, it cannot be tied to the behaviour of a particular group or individual. Hence, although an individual may begin a practice, the question whether it takes root can be decided only after a period of time, and only if it passes the test of community acceptance.¹³² It follows that tradition is a powerful force for determining not only the social fact of a rule but also its legitimacy.¹³³

Traditionalists therefore have difficult questions to answer. Bearing in mind that most of the girls being tested are under-age, so their consent is of doubtful validity, would it not be true to say that the practice serves the interests of only a limited group of traditionalists? Should virginity testing be protected under the constitutional guarantee of cultural traditions, given its demise in the last century, and the claim that it now serves as a prophylaxis against an entirely modern phenomenon, the HIV/AIDS epidemic? Would it not be closer to the truth to say that it simply proclaims a cultural identity and the reassuring security of returning to the past?

¹²⁷ Scorgie (n 4) 57.

¹²⁸ See, for instance, Izzard "Migrants and mothers: Case studies from Botswana" 1985 *JSAS* 258; Burman "Intergenerational family care: Legacy of the past, implications for the future" 1996 *JSAS* 585 and Murray *Families Divided; The Impact of Migrant Labour in Lesotho* (1981) 110-112.

¹²⁹ George (n 6) 1458.

¹³⁰ Which is already a requirement of s 36(1), the limitation section. Moreover, although a right of democratic participation is not specified in those terms, s 9 and 19 of the bill of rights provide a basis from which it may be developed.

¹³¹ See further Krygier "Tradition as law" 1986 *Law & Philosophy* 237 240-241.

¹³² In this respect, the recent decision in the *Shilubana* case (n 117) par 54 apparently minimised the importance of community practice, whether past or present. For general purposes, the court held that past practice constitutes only one of several factors that must be considered. See Van der Westhuizen J's three factor test (par 44-47 and 76). On the question of tradition, see Himonga "Taking stock of changes to customary law in a new South Africa" in Glover (ed) *Essays in Honour of A J Kerr* (2006) 215 226.

¹³³ Krygier (n 131) 240-241.

SAMEVATTING

MAAGDELIKHEIDSTOETSING: MISDAAD, ONREGMATIGE DAAD OF WARE KULTURTRADISIE?

Tradisioneel het al die inheemse kulture van Suidelike Afrika die beskerming van vroulike maagdelikheid hoog geskat. Dit was belangrik om maagdelikheid as bedingingsvoordeel in huweliksonderhandelinge te gebruik. Daarom was jong meisies verplig om gereelde inspeksies te ondergaan. Alhoewel hierdie praktyk stelselmatig in onbruik verval het, het dit in die laaste twee dekades opnuut byval gevind. Dit is nou 'n instelling by die belangrikste tradisionele feeste, merkbaar veral in Zoeloeland. As die jeugdigheid van die meisies, sowel as die sosiale druk om deel te neem aan die proses egter in ag geneem word, blyk dit dat diegene wat verantwoordelik is vir die oplewing van die praktyk hulself geregtelik kan blootstel. In die verband kom veral deliktuele eise ter sprake maar ook strafregtelike vervolging ingevolge die Wet op Kindersorg 38 van 2005 en die Wysigingswet op die Strafwet (Seksuele Misdrywe en Verwante Aangeleenthede) 32 van 2007 is gepas.

Ten spyte van die grondwetlike waarborg van kulturele vryheid ingevolge artikels 30 en 31 van die grondwet, blyk dit bykans onmoontlik te wees om maagdelikheidstoetse te regverdig in die lig van ander grondwetlike beginsels soos gelykheid, menswaardigheid en die reg op fisiese integriteit.

In die lig van onlangse argumente deur Erika George het die heersende debat oor inheemse kulture en menseregte 'n dooiepunt bereik. Daarom moet ons eerder konsentreer op die brandende kwessie van openbare gesondheid, wat beter kan bydra tot die behoorlike regulering van maagdelikheidstoetse. Die doelwit kan slegs bereik word as voorstanders van beide kante hul standpunte oor kultuur en menseregte aanpas en 'n meer insiklike benadering tot hierdie begrippe as vertrekpunt benut.

“That today’s professional judge owes a general duty to give reasons is clear ... The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. ... The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. ... [W] here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. ... The rule is the same: the judge must explain why he has reached his decision. ... Transparency should be the watchword” – *Flannery v Halifax Estate Agencies Ltd* 2000 1 All ER 373 377-378 (CA).