

THE CONSTITUTIONALITY OF THE MAIDEN BURSARY

by

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DEDICATION

For the very first time in my life, I was able to show myself unwavering kindness and patience. In the midst of countless thoughts of giving up, I had the courage to tell myself that when I wake up the following morning, my life will be better than it was the previous day. I have never had the opportunity to say that I am proud of myself, but today, I am. Saying these words did not and still does not come with ease, there was a little voice inside my head convincing me not to say them because what if, what I am proud of does not reflect my best standard? The stakes are high for me and I have so much to lose. Another voice inside my head told me, yes, the stakes are high but they would not be high if you were not capable of reaching higher and beyond. So then I told myself, that in this instance there is nothing to lose but more space to learn and improve. So I dedicate this dissertation to myself and everyone who finds a sense of belonging and comfort in the words expressed above. Truly, there might be something to lose but not everything to lose.

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I would like to express my sincere gratitude to my supervisor A/Prof Barratt for her guidance and invaluable support. I extend special thanks to my friends and family for cheering me on during times of doubt and despair. Your love and support kept me going.

ABBREVIATIONS

| | |
|--------|--|
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| UDHR | Universal Declaration of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| OUA | Organization of African Unity |
| PAJA | Promotion of Administrative Justice Act |
| PEPUDA | Promotion of Equality and Prevention of Unfair Discrimination Act |
| POWA | People Opposing Women Abuse |
| SADC | South African Development Community |
| UN | United Nations |

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Chapter One

1.1. INTRODUCTION

“There is no limit for us as maidens . . . we are going to get the bursary (whether we) pass with distinction or not. . . with your body, with your virginity, we get the bursary.”¹

In 2015, South Africa saw yet another student uprising as university students took to the streets, chanting songs as they marched against the increment of fees. It is common knowledge that the majority of South African households could not and continue to not afford to pay for their children’s tertiary education, therefore the reliance on different scholarships or bursaries is not news.

In response to this outcry, in January 2016, an influx of South African newspapers reported on the Maiden Bursary Scheme from the UThukela District Municipality in the province of KwaZulu-Natal. According to these newspaper articles and as confirmed by a report from the Commission for Gender Equality,² the bursary was awarded to 16 female students to further their tertiary education.³ This bursary was set to acknowledge the difficulties that a number of students face when it comes to pursuing their tertiary education.

The bursary caters for four categories of students; new students, debt payments, returning students, and maidens. The first three categories cater for both male and female students, while the last category, the maidens, consists of and caters for female students, only. The bursary covers full tuition fees, accommodation fees, student debtors’ fees, books, and stationery.⁴ The bursary may be terminated if the recipient fails a subject or ceases to be a student.

¹ This is a quotation from one of the recipients of the bursary, Bongiwe Sithole (pseudo name) AFP ‘Some happy to undergo virginity testing’ *Independent Online* (IOL) 10 March 2016, available at <http://www.iol.co.za/dailynews/news/some-happy-to-undergo-virginity-testing-1995847>, accessed on 2 June 2021.

² The Commission for Gender Equality is a chapter 9 institution with a constitutional mandate of promoting the respect for gender equality, the protection, development, and attainment of gender equality. They achieve this mandate through methods such as research, investigation and education.

³ Commission for Gender Equality ‘Investigative report on the Maiden Bursary at the UThukela District Municipality’ (Supplementary Investigative Report) (2016), available at https://static.pmg.org.za/161025Supplementary_Investigative_Report.pdf, accessed on 15 November 2021.

⁴ Ibid para 8.1.

At first glance, the induction of this bursary seemed to be an invaluable response to the societal financial and education problem. However, what was of utmost controversy was the unusual requirement of the bursary. Before becoming a recipient, a girl needs to provide a maiden certificate to prove that she is indeed a virgin. At the heart of the bursary is the core requirement of a girl's virginity. When a girl ceases to be a virgin, it is common cause that her scholarship will be terminated. In other words, despite not being stated in black and white, a girl must undergo a virginity test, and upon receipt of the bursary, she must remain a virgin.⁵

1.2. THESIS STATEMENT

The Maiden Bursary is a weapon of empowerment that seeks to advance and uplift women from disadvantaged communities, however this advancement is derailed by the bursary's requirement that women should be and remain virgins for the duration of their funding.

1.3 ARGUMENT

African cultures, such as the Zulu culture amongst others, value a woman's virginity. Virginity testing as a cultural and traditional practice is a protective mechanism for children's sexuality, prevention of teenage pregnancy, limiting the spread of HIV/AIDS and other sexually transmitted diseases.⁶ It is also used as a strategy to promote proper sexual behaviour among young women.⁷ Passing the virginity test brings pride to the woman's family⁸ and the denial of such a practice denies women the autonomy to stay true to their cultural identity.⁹ Despite the test's protective mechanism, virginity testing as a practice is still viewed as a human rights violation¹⁰ because it is invasive, discriminatory, and arguably involuntary. For the latter,

⁵ Ibid at 18.

⁶ Chisale 'Decolonising HIV prevention: A critical examination of *ukusoma* and virginity testing' (2016) 23 *Alternation Journal* 2 at 223.

⁷ Chisale and Buffel 'The culturally gendered pastoral care model of women for refugee girls in a context of HIV/AIDS' (2014) 14 *Studia Historiae Ecclesasticae* at 291.

⁸ Ibid at 218.

⁹ Chisale & Byrne 'Feminism at the margin: the case of the virginity bursaries in South Africa' (2018) 16 *African Identities* 4 at 376.

¹⁰ Chisale supra note 6 at 218.

women who refuse to undergo the test, are assumed to be non-virgins and are subjected to ostracisation and insults.¹¹ This inevitably limits their right to dignity.

This paper argues that the Maiden Bursary's requirement that women should be and must remain virgins is not constitutionally compliant. In addressing the constitutionality of this requirement, the starting point is acknowledging that there is a requirement that one must be a virgin. This raises constitutional issues of privacy and dignity. Secondly, the making of a bursary available to females and not to males raises an equality issue. This differentiation is very common and is not regarded as unfair discrimination. However, the problem arises not because the recipients are female only but because of the virginity testing requirement. Thirdly, there is a tension between the right to culture that seems to be patriarchal and seems to be based on the concept of controlling women and the right to sex and gender equality – which would reject control of women on the basis of a number of human rights including equality, dignity, and privacy. Fourthly, the emphasis on virginity means that a woman cannot receive the bursary if she is pregnant or if she has given birth to a child. This is more than about just choices about sexual activity. It is also about reproductive rights and the choice to have a baby which raises constitutional issues of privacy, dignity, equality, and the right to bodily integrity. Lastly, the decision by an organ of state to include the virginity requirement as an empowerment mechanism does not constitute just administrative action.

1.4. RESEARCH METHOD

This is a normative legal research that makes use of international and regional instruments, case law, statutes, academic journals and commentary, books, newspaper articles, public and non-governmental submissions, to prove the argument raised above.

1.5. CHAPTER SYNOPSIS

Chapter 1 is an introduction of the research; it sets out the background and core argument of the research.

Chapter two explores how the virginity requirement may limit women's constitutional right to dignity in terms of section 10 of the Constitution because it attaches a girl or woman's worth

¹¹ Erika R George 'Like a virgin? Virginity testing as HIV/AIDS prevention: Human rights universalism and cultural relativism revisited' (2007) 1 *Law Journal* 1 at 15.

and respect to their sexual conduct instead of having their dignity respected by virtue of being a human. The chapter further explores how this requirement also infringes the right to privacy in terms of section 14 of the Constitution, which at its core is the respect for one's inner sanctum.

Chapter three is an equality analysis, in terms of section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act. It explores how the bursary serves a legitimate governmental purpose and serves as a redress measure. It further explores how the virginity requirement may be discriminatory on the grounds of sex, gender and alternatively on an unlisted ground of virginity status. It also explores whether such discrimination is justifiable.

Chapter four looks at the conflict between the right to culture and other constitutional rights such as the rights to equality, privacy, and dignity. This chapter acknowledges the importance of the right to culture while also encouraging the exercise of this right within the confines of the Constitution. This chapter also explores how the requirement to provide a maiden certificate, thereby undergoing a virginity test can be used as a weapon for empowerment. It also explores the tension between the right to culture that seems to be patriarchal and seems to be based on the concept of controlling women and the right to sex and gender equality.

Chapter five looks at how the emphasis on virginity limits women's reproductive health care rights, and how the latter intersects with other rights. The chapter also explores how imposing abstinence on women limits their autonomy.

Chapter six looks at how the decision to award a bursary that has a virginity condition may constitute administrative action in terms of section 1 of the Promotion of Administrative Justice Act (PAJA) and therefore reviewable on grounds such as rationality and reasonableness. This chapter also looks at how in the event that the decision does not constitute administrative action in terms of PAJA, it can be reviewed in terms of the principle of legality.

Chapter Two: Virginitv requirement

2.1. INTRODUCTION

The primary requirement for the Maiden Bursary is that one must be a virgin. Virginitv often carries a narrowed, heteronormative, and hymenal definition. One that is based on penile-vagina sexual intercourse.¹² The primary focus of this definition is the penetration of a vagina with a penis or any phallic object thereby breaking the hymen.¹³ Though virginitv has no ties to the hymen, the breaking of a hymen, however, carries a symbolic tie that refers to the loss of virginitv.¹⁴ Virginitv in this instance means that a woman must not have engaged in vaginal penetrative sex because this is the only “possible” physical examination to prove one’s virginitv. Determining virginitv on the intactness of the hymen excludes other sexual activities that may not include vaginal penetration such as oral and anal sex.¹⁵ This means that men are not subjected to this test, and women who engage in other sexual activities that do not include vaginal penetration can successfully qualify because there is no similar test to determine a man’s virginitv or that one has engaged in other sexual activities that are not penetrative sex.

The virginitv requirement raises constitutional issues of the right to dignity and privacy.

2.2. DIGNITY

Apartheid deprived black people of the right to vote, quality education, and equality. They were not afforded dignity because they were deemed to be subordinate to white people and the law was used to reflect this falsified hierarchy.¹⁶ Today, dignity is one of the fundamental values of the South African Constitution used to address and remedy the country’s past injustices.¹⁷ The apartheid laws and government discredited and subjugated black people and other minority groups. This subjugation led to the exclusion and inferior ranking of minority groups.¹⁸

¹² Zoe Duby ‘Penile-vaginal heteronormativity in defining sex, virginitv, and abstinence: Implications for research and public health in Sub-Saharan Africa’ (2019) available at <http://www.dsbsfieldnotes.uct.ac.za/news/penile-vaginal-heteronormativity-defining-sex-virginitv-and-abstinence-implications-research>, accessed on 3 June 2021.

¹³ Ibid.

¹⁴ Rachel Cooper & Lynn Nylander (*De*) *Constructing Sexuality and Virginitv* (Master’s Thesis, Lund University, 2010) at 45.

¹⁵ Zoe Duby supra note 12.

¹⁶ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40.

¹⁷ *Dawood and Another v Minister of Home Affairs and Others* 2003 (3) SA 936 (CC) para 35.

¹⁸ *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 329.

Disgruntled yet forgiving of our past, dignity is now a restoration of self-worth for all South Africans and it plays a rejuvenating role especially to those who have been previously marginalised and disadvantaged.¹⁹

The seriousness of dignity is enshrined in the South African Constitution which expresses dignity as a founding value and a justiciable right.²⁰ For the former, dignity is a value that is used to inform and interpret other rights²¹ such as “the right to equality, right to not be punished in a cruel, inhuman or degrading way and the right to life.”²² Dignity is also a justiciable and an enforceable right.²³ Section 10 of the Constitution holds that everyone has the right to dignity and this right should be protected and respected.²⁴ The Universal Declaration of Human Rights considers dignity as the foundation of all freedom, justice, and peace²⁵ because every human being is born free and equal in dignity and rights.²⁶ Article 5 of the African Charter on Human and Peoples’ Rights also promotes the right to the respect of inherent dignity and prohibits all forms of exploitation and degradation.²⁷ Article 3 of the Protocol to the African Charter on Human and Peoples’ on the Rights of Women in Africa enshrines women’s right to inherent dignity and affords them recognition and protection of other human rights. This provision further gives member states the responsibility to take appropriate measures that prevent exploitation and degradation of women.

A woman takes a virginity test for the purposes of proving to someone else her virginity status. In this case, young women have to undergo a virginity test not for themselves as this would be unnecessary because their status is already known to them. Instead, they undergo the virginity test because it is required of them to prove to their bursary scheme. In the next paragraph I

¹⁹ *Dawood* supra note 17 para 35.

²⁰ Section 1 of the Constitution.

²¹ *Dawood* supra note 17 para 35.

²² *Ibid.*

²³ *Ibid.*

²⁴ Section 10 of the Constitution.

²⁵ UN General Assembly, Universal Declaration of Human Rights (10 December 1948) Preamble.

²⁶ *Ibid* at Article 1.

²⁷ African Charter on Human and Peoples’ Rights (adopted 27 June 1981 and entered into force 21 October 1986) (Banjul Charter). This Charter was signed and ratified by South Africa in 1996.

explain how the requirement of a maiden certificate may undermine a woman's right to dignity.²⁸

2.1.1. Virginit

2.1.1. Virginit
In the European culture, a woman's honour was primarily tied to her sexual purity or virginity. Unmarried women who engaged in sexual activities before marriage and married women who engaged in sexual activities with someone who was not their husband were considered to be dishonourable.²⁹ Because women had secondary honour "that is reflected or shared honour of the men and family with whom they were associated",³⁰ it was not the woman alone who was dishonoured but the man that she was associated with.³¹ When a woman's conduct brought shame, disgrace and dishonour, it was the man and not the woman that had to defend this dishonour.³² In the African customary law context, a woman who is a virgin brings pride and honour to her father and family. Her virginity allows the family to negotiate a higher amount for *lobolo* ³³ and the loss of her virginity constitutes a sexual delict to the father and family because it is them and the woman that suffers harm.³⁴ The honour that she brings to her family and her father cements her worth and acceptance in the community. If a woman decides to exercise her sexual agency before marriage, she is considered to be promiscuous because she deviates from the perception of moral purity that gives her family a higher bargaining power.³⁵

In this case, a girl is not entitled to dignity by virtue of being a human being, she needs to earn it by bringing honour to her father and family. Okin makes reference to a practice that is mainly common in Latin America and South East Asia of rapists marrying their rape victims. The

²⁸ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted in Maputo 11 July 2003) (Maputo Protocol).

²⁹ Amanda Barratt 'Strange bedfellow? The action for adultery and the South African Bill of Rights' (2014) 7 *Int. J. Private Law* 4 at 312 also see Appiah K *The Honor Code: How Moral Revolutions Happen* (2010) Norton New York at 141.

³⁰ Appiah K supra note 29 at 104 also see Stewart F *Honor* (1994) University of Chicago Press, Chicago at 107.

³¹ Amanda Barratt supra note 29 at 312.

³² Stewart supra note 30 at 107 also see Appiah K supra note 29 at 61.

³³ Fiona Scorgie 'Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention' (2002) 61 *African Studies* 1 at 64.

³⁴ Amanda Barratt 'The South African action for adultery-common law, customary law and constitutional perspectives' (2017) 8 *Int. J. Private Law* 3 at 244.

³⁵ Fiona Scorgie supra note 33.

acceptance of such marriages is to redeem the rape victim's family.³⁶ Here, I am not in any way equating rape to the "loss of virginity", what I am trying to do is draw reference to the common factor that "impure" women bring dishonour to their families. Okin notes that rape is not viewed primarily as an assault but more as a dishonour to the rape victim's family.³⁷ Therefore, by marrying a rape victim, the rapist, or the marriage rather, restores the honour of the victim's family.³⁸ The same can be said about a girl who has "failed" the virginity test and is no longer a virgin. Some communities will view her, as what Okin refers to, as "damaged goods"³⁹ and because of this, is not considered to be marriageable. Through this, the girl brings a dishonour to her family.

Furthermore, the inability of a woman to produce a maiden certificate automatically means that she is not a virgin and is subject to stigmatisation, isolation, rejection, and mockery from her community.⁴⁰ This defies the underlying element of respect that is entrenched on one's dignity as well as their worth.⁴¹ The interconnection of the right to dignity and freedom as noted by the Constitutional Court in *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*⁴², shows that human dignity has no value without freedom. That means, when a girl's freedom to choose how and when she wants to sexually express herself is limited and controlled, so is her right to dignity.

³⁶ Susan Moller Okin *Is Multiculturalism Bad for Women?* (1999) Princeton University Press at 15.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Virginity Testing and the Children's Bill Discussion Paper (2005) Children's Institute, University of Cape Town at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Law_reform/Children_Act_guides/Research_and_Submissions/virginity_testing_10_oct_2005.pdf, accessed on 13 January 2022. Also see Durojaye E 'The human rights implications of virginity testing in South Africa' (2016) 16 *International Journal of Discrimination and the Law* 4 at 13.

⁴¹ Durojaye E *ibid* at 14.

⁴² *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 49, the Constitutional Court held:

"human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity"

2.3. PRIVACY

Section 14 of the Constitution enshrines the right to privacy.⁴³ The right to privacy is the right to be left alone⁴⁴ and it concerns only the “inner sanctum of a person such as his or her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community.”⁴⁵ Article 17 of the International Covenant on Civil and Political Rights as well as the Universal Declaration of Human Rights promote the protection of the right to privacy, and requires states to refrain from measures that invade one’s inner sanctum such as their home and body.⁴⁶

One would ask how the Maiden Bursary limits a girl’s right to privacy. The bursary requires all its recipients to be virgins and virginity is linked to a girl’s sexual conduct, one that should only be the girl’s business and not the business of an outsider. In *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*, Didcott J held that “what erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is no nobody’s business but mine. It is certainly not the business of the society or the state.”⁴⁷ What a person decides to do with their body, including the sexual activities that they choose to engage in, in their private confines is their own private matter. The right to privacy emphasises the freedom to enjoy intimacy and autonomy and protecting one’s space from invasion.⁴⁸

The right to privacy gives effect to “a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without fear from the outside community.”⁴⁹

⁴³ Section 14 states:

“Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

⁴⁴ Warren, Brandeis ‘The Right to Privacy’ 1890 (4) *Harvard Law Review* 5.

⁴⁵ *Bernstein and Others v Bester N.O. and Others* 1996 (2) SA 751 (CC) para 67.

⁴⁶ UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966) at article 27. Virginity Testing and the Children’s Bill supra note 40 at 10. Also see Durojaye E supra note 40 at 13.

⁴⁷ 1996 (3) SA 617 (CC) para 91.

⁴⁸ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 27.

⁴⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 32.

Therefore, how one expresses their sexual orientation is also protected by the right to privacy⁵⁰ especially “if in expressing [their] sexuality, [they] act consensually and without harming one another, invasion of that precinct will be a breach of [their] privacy.”⁵¹ This means that to regulate or control the consensual sexual conducts of adolescents, “an intimate sphere of their personal relationships”⁵² is an invasion of privacy.

Privacy in this case is about the choices that the recipients of the bursary make in their private lives, that is being able to have sex in private without anyone interfering with that choice. The bursary’s focus on women’s virginity is not only a form of control over the women’s sexual conduct but is an intrusion of their private and intimate choice, this in turn violates their right to privacy which is further exacerbated by the public disclosure of a girl’s virginity status.

Another part of the right to privacy is to have control over your personal information.⁵³ This allows a person to determine the scope in which their private life can be disclosed as well as how and when it can be disclosed.⁵⁴ Virginity testing discloses one’s sexual conduct and it makes it indirectly accessible to the public domain. If a woman does not pass her virginity test her bursary is terminated and her funding is withdrawn. This makes it easy for her family, friends and people surrounding her to ascertain that she failed the test because she had sex. In some instances, the virginity test may occur in public settings where a woman who is a virgin is congratulated while the non-virgin is not. The public’s knowledge of her virginity status and sexual conduct becomes an invasion of privacy.

Women who disclose their virginity status solely for the purposes of attaining financial relief to further their education do not have actual consent.⁵⁵ As a result, the indirect disclosure of their sexual conduct shows a lack of power and control over their personal information thereby invading their right to privacy.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) para 60.

⁵³ A Roos ‘Personal data protection in New Zealand: Lessons for South Africa?’ 2007 *SALJ* 400.

⁵⁴ *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271.

⁵⁵ I explore this at Chapter 5

2.4. CONCLUSION

This chapter has explored how the bursary's virginity requirement infringes the rights to dignity and privacy. The right to dignity as a value and as a right is inherent by virtue of being a human, and should not require a person to earn it. Women who are not virgins are insulted, called all sorts of ill terms and are deemed to bring dishonour not only to themselves but to their families. Because of this, they are subjected to ridicule, stigmatisation and isolation. To base a woman's respect, honour and worth on her sexual freedom does not coincide with the right to dignity. A woman's value should not be tied to her sexual conduct. Furthermore, the virginity testing requirement infringes a woman's right to privacy in two parts, firstly by disclosing their virginity status. In doing so, it makes private information known to the public whether directly or indirectly. Secondly by interfering with the women's private and intimate life. The virginity testing requirement allows the Municipality and the people that have to conduct the test on the women to intrude their private sphere and inevitably policing how they choose to express their sexuality.

Chapter Three: Equality

3.1. INTRODUCTION

Equality is a founding value⁵⁶ and a right that is enshrined in section 9 of the Constitution.

Section 9 states:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

The challenge in this matter is not against a legislative provision, instead, the challenge is against a municipal decision or conduct by an organ of state or an institution, and the Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁷ (PEPUDA) applies. PEPUDA is enacted to give effect to section 9 of the Constitution, this horizontal application allows for all forms of discrimination by the state and ordinary persons to be challenged. When one applies PEPUDA, its provisions must be applied through the constitutional lens, meaning the constitutional principles that apply to section 9 of the Constitution will still be applicable. Because PEPUDA mirrors the section 9 analysis as well as the factors enshrined in the *Harksen test*,⁵⁸ I will adopt the structure that is laid out in the *Harksen test* which states:

⁵⁶ Section 1 (a) of the Constitution provides:

“Human dignity, the achievement of equality and the advancement of human rights and freedoms”

⁵⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

⁵⁸ *Harksen v Lane N.O.* 1998 (1) SA 300 (CC).

- “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).”⁵⁹

Before we establish whether this bursary requirement imposes a burden and is therefore discriminatory, we need to ask if there is a differentiation to start with. This is a principle that gives effect to section 9(1) which guarantees equal treatment, protection and benefit before the law, as a result will be interpreted using the same constitutional lens.

3.1.1 Is there a differentiation?

In dealing with the crux of this question, the Constitutional Court in *Prinsloo v Van Der Linde*, held—

“[i]t is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regard to mere differentiation the constitutional state is

⁵⁹ Ibid para 50.

expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.

Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present”⁶⁰

There are two forms of differentiation, between men and women and between women who are virgins and women who are non-virgins. Bursaries do differentiate on the basis of sex or gender, and it is not considered unfair discrimination because the primary object is to promote the achievement of equality.⁶¹

3.1.2 Is it rational?

It is clear that there is differentiation and now we ask if that differentiation is rational. Section 14(3)(f) of PEPUDA also asks whether the discrimination serves a legitimate purpose. In *Minister of Education & Another v Syfrets Trust Ltd NO & Another*, the deceased’s testamentary will provided for the establishment of a bursary fund for male students, who were non-Jewish and of European descents to pursue their tertiary education. At the core of the will was the establishment of a bursary fund based on a condition that excluded women, Jewish people and non-European descents, a condition that was discriminatory on the grounds of race, sex/gender and religion. The court held that—

“the primary purpose which the trust sought to achieve is undoubtedly charitable and laudable, namely providing bursaries to ‘deserving students with limited or no means’ for tertiary study. Having done so, however, the provisions of the trust immediately disqualify over half of such

⁶⁰ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 25 and 26.

⁶¹ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 32.

potential candidates from applying at all on the basis of their race, gender or religion. Moreover, the trust does not promote marginalized groups; rather it discriminates against them”⁶²

I share similar sentiments in this matter. It is common knowledge that bursaries cannot cater for every student. The problem in this matter arises not because the recipients are females only but because of the virginity testing requirement. For this reason, one would find that there is no legitimate government purpose because at the centre of the requirement is an imposition of harm on women which inevitably deprives women that need financial support from benefiting merely because they are not virgins. As a result, there is no rational connection between the differentiation in question and the governmental purpose that it sought to be achieved. As per the first stage of the *Harksen test*, this is where the enquiry would end.

However, I prove below that even if one were to find that the discrimination serves a legitimate government purpose, therefore, not irrational, it would still not pass constitutional muster.⁶³

3.1.3 Does the differentiation amount to discrimination?

Section 6 of PEPUDA prohibits unfair discrimination against any person, by the state or ordinary person. Section 1 of the Act defines discrimination as:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”

⁶² Ibid para 34.

⁶³ In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 27, the Constitutional Court held that:

“I am satisfied that the differentiation in the present case was rationally connected to legitimate governmental objectives. Not only were they measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources, during a difficult period of transition. This is, however, not the end of the enquiry as differentiation ‘that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purpose of section 8(2)’”

Section 1 of PEPUDA further defines prohibited grounds as—

- “(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground—
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms”

The grounds in subsection (a) of PEPUDA mirror the grounds set out in section 9(3) of the Constitution. Bursaries are not designed to cater to everyone. In the ordinary sense, bursaries are created to differentiate on a number of grounds such as one’s intellectual capacity, economic status, race, and sex. This means that there are bursaries that target students based on merits but there are also bursaries that target students from systematically disadvantaged backgrounds and may exclusively target boys or girls on the basis of financial need. These bursaries, unlike the Maiden Bursary do not violate PEPUDA or the Constitution.

While the bursary serves a legitimate government purpose, the requirement of a virginity test on the other hand discriminates on the prohibited grounds of sex; the physical examination of one’s virginity is only possible if a person has a vagina, and the grounds of gender, the requirement is only applicable to women as per section 1(a) of PEPUDA. Furthermore, section 8 of PEPUDA specifically prohibits gender discrimination and is of relevance to this matter in terms of the prohibition of gender discrimination. PEPUDA clearly emphasises that this includes:

“ any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl child; any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; discrimination on the ground of pregnancy.”

The bursary is only available to maidens and for this reason, only female candidates can be tested, and they bear the burden of undergoing an inspection that men do not have to go through. This requirement is a cultural or traditional practice that imposes a burden and

obligation that disadvantages women and withholds benefits and opportunities or advantages from women, particularly those who are not virgins. This undermines and impairs the dignity of the same women that it is trying to uplift. What this does is to perpetuate harmful sex and gender stereotypes.

3.1.4. Is the discrimination unfair?

Section 14(1) of PEPUDA states—

“it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.”

This provision gives effect to section 9(2) of the Constitution and supports legislative measures that are designed to advance and protect groups that have been disadvantaged by unfair discrimination. It acknowledges the importance of redress measures and the positive steps that should be taken to eradicate social inequality. This provision shows commitment to substantive equality and not formal equality. Formal equality refers to the neutral and symmetrical application of the law with the intention of providing equal treatment.⁶⁴ This liberal and traditional approach assumes that everyone is on an equal playing field, therefore, they have the same skills and resources to compete.⁶⁵ Formal equality upholds equal treatment without preferences or acknowledgement of prejudice.⁶⁶ This approach does not take into consideration the historical disadvantages, socio-economic status, and circumstances of certain groups.⁶⁷ As a result, this approach reinforces and promotes social disadvantages that continue to maintain the dominant status quo of the privilege.⁶⁸ In *President of RSA v Hugo*, Goldstone J held that South Africa’s new democracy requires a form of equality that considers the historical context and circumstances of a certain group before providing an equal treatment approach.⁶⁹ The

⁶⁴ JL Pretorius, ME Klinck and CG Ngwena *Employment Equity Law* (2019) LexisNexis South Africa at 2.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ De Vos Pierre et al *South African Constitutional Law in Context* (2014) Oxford University Press.

⁶⁸ Ibid; also see JL Pretorius ME Klinck CG Ngwena supra note 64.

⁶⁹ *President of RSA v Hugo* 1997 (4) SA 1 (CC) at 729FG.

failure to consider these historical disadvantages and to halt past injustices perpetuates a system of delayed justice⁷⁰ hence the need for substantive equality.

Substantive equality on the other hand considers the present and historical factors that contribute to the inaccessibility of equal opportunities.⁷¹ It looks at the impact that differentiation has on certain groups and this is the form of equality that is adopted by the South African Constitution.⁷² Substantive equality is an approach that aims to dismantle historical inequalities and the creation of new forms of inequality.⁷³ To substantiate the substantive equality approach the Constitutional Court in *Minister of Finance v Van Heerden* held that:

“it is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.”⁷⁴

Moseneke J in *Minister of Finance v Van Heerden* held that for a measure to fall under section 9(2) it must meet the requirements of the threefold enquiry.

“The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.”⁷⁵

On the same note, article 4 of CEDAW also permits substantive equality and holds that a member state must take remedial measures to uplift women. The purpose of these measures should be to create an equal playing field for both men and women in the long run. As a result,

⁷⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 60.

⁷¹ JL Pretorius ME Klinck and CG Ngwena supra note 64 at 2 also see section 14(3)(b) of PEPUDA.

⁷² Ibid.

⁷³ Ibid

⁷⁴ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 27.

⁷⁵ Ibid para 37.

once men and women are on an even playing field those remedial measures must be discontinued to prevent unequal standards from both genders.

On the face of it, the Maiden Bursary fits into the substantive equality approach in that it understands that women have been historically disadvantaged because of their gender and the effects of that past continues to put women in vulnerable positions. As a result, for women to be on an equal playing field with men, they need to take measures that may be seen to discriminate against men or other groups, when in reality those measures are there to advance women. The court held further that:

“legislative and other measures that properly fall within the requirements of section 9(2) are not presumptively unfair. Remedial measures are not a derogation from, but a substantive and composite part of the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality.”⁷⁶

The bursary’s differentiation between females who are virgins and those who are non-virgins and between men and women, has a primary purpose of empowering women, who are a vulnerable and disadvantaged group in society. It achieves this by providing monetary relief for them to pursue tertiary education. The bursary is also a tool for redress or to merely empower students through the provision of financial relief and support and to pave a way for a better future through education. It also allegedly uses the right to education as a method to fight against the spread of HIV/AIDS. It gives effect to the idea that through education one can conquer all as confirmed by CEDAW General Recommendation 36 that:

“as a human right, education enhances the enjoyment of other human rights and freedoms, yields significant development benefits, facilitates gender equality and promotes peace. It also reduces poverty; boosts economic growth and increases income; increases chances of having a healthy life; reduces child marriage and maternal deaths; and, enables individuals to combat diseases such as HIV/AIDS”⁷⁷

⁷⁶ Ibid para 32.

⁷⁷ CEDAW General Recommendation No. 36 on the Rights of Girls and Women to Education (16 November 2017) para 9.

Even if one were to arguably find that the bursary does not discriminate on the grounds of sex and gender, the bursary still discriminates on the basis of virginity status, which is an unlisted ground. Following this one must consider the unfairness of the discrimination and the impact of that discrimination on the person. Amongst other factors one can consider “the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”⁷⁸ In *Minister of Education and Another v Syfrets Trust Ltd NO and Another*, the court in addressing the presumption of unfairness noted that the people who are discriminated against by the bursary condition as stipulated in the will are people who have suffered past disadvantages.⁷⁹ In the case of the Maiden Bursary, women are a previously marginalised group, more so if they do not subscribe to societal standards. As mentioned in the chapter on dignity, in certain parts of the society, women who are not virgins prior to getting married are ostracised and ridiculed. Their self-worth and respect is stripped off.

Similar sentiments are also shared in this case, the disqualification of women that are deserving of the bursary because they are not virgins is not justifiable and is against section 29 of PEPUDA and the National Education Policy Act.⁸⁰

Section 29 of PEPUDA refers to a Schedule on Illustrative List of Unfair Practices in Certain Sectors and section 2 of the Schedule prohibits “unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.” The National Education Policy Act was enacted to give effect to the constitutional right to education by providing for a national education policy. Section 3 of this Act requires the minister to determine a national education policy in alignment with the Constitution by ensuring the advancement of equality, particularly the advancement of women.⁸¹

⁷⁸ Ibid para 51.

⁷⁹ *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 34.

⁸⁰ 27 of 1996.

⁸¹ Section 4 states:

- “4. The policy contemplated in section 3 shall be directed toward—
 - (a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the [interim] Constitution, and in terms of international conventions ratified by Parliament, and in particular the right—

However, despite this active attempt to advance women, one cannot neglect the fact that this advancement comes with a disqualification of other women that are also deserving. Therefore, this maintains the same uneven playing field especially amongst women which renders the discrimination unfair.

3.1.5. Justification

In *August and Another v Electoral Commission*, the Constitutional Court held that “in the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners’ rights in terms of section 36 of the Constitution as there was no law of general application upon which they could rely to do so.”⁸² Similar to the above mentioned case, the last part of the enquiry which is whether the violation was justified is not applicable because the bursary is not a law of general application.

3.2 SOUTH AFRICA’S INTERNATIONAL LAW OBLIGATIONS ON THE RIGHT TO EQUALITY

3.2.1. International law

3.2.2.1. Universal Declaration of Human Rights

The Declaration is premised on the fundamental of freedom and dignity for all.⁸³ In terms of article 2, the effects of human rights should not amongst other reasons be subject to race, colour, sex, language or any other social or identity category. The Declaration further enshrines the right to equal protection before the law without any discrimination⁸⁴ and the right to privacy.⁸⁵ The Declaration has inspired numerous human rights treaties which South Africa is a signatory to.

(i) of every person to be protected against unfair discrimination within or by an educational department or education institution on any ground whatsoever

...

(c) achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women...”

⁸² *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) para 23.

⁸³ Article 1 of the Universal Declaration of Human Rights.

⁸⁴ Article 7 of the Universal Declaration of Human Rights.

⁸⁵ Article 12 of the Universal Declaration of Human Rights.

3.2.2.2. Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁶ promotes and protects women's rights, and it further calls on all its member states to eliminate any form of unfair discrimination that targets women. Article 1 of CEDAW defines the term discrimination against women—

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The Maiden Bursary is a governmental measure that is meant to empower women, but its means in terms of article 1 are discriminatory and cause a disproportionate effect on women. Women who are not virgins in this case lose the opportunity to access free higher education, this restricts women from enjoying and accessing certain benefits and privileges because of their virginity status.

Article 2 of CEDAW requires its member states to take measures to abolish or modify laws, customs and practices that discriminate against women. Article 5 further requires member states to take appropriate measures and carve out a different perspective for men and women that is intended on eradicating prejudicial and customary practices that see men as superior or boxes men and women into expected societal stereotypes.

Virginity testing is a customary practice that is prejudicial to women and fits the criteria of a harmful practice because it—

“a constitute[s] a denial of the dignity and/or integrity of the individual and a violation of human rights and fundamental freedoms

⁸⁶ Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 (CEDAW). Despite being adopted in 1979, CEDAW came into force in 1981. CEDAW is a human rights treaty that South Africa signed in January 1993 and ratified on 15 December 1995 without any reservations.

- b constitute[s] discrimination against women or children and [is] harmful insofar as [it] results in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;
- c [it is a] traditional, re-emerging or emerging practices that [is] prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, based on sex, gender, age and other intersecting factors;
- d [it is] imposed on women and children by family, community members, or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.”⁸⁷

Despite their link to reproductive rights, harmful cultural practices are considered an equality matter. CEDAW General Recommendation 31 holds that harmful cultural practices are grounded in discrimination on the basis of sex, age, gender, and other intersecting forms of discrimination which are often associated with different forms of violence and harm. The purpose of this harm is to deny women their rights to dignity, education, equality, and health care. These practices are imposed on women by their friends, family, and society despite their decision to consent.⁸⁸ The virginity requirement further “reinforces socio-cultural norms that perpetuate women’s inequality, including stereotyped views of female morality and sexuality, and serves to exercise control over women and girls.”⁸⁹

3.2.2. Regional

3.2.2.1. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)⁹⁰

⁸⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/ general comment No. 18 of the Committee on the Rights of the Child on Harmful Practices para 16 (own emphasis).

⁸⁸ Ibid para 14.

⁸⁹ Eliminating Virginity Testing: An Interagency Statement (2018), available at <https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1>, accessed on 19 January 2022 at 5.

⁹⁰ South Africa ratified on 7 January 2000.

Aside from other international law instruments, the Maputo Protocol also prohibits all forms of discrimination against women and requires states to take legislative and other measures to eradicate discrimination.⁹¹ The Protocol promotes the enjoyment of all rights and freedom for everyone regardless of their social identity such as race, sex, religion. It requires everyone to have the same access to the law and to enjoy the same benefits and protection before the law. The Protocol requires member states to take measures that eliminate harmful cultural and traditional practices which are premised on the idea of “inferiority or the superiority of either of the sexes or on stereotyped roles for women and men”.⁹² Article 5 further requires member states to eliminate all harmful cultural practices which negatively affect women.

3.2.2.2. SADC Protocol on Gender and Development

Similar to CEDAW, the SADC Protocol,⁹³ confirms the necessity of affirmative action as a form of eradication of gender inequality.⁹⁴ Article 11 requires State Parties to adopt legislative measures that ensure the protection of the girl child by eliminating all forms of discrimination against the girl child. They must also ensure equal access to education, health care as well as protection from harmful cultural attitudes and practices. In recognising that violence against women and children includes traditional practices that are harmful to women⁹⁵ the SADC Protocol further calls for the eradication of elements in traditional norms, practices and stereotypes that give legitimacy and fuel this violence.⁹⁶

3.3. CONCLUSION

The Maiden Bursary provides financial assistance to women who want to pursue their tertiary education on condition that they remain virgins. Like any other bursary, it gives effect to substantive equality by discriminating against a certain group. The bursary’s strict requirement that a woman must be a virgin before being a recipient and must remain a virgin throughout the duration of her education and failing to do so will lead to a termination is discriminatory.

⁹¹ Article 2(1) of the Maputo Protocol.

⁹² Article 2(2) of the Maputo Protocol.

⁹³ The SADC Protocol was signed and adopted by South Africa in August 2008.

⁹⁴ Article 5 of the SADC Protocol on Gender and Development.

⁹⁵ An Addendum to the 1997 Declaration on Gender and development by SADC Heads of State or Government, available at https://www.justice.gov.za/docs/other-docs/1998_SADC%20DeclarationAddendum.pdf, accessed on 12 January 2022 para 5.

⁹⁶ *Ibid* para 13.

It unfairly discriminates on the grounds of sex and gender because virginity testing is done on women, and people with vaginas, alternatively, against women who are non-virgins, that is on an unlisted ground. As a result of this unfair discrimination the bursary does not pass constitutional muster. South Africa has international obligation to promote equality and the virginity requirement also limits those obligations.

Chapter 4 : Culture

4.1. INTRODUCTION

The word culture is quite complex and is hard to define. In trying to explore the definition of culture, O'Regan J in *MEC for Education KwaZulu-Natal and Others v Pillay*⁹⁷ referenced O'Keefe.⁹⁸ O'Keefe notes that culture involves multifaceted elements ranging from the arts, film, radio, television and to what is of relevance in this paper, people's way of living such as values, common practice and shared experiences. Referring to common practices and shared experiences, South Africa is a rainbow of cultures, rich in history and traditions. This form of diversity is one of the catalysts of constant evolving democracy hence the constitutional protection of the right to culture. Culture gives us a sense of belonging and it is an "inescapable part of being a human and helps us make sense of the world. It shapes our identity and is central to the way we experience ourselves, our collectivities, and the world."⁹⁹

The courts have also noted that culture is not stagnant, instead it is influenced and constantly evolves over time. In coming to the conclusion that a mother was entitled to negotiate *lobolo* and to receive *lobolo* of her daughter, the High Court in *Mabena v Letsoalo* acknowledged that customary law like any other system of law is in a state of "continuous development"¹⁰⁰

In *MEC for Education KwaZulu-Natal and Others v Pillay*, the Constitutional Court held that the respect and protection of religion and cultural practices are protected by the Constitution because of their centrality to the rights to human dignity as well as equality.¹⁰¹ South Africa has signed and ratified numerous human rights treaties that acknowledge the vitality of culture in a diverse society. As a result, the Universal Declaration of Human Rights enshrines the right to free participation to cultural life¹⁰² and the International Covenant on Civil and Political Rights further holds that ethnic, religious or linguistic minorities should not be "denied the right in community with the other members of their group, to enjoy their own culture, to profess

⁹⁷ *MEC for Education KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

⁹⁸ O'Keefe 'The 'Right to take part in cultural life' under Article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 904 at 905.

⁹⁹ Catherine Albertyn "The stubborn persistence of patriarchy"? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 1 at 170.

¹⁰⁰ *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1074.

¹⁰¹ *MEC for Education KwaZulu-Natal and Others v Pillay* supra note 97 para 62.

¹⁰² Article 27 of the Universal Declaration of Human Rights.

and practise their own religion, or to use their own language.”¹⁰³ Similar to these human rights treaties that South Africa has signed and or ratified, the South African Constitution specifically protects the right to culture.

Section 30 of the Constitution provides that “everyone has the right to use the language and to participate in the cultural life of their choice”. Section 31 further states—

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

The protection of the right to culture may also give effect to cultural autonomy, where different cultural groups have the freedom to express their cultural identities without any fear of harm. One achieves this through the preservation of certain values and traditions, the latter including gender roles.¹⁰⁴ According to Albertyn, in the context of South Africa, the freedom to express your cultural identity is important because of the country’s apartheid past “that denigrated and stigmatised African and minority cultures as less worthy”.¹⁰⁵

It is therefore important in our encouragement of cultural diversity to fully acknowledge that even though culture is predominately practiced collectively, it is still an individualistic right. The Constitutional Court cemented this in *Christian Education South Africa v Minister of Education* where it noted that the right to culture and the rights enshrined in sections 30 and 31 are not group rights¹⁰⁶ because the Constitution does not protect collective rights instead it

¹⁰³ International Covenant on Civil and Political Rights at article 27.

¹⁰⁴ Catherine Albertyn supra note 99 makes reference to Holomisa ‘A traditional leadership perspective of gender, rights, culture and the law’ in K Bentley & H Brookes *Agenda Special Focus* (2005) 48.

¹⁰⁵ Catherine Albertyn supra note 99 at 174.

¹⁰⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (*Christian Education*) para 23.

protects the rights of individuals who exercise their rights through interactions and engagements with others.¹⁰⁷

4.2. WEAPON FOR EMPOWERMENT

Virginity testing is a cultural practice that celebrates and appreciates womanhood in many cultures and in our case it can be used as a weapon for women empowerment. One of the recipients of the bursary, Thubelihle Dlodlo¹⁰⁸ is from a family that cannot afford to pay for her university fees, however, as a result of being a virgin, she now has the opportunity to study further and complete her degree.¹⁰⁹ Another recipient of the bursary Bongiwe Sithole speaks highly of the bursary and the impact it has had in her life. As a thirty-two-year-old woman she would have dropped out of university due to poverty, but the introduction of the bursary gave her a second chance.¹¹⁰ The Maiden Bursary Scheme provides unmarried young women and girls a financial incentive to pursue their tertiary education. In return, the women must remain virgins. In this case, financial relief is an empowerment tool.

According to the Mayor Dudu Mazibuko, the bursary further fights against other rampant social ills in South African communities. In addition to contributing towards access to education the bursary encourages young and unmarried women to abstain from sex to curb the rate of teenage pregnancy and reduce their chances of contracting HIV/AIDS¹¹¹ and other sexually transmitted diseases. The bursary is not only focused on its primary purpose, which is to provide financial relief to young women, but it also bears health benefits. Despite the Mayor's comments, Behrens holds that the argument that virginity testing will decrease the number of HIV/AIDS infections, sexual transmitted diseases, and teenage pregnancy, though may be a justified reason, it is not obvious that virginity testing is the only and best intervention to alleviate these issues.¹¹²

¹⁰⁷ De Vos Pierre supra note 67.

¹⁰⁸ Recipient's pseudo name.

¹⁰⁹ AFP 'Some happy to undergo virginity testing' *Independent Online (IOL)* 10 March 2016, available at <http://www.iol.co.za/dailynews/news/some-happy-to-undergo-virginity-testing-1995847>, accessed on 2 June 2021.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

According to a research conducted by People Opposing Women Abuse (POWA), they found that women favoured virginity testing because it instils discipline, it discourages ‘promiscuity’, and it teaches women how to respect themselves, how to make moral decisions and it also helps the parents to monitor their children’s activities.¹¹³

4.3. CONTROL OF WOMEN

Despite the above, culture is not without criticism. There is a huge debate about the tension between the right to culture and gender equality, in that the virginity requirement as mentioned under the chapter on equality raises an equality issue as it is a mechanisms through which men exert control over women. That is, it is a core feature and mechanism of patriarchy. Okin refers to two connections between culture and gender. The first being personal, reproductive, and sexual life functions.¹¹⁴ The second connection is the control of women which is contrary to the right to equality.¹¹⁵ Culture seems to be patriarchal, in so far as it controls women and limits their rights to equality and dignity. Culture maintains male dominance through the suppression of women, it does this by creating the fallacious “perfect woman” standard that determines what and when a woman’s actions may be deemed “appropriate”. This is often done by placing value on women’s sexual and reproductive abilities, and the failure to meet the standard deems them unworthy. Okin notes that some cultural customs such as clitoridectomy and child marriage to name a few, are deemed necessary because they enable the control of women. A clitoridectomy practitioner in the Ivory Coast and Togo explained that the practice “helps insure a girl’s virginity before marriage and fidelity afterwards by reducing sex to a marital obligation.”¹¹⁶ Furthermore, supporters of the female genitalia cutting say the practice “curbs a girl’s sexual appetite and makes her more marriageable”.¹¹⁷ These cultural practices, like

¹¹³ Submission by People Opposing Women Abuse (POWA) to the CEDAW Commission on virginity testing as a harmful traditional practice submitted by Nondumiso Nsibande at 4 and 5, available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/PeopleOpposingWomenAbuse.pdf>, accessed on 15 November 2021.

¹¹⁴ Susan Moller Okin supra note 36 at 12.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 14. Okin references an interview by the New York Time’s, where a female exciser held that “a woman’s role in life is to care for her children, keep house and cook. If she has a not been cut, she might think about her own sexual pleasure”. See Celia Dugger ‘Genital ritual is unyielding in Africa’ *The New York Time’s* 5 October 1996, available at <https://www.nytimes.com/1996/10/05/world/genital-ritual-is-unyielding-in-africa.html>, accessed on 01 January 2022.

¹¹⁷ Ibid.

virginity testing police women's sexuality and reproduction, they continue to subordinate women while men continue to hold power.¹¹⁸

In *S v Jordan*, O'Regan J noted the sexual double standards in our society. That when it comes to a women's sexuality, different social stigmas are applied, for women their sexual activities are often criminalised.¹¹⁹ They further note that a female sex worker has a face, she is "visible and denounced" and is also seen as a social outcast. A male patron on the other hand is "faceless" and his sexual activities have been ignored and accepted.¹²⁰ The stigmatising and condemning of women for expressing their sexual freedom while celebrating men who do the same is an act of policing and controlling women. Like male patrons, it seems accepted and normalised that men do not have to undergo a virginity test. This explains the municipality's decision to only target women and not men.

In this case, the virginity testing requirement continues the same discriminatory and patriarchal views that the Constitutional Court and our Constitution has spoken against. When a woman passes her virginity test, her community and family celebrate the honour and dignity that she brings unto them. This is a practice that promotes and strengthens cultural autonomy as it reignites cultural beliefs and practices that unify the community.¹²¹ The condition of the Maiden Bursary is based on cultural values and principles that are consistent with the aforementioned constitutional and international law rights. However, the enjoyment of the right to culture is subject to the Constitution.¹²² It could be argued that this cultural practice, while it celebrates virginity and the honour of women, is in fact a tool for controlling women and their sexuality.

¹¹⁸ Catherine Albertyn *supra* note 99 at 171.

¹¹⁹ O'Regan J and Sachs J at para 65 held that for the purposes of their case, the criminalisation of women's sexual activities is prejudicial to women and "runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality."

¹²⁰ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) para 64.

¹²¹ Erika R George 'Virginity testing and South Africa's HIV/AIDS crisis: Beyond rights, universalism and cultural relativism toward health capabilities' (2008) 96 *Calif L Rev* 1447 at 1477.

¹²² *Ibid.*

Firstly, women have found other means of sexual pleasure that do not include vaginal penetration, such as anal sex. This imposes a burdensome sexual responsibility on women than men because men do not undergo virginity testing¹²³ as there is no way to test men.

Secondly, the research conducted by POWA shows that virginity testing is used as a tool to discipline and control young women and a lot of parents believe that if their children remain virgins, they will have good morals and will be bound to do well in life. The controlling of women is often embedded in the false narrative, that a woman who remains a virgin is a “good woman”. This “good woman” is rewarded for her good behaviour and the pride that she brings to the family. This, however, has an effect on women who are not virgins as they are made to suffer from humiliation because not only did they bring dishonour and shame to their families, but they also ruined their future prospects.¹²⁴ The fixation is so much on controlling women that some of the reasons that lead to the loss of virginity, in the case of rape and abuse are not taken into account. Looking at virginity with the sole purpose of controlling women does not bear a holistic approach. It is out of touch with people’s realities and lived experiences because it does not look at the circumstances surrounding the loss of virginity. Instead, it subjects a woman to revictimisation and “tarnishment” of her image especially if she lives in a traditional and conservative society that holds a girl’s virginity in high regard.¹²⁵

Thirdly, beyond controlling women, it also discriminates against them. It exploits women for the benefit of men, particularly older men. This act is viewed as the grooming of young women for the pleasure of men.¹²⁶

The claim that the bursary empowers women is not completely unfounded. Women empowerment is the upliftment of women to give them the same equal opportunities as their men counterparts. This includes affirmative action measures that create an equal playing field for both men and women.¹²⁷ However, the problem with the bursary is that it assumes that virginity testing is the only option that can prevent social ills. This is not correct, as there are

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ *Biyela Nokukhanya Angel Virginity Testing As Women Empowerment: A Case Study of the Thukela District Municipality’s Virgin Bursary Scheme* (LLM thesis, University of KwaZulu-Natal, 2018) at 38.

other educational and awareness programmes that teach safe sex that would be a more effective intervention.¹²⁸ The bursary further assumes that women can only refrain from sex if they are lured with an incentive.¹²⁹ This form of empowerment is, however, discriminatory.

This does not end here, even those women who are indeed virgins can still be ostracised and miss out on an opportunity to obtain this bursary because a woman's virginity status is determined by the intactness of her hymen. There are some women who were born without a hymen, as a result this method of confirming one's virginity is inaccurate.¹³⁰ Furthermore, a hymen can be ruptured when playing sports or other physical activities and not only through vaginal penetration.¹³¹ Behrens, therefore, argues that the determination of a woman's virginity status through the intactness of a hymen is inaccurate because this can produce false results.¹³² This means that a woman who is a virgin could be deemed as a non-virgin and vice versa. To be incorrectly categorised as a non-virgin puts a woman "at risk of harm or indignity as a result of their false classification".¹³³

Virginity testing continues to reinforce patriarchal norms. Behrens argues that in a research conducted by Leclerc-Madlala¹³⁴ asking women alone to remain virgins encourages women to be submissive and subservient to men.¹³⁵ They are asked to hold on having sex until they are married but this is not expected of men. Virginity testing encourages women to be virgins, and if they are virgins, they are considered to be well-mannered, respectful, and obedient. Teaching women to be subservient creates a hierarchy between men and women. In return this creates

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Harmful Social and Cultural Practices - Virginity Testing? Submission to the Select Committee on Social Services Children's Bill (Cape Town 2005), available at <https://www.sahrc.org.za/home/21/files/30%20SAHRC%20Submission%20on%20Childrens%20Bill%20-%20Virginity%20Testing%20%28Parl.%29%20Oct%202005.pdf>, accessed 13 January 2022.

¹³¹ Ibid.

¹³² Kevin G Behrens 'Virginity testing in South Africa: a cultural concession taken too far?' (2014) 33 *South African Journal of Philosophy* 2 at 181.

¹³³ Ibid.

¹³⁴ Leclerc-Madlala S 'Virginity testing: managing sexuality in a maturing HIV/AIDS epidemic' (2001) 15 *Medical Anthropology Quarterly* 4 at 543.

¹³⁵ Ibid also see Kevin G Behrens supra note 132 at 183.

male dominance. It further prohibits a woman's sexual liberation and the freedom to live and behave in any manner that she sees fit.¹³⁶

4.4. GENDER EQUALITY AND CULTURE

As noted above, South Africa is a culturally diverse country but this does not come without difficulties. Applying human rights while trying to balance people's cultural norms and beliefs is not a clear cut. This is more so when certain cultural practices and beliefs are patriarchal and that patriarchal system endorses and encourages male dominance and superiority at the expense of women's rights. Though there is no hierarchy of rights, the conflict between gender equality and culture can be mediated through the prioritisation of equality which is an enabler and affirmer of the right to culture.¹³⁷

In *Prince v President of the Law Society of the Cape of Good Hope*,¹³⁸ the Constitutional Court held that:

“In a constitutional democracy like ours that recognizes and tolerates diverse religious faiths, tolerance of diversity must be demonstrated by accommodating the practices of all faiths, if this can be done without undermining the legitimate government interest. Thus when Parliament is faced with a religious practice that involves some conduct that runs counter to its objectives, the proper approach under our Constitution is not to proscribe the entire practice but to target only that conduct that runs counter to its objectives, if this can be done without undermining its objectives. This approach is consistent with the constitutional commitment to tolerance and accommodation of different religious faiths implicit in our Constitution. The requirement that less restrictive means must be used in the limitation of constitutional rights is indeed a manifestation of this commitment”¹³⁹

Despite religion being the focus, the same argument is also applicable to the right to culture. The right to culture like any other constitutional right is not absolute. The right to culture must be within the confines of the Constitution. Sections 30 and 31 acknowledge the cultural

¹³⁶ Kevin G Behrens supra note 132 at 183.

¹³⁷ Grant 'Human rights, cultural diversity and customary law in South Africa' (2006) 50 *Journal of African Law* 1 at 9.

¹³⁸ 2002 (2) SA 794.

¹³⁹ Ibid para 79.

diversity of South Africa and in so doing begs the respect for other rights. Section 31(2) clearly states that the exercise of the right to culture should not be inconsistent with other rights in the Bill of Rights. In *Christian Education*, the Constitutional Court noted that:

“Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to “privatise” constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.”¹⁴⁰

In justifiably limiting the right to culture and ensuring equality, in *Bhe v Magistrate of Khayelitsha*, the Constitutional Court acknowledged the exclusion of women from inheritance as discrimination on the grounds of gender. Furthermore, that the discrimination “entrenches patterns of disadvantage among a vulnerable group, exacerbated by the old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order”.¹⁴¹ The Constitutional Court went on further to rule that male primogeniture limited the right to equality. In *Gumede v President of the Republic of South Africa*, the Constitutional Court also acknowledged the patriarchal nature that was entrenched in some of the customary laws codified in the KwaZulu-Natal Act and Natal Code, in that they infantilised women and gave spousal power to husbands. The consequences of this meant that women could not own property and could not be entitled to anything in their marital estate upon the dissolution of the marriage. In both cases, without a doubt the Constitutional Court acknowledged the right to culture and the discriminatory effects against women, that follows from this right.¹⁴²

¹⁴⁰ *Christian Education South Africa* supra note 106 para 26.

¹⁴¹ *Bhe and Others v Magistrate of Khayelitsha and Others* 2005 (1) SA 580 (CC) para 91.

¹⁴² *Gumede v President of the Republic of South Africa Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

4.5. PATRIARCHAL BARGAINING

Virginity testing is a cultural practice that is rooted in patriarchy. Stander argues that despite it being a patriarchal practice it does not take away a woman's autonomy instead women bargain from this activity. This approach is referred to as patriarchal bargaining and according to this approach:

“women are not merely the receptors of patriarchal rules and customs, but also often use their gender positions and sexuality – even those that might be perceived as oppressive – to gain certain positions and benefits in society, such as security, financial benefits, social status, and, as will be proposed in what follows, education.”¹⁴³

Standar further holds that black rural women understand their socio-economic position in society and may find ways to capitalise on their struggles.¹⁴⁴ The Maiden Bursary makes use of a patriarchal practice to the benefit of women, unlike in ordinary circumstances women are not only undergoing a virginity test for someone else's glory but they do so to fulfil their self-interests of getting access to free tertiary education. Despite virginity testing being viewed as a practice that women do not have inherent consent over because of its patriarchal history, women can still exercise their agency and free will to consent.

Standar further notes that “women who advocate virginity testing therefore seem to be strategizing within an area of struggle, namely, the spread of HIV/AIDS, by redeploying the practice of virginity testing in order to gain control of a situation that seems to be out of control.”¹⁴⁵

4.6. CONCLUSION

The right to culture is a constitutionally protected right. Though exercised in association, it is still an individual right. The protection of this right gives effect to the rights to equality and dignity while in some instances may simultaneously limit those rights. Of course, the right to culture is subject to limitations if it is not exercised within the confines of the Constitution. The Maiden Bursary's virginity testing requirement is a celebration of a cultural practice and

¹⁴³Standar Sunelle ‘Subordination vs agency/resistance in South Africa: Virgins bargaining their way through higher education’ (2016) 2 *Stellenbosch Theological Journal* 2 at 440.

¹⁴⁴ Ibid at 442.

¹⁴⁵ Ibid at 441.

tradition that brings honour and pride to a woman's family and thereby empowering women. However, this same practice can also be seen as a tool to control women and feed into the patriarchal system.

Chapter 5: Right to bodily and psychological integrity

5.1. INTRODUCTION

The Constitution of South Africa enshrines the right to bodily and psychological integrity which allows people to make autonomous decisions regarding their own bodies and to make decisions regarding their reproduction.¹⁴⁶ This right also prevents persons from being subjected to scientific and medical experiments without their informed consent.¹⁴⁷ In this chapter I focus on the two elements that are embedded in section 12 — reproductive rights and the right to autonomy.

5.2. REPRODUCTIVE RIGHTS

5.2.1. Children's rights

Section 28(2) of the Constitution enshrines the best interests of a child principle and the Children's Act¹⁴⁸ was enacted to give effect to this right and other children's rights enshrined in the Constitution. Section 12 of the Children's Act prohibits the subjection of children to social, cultural, and religious practices that are detrimental to their well-being. These practices include virginity testing, genital mutilation, and marriage for children below the minimum age. The Act expressly prohibits virginity testing for children under the age of 16. For those children who are over the age of 16, they have to give consent.¹⁴⁹ The Act also defends the privacy of children who decide to undergo a virginity test by advising against the disclosure of the results of the virginity test without the child's consent. The Act is also clear that the contravention of the aforementioned provision is considered an offence.¹⁵⁰

The rights enshrined in this Act are also consistent with the children's rights enshrined in the UN Convention on the Rights of the Child which South Africa ratified on 16 June 1995.¹⁵¹ Article 2 of the Convention requires state parties to respect all children's rights stipulated in the Convention without any form of discrimination. Article 16 protects children's rights to privacy and article 24(3) requires state parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

¹⁴⁶ Section 12 of the Constitution.

¹⁴⁷ Section 12(2) of the Constitution.

¹⁴⁸ 38 of 2005.

¹⁴⁹ Section 12(4)-(5) of the Children's Act.

¹⁵⁰ Section 304 of the Children's Act.

¹⁵¹ UN General Assembly, Convention on the Rights of the Child (20 November 1989).

In its concluding observation on the rights of children in South Africa, the Committee to the UN Convention on the Rights of the Child expressed its concern about the “traditional practice of virginity testing which threatens the health, affects the self-esteem, and violates the privacy of girls”. It also recommended that state parties:

“undertake a study on virginity testing to assess its physical and psychological impact on girls. In this connection, the Committee further recommends that the State party introduce sensitisation and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing in light of articles 16 and 24 (3) of the Convention.”¹⁵²

Following the ratification of the UN Convention on the Rights of the Child, on 7 January 2000, South Africa ratified the African Charter on the Rights and Welfare of the Child. The Charter also provides for children’s right to privacy. As per article 21, it also requires states parties to

“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.”¹⁵³

If the bursary has recipients that are less than the age of 16, it would be in violation of the Constitution and the Children’s Act. The South African Children’s Act like the international law instruments related to it, only forbids virginity testing on girls under the age of 16, but does permit testing on girls from 16 to 18 under specified conditions. Of course the Children’s Act does not talk about women over the age of 18, but this is where CEDAW comes in, which I explore below.

5.2.2. Reproductive rights and health care

In *Christian Lawyers Association v National Minister of Health*, the Pretoria High Court held in terms of section 12 of the Constitution, that if a girl is sixteen years old she can choose to

¹⁵² Committee on the Rights of the Child Concluding Observations of the Committee on the Rights of the Child: South Africa (unedited version) Twenty-Third Session CRC/C/15/Add.122 January 2000 para 33.

¹⁵³ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child (11 July 1990).

have an abortion without parental consent,¹⁵⁴ because prohibiting women from having an abortion would limit their reproductive rights and the right to health care.¹⁵⁵ Reproductive rights intersect with the right to health care. Section 27(1)(a) of the Constitution promotes the right to health care which includes access to reproductive health care and as mentioned in *Soobramoney v Minister of Health*, the state has a duty to realise this right depending on the state's available resources.¹⁵⁶

South Africa not only has a duty under its Constitution, it also has a duty in terms of international law to embrace reproductive health care rights. The Maputo Protocol further protects women's rights to health and reproductive rights such as choosing any contraceptive methods of their choice and having control of their fertility¹⁵⁷ The same sentiments are also covered by the SADC Protocol on Gender and Development which mandates state parties to ensure that a girl child has access to information on sexual and reproductive health.¹⁵⁸ CEDAW also promotes women's right to accessible health care which includes the right to reproductive health. CEDAW requires member states to provide educational knowledge and information regarding the health of families and advice on family planning. Article 12 of CEDAW requires member states to take measures that eradicate discrimination targeting women in the health care field and must ensure that both men and women receive equal access to health care with the inclusion of health care issues related to family planning. Member states are also required to ensure health care services related to "pregnancy, confinement and post-natal period, granting free services where necessary." In Article 14, CEDAW places an emphasis on rural women's access to health care facilities including information relating to health care issues.

CEDAW and its General Recommendation 24 promote access to reproductive health facilities. They emphasises the importance and availability of guided information on reproductive health issues such as contraceptives, family planning such as whether you want to have children or not and if you do, the number of children. It is clear that one cannot interfere with a woman's reproductive rights without limiting their right to health care as well.

¹⁵⁴ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T).

¹⁵⁵ *Ibid* at 1443.

¹⁵⁶ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).

¹⁵⁷ Article 14 of the Maputo Protocol.

¹⁵⁸ Article 11 of the SADC Protocol on Gender and Development.

5.2.3. Reproductive rights and bodily integrity

The right to reproductive rights intersects with the right to health as noted above, it also intersects with the right to bodily integrity. In an article written by John Whitehead about the unconstitutionality of transvaginal ultrasound. Whitehead talks about a proposed bill that requires doctors to subject all women who want to undergo an abortion to ultra-sound procedures. Whitehead notes that the carrying out of an invasive probe on women without their consent violates women's constitutional rights, particularly, privacy, dignity, and bodily integrity.¹⁵⁹ Similar to the issue of virginity testing, the physical mechanism used by both health and non-health practitioners is invasive. Virginity testing has no scientific basis, and one cannot conclude that a woman has had sex by merely looking at the intactness of her hymen. The use of the two-finger test by non-health care practitioners is not only invasive but it also poses a health care issue. The two finger test exposes women to numerous health care risks such as possible vaginal infections resulting from unhygienic environments. Arguably, because of their financial circumstances, the women are left without a choice but to submit to the invasive physical examination.

5.2.4. Reproductive rights and the right to education

The Constitution at section 29, enshrines the right to education and article 10 of CEDAW requires its member states to take measures that eradicate discrimination so as to promote and protect women's right to education.¹⁶⁰ This provision requires South Africa to ensure that men and women have equal access to schools, education curricula and educational resources. This provision further requires men and women to reap the same benefits from scholarships and other study grants and same opportunities that promote the continuation of education. The severe target on women deprives them of their full rights to education and opportunities that are tied to this right. As a result, this bursary infringes women's right to education and the principles of CEDAW against the discrimination of women. If a woman is pregnant she does not stand a chance of receiving the bursary from the initial stage and if she falls pregnant during

¹⁵⁹ John Whitehead 'Transvaginal ultrasound unconstitutional' (2012), available at https://dailyprogress.com/news/transvaginal-ultrasound-unconstitutional/article_9b131634-f364-56dd-b196-964da4bcb59d.html, accessed on 05 April 2021.

¹⁶⁰ General Recommendation 36 para 7 states that "all States parties have an obligation to protect girls and women from any form of discrimination that denies them access to all levels of education and to ensure that where this occurs they have recourse to avenues to justice."

the duration of the bursary, the bursary will be terminated because she is no longer a virgin. An issue then arises for the purposes of this chapter— a link between the right to education and reproductive rights — if a pregnant girl is not given financial assistance to further her education because she is pregnant infringes her reproductive rights and right to education.

5.3. AUTONOMY

5.3.1. The decision to have sex

On autonomy, as highlighted in *Christian Lawyers Association v National Minister of Health*, when a person limits a woman's right to control her body and make decisions regarding her body, that person infringes her autonomy.¹⁶¹ CEDAW General Recommendation 24 holds that reproductive rights give women sexual autonomy, which enables women to make decisions about their bodies. Virginity testing limits women from deciding when they want to engage in sex for purposes of procreation or recreation. Encouraging women to abstain from sex is not the only available method that can prevent teenage pregnancy and the contraction of HIV/AIDS and other sexually transmitted diseases. Women have the right to choose if they want to have children and when they want to. Imposing a requirement on women to not fall pregnant at a certain age or event, such as before marriage, infringes a woman's right to reproductive health because it nullifies her autonomy. The aim of the practice is to exert control over women's bodies.¹⁶²

5.3.2. The decision to undergo the virginity test

One of the contentious issues regarding virginity testing is voluntariness. When a person makes a voluntary decision, that decision must be given freely without coercion and undue influence.¹⁶³ O'Neill argues that oftentimes vulnerable people choose to participate "voluntarily" under duress because of the fear of the consequences of not participating.¹⁶⁴ The women feel proud of this cultural practice, cementing the idea that when they undergo a virginity test, they do so willingly, and one cannot argue that their autonomy is nullified. However, Durojaye notes that virginity testing as a cultural practice is imposed on women and

¹⁶¹ *Christian Lawyers Association supra note 154* para 17.

¹⁶² Virginity Testing and the Children's Bill Discussion Paper October 2005 at 10. Also see Durojaye E *supra* note 40 at 13.

¹⁶³ O'Neill O 'Some limits of informed consent' 2003 *Journal of Medical Ethics* 29 at 5.

¹⁶⁴ *Ibid.*

those who choose to not participate suffer from societal isolation and ridicule.¹⁶⁵ The fear of the latter may lead to their participation. In the context of the Maiden Bursary, it can be argued that the women who undergo virginity testing do so involuntarily.

In *Volks N.O. v Robinsons*, Sachs J held that “the element of voluntariness which lies at the heart of marriages is threatened rather than enhanced if people feel coerced into marrying for fear of adverse consequences if they fail to do so.”¹⁶⁶ This means that even though people are not forced to get married, if they want the benefits of marriage, they need to get married as this is the only way they can get those benefits, leaving them with no choice but to get married. In *Bwanyana v Master of the High Court, Cape Town and Others*, Madlanga J also touched on the issue of choice in relationships where he held:

“To suggest that everybody does have a choice is out of touch with reality.

We should be wary of adopting a position of an armchair pontificator who is divorced from realities on the ground. After all, few situations present us with the absolute absence of choice. The question is not whether absolutely there is no choice. It is whether realistically choice may be exercised. A woman who is in a physically and emotionally abusive relationship and who is constantly under threat of being killed if she ever reports the abuse to the police or other authorities, or of being hunted down and killed if she dares leave does have a choice to report or leave regardless. But can we justifiably blame her if she is so consumed by fear that she cannot bring herself to do either? A lesbian who lives in a particularly homophobic area where killings of homosexuals and acts of so-called corrective rape are rampant does have a choice, regardless, to reveal her sexual orientation for all to see.”¹⁶⁷

Despite the reference to marriage, at the heart of it is the element of choice and the same logic can be applied to virginity testing. First, it is worth noting that because the virginity test is compulsory if one wants the bursary, voluntariness is erased and secondly the women cannot reap the benefits of the bursary unless they submit to the virginity test. This means that for women and rural women particularly, who are a predominant group that undergoes this test and so happen to be one of the most vulnerable groups in society because of their economic

¹⁶⁵ Durojaye E supra note 40 at 11.

¹⁶⁶ *Volks N.O. v Robinsons and Others* 2005 (5) BCLR 446 (CC) para 235.

¹⁶⁷ *Bwanyana v Master of the High Court, Cape Town and Others* [2021] ZACC 51 paras 63 and 64.

disadvantage, do not have a choice but to remain virgins if they want financial support for their tertiary education. They are compelled to do so otherwise they might lose their funding. Following the aforementioned reasoning in *Bwanya*, even if one were to say that these women have a choice to not undergo a virginity test, the truth is, that choice has no practical effect because of the consequences that may follow when they choose to exercise that choice.

5.4. CONCLUSION

Reproductive health care rights intersect with numerous constitutional rights such as the right to health care, education, and bodily integrity, because of this intersection, the imposition of abstinence on women not only limits their reproductive rights but other intersecting constitutional rights. This requirement further limits women's autonomy in that it dictates when they can have sex and also compels them to undergo the virginity test. The latter, despite being viewed as voluntary, the refusal to undergo the test means loss of the scholarship which inevitably erases their freedom to choose, or rather, makes their choice impractical. The virginity requirement when imposed to young girls who are below the age of majority, infringes their constitutional rights, the Children's Act and other international and regional instruments that protect their rights.

Chapter 6: Administrative Action

6.1. INTRODUCTION

The first question to ask in this case is whether the UThukela District Municipality's decision to award bursaries subject to the provision of a maiden certificate constitutes administrative action.

Section 33 of the Constitution enshrines the right to just administrative action that is lawful, reasonable, and procedurally fair. This section further states that:

- “(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

6.2. DEFINITION OF ADMINISTRATIVE ACTION

To give effect to this right, the Promotion of Administrative Justice Act¹⁶⁸ was enacted. In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*, the Constitutional Court emphasised that the enactment of PAJA was “clearly intended to be, and in substance is, a codification of these [section 33] rights”.¹⁶⁹ According to section 1 of the PAJA, administrative action is:

“any decision taken or failure to take a decision by an organ of state when exercising a power in terms of the Constitution or a provincial Constitution, or exercising a public power or performing a public function in terms of any legislation or a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which is direct external legal effect”

¹⁶⁸ 3 of 2000.

¹⁶⁹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 95.

In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* and *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*, the Constitutional Court and the Supreme Court of Appeal respectively, held that the definition of administrative action under section 1 of PAJA must be construed in terms of section 33 of the Constitution.¹⁷⁰ In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, the Constitutional Court in acknowledging the difficulty of characterising what constitutes administrative action in terms of section 33 of the Constitution, held that the characterisation will have to be done “in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.”¹⁷¹ It is also clear that section 33 is not concerned with every administrative action performed by the state, rather, because the section is “designed to control the conduct of the public administration performed by an organ of state” it is only concerned about the conduct of the organ of state if it exercises public power.¹⁷²

When it comes to determining administrative action, the Constitutional Court held that whether a conduct constitutes administrative action, the primary concern should not be on who performs the function, that is, the identity or governmental role of the person performing the action, instead it should be about the nature of the power. The Court specifically said that the focus should not be about the “arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising”.¹⁷³ The Court is therefore more concerned about the function than the functionary. This is because, the complexity of administrative action permits any branch of government to perform an action that is administrative in nature. Amongst other factors, the Court will consider, the source of the power, subject matter, nature of the power, whether it involves a public duty.¹⁷⁴

¹⁷⁰ Ibid para 100 also see *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005(6) SA 313 (SCA) (*Greys Marine*) para 22.

¹⁷¹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 para 143.

¹⁷² Ibid para 136, also see *Bullock NO and Others v Provincial Government of North West Province and Another* [2004] 2 All SA 249 (SCA) para 10.

¹⁷³ Ibid para 141.

¹⁷⁴ Ibid para 143.

In *Greys Marine*, Nugent JA noted that at the centre of the definition of administrative action “is the idea of action (a decision) of an administrative nature taken by a public body or functionary”.¹⁷⁵ One of the primary subject matters of this decision is the right to education, a right that can be given effect through the exercise of a public power. In our case, the distribution of the Maiden Bursary to women while requiring them to prove their virginity imposes a condition and a restriction. In turn, this constitutes a decision,¹⁷⁶ one that is taken by an organ of state exercising public powers. Despite not being permitted by an empowering provision, this decision entails the use of public funds, to serve the interests of the public. Furthermore, as a result of the proof of virginity requirement, the decision imposes a burden on women and has a negative effect on women and particularly women who are not virgins. As mentioned in the chapters above, this infringes on women’s rights to equality, health care, bodily integrity, dignity, and privacy and in turn has an adverse direct, external legal effect on these women. The municipality’s decision constitutes administrative action and is reviewable in terms of PAJA.

6.3. GROUNDS OF REVIEW

6.3.1. Rationality

The important question to ask is whether the UThukela District Municipality’s decision to award a bursary to women on condition that they undergo a virginity test was rational. Section 6(2)(f)(ii) of PAJA amongst other reasons, bestows powers to the courts or tribunals to review an administrative action if the action itself is not rationally connected to the purpose for which

¹⁷⁵ *Greys Marine* supra note 170 para 22.

¹⁷⁶ In terms of section 1 of PAJA decisions refers to:

“Any decision of an administrative nature, made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly”

it was taken. Rationality review under PAJA evaluates the link between the means, including the process and the ends.¹⁷⁷

In *Democratic Alliance v President of South Africa and Others* the Constitutional Court held—

“that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.”¹⁷⁸

Though it can be argued that the municipality failed to consider a relevant fact, that imposing bursary requirements that limit certain rights may create a constitutional inconsistency, it does not render the decision irrational. In any instance, a focused consideration on the content would be delving into the merits of the decision which is beyond the ambits of rationality. However, in our case, we are not concerned about other less restrictive means of giving effect to the right to education. We are not asking whether the government should have taken an approach that is not drastic, instead we are asking whether there is a rational connection between the means and the ends. In response to this question, the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation* held—

“where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution”¹⁷⁹

¹⁷⁷ *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) para 50.

¹⁷⁸ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) para 41.

¹⁷⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

In *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*, the Constitutional Court also emphasised that the decision must be rationally connected to a legitimate governmental end, and it noted further that—

“what is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is.”¹⁸⁰

In *Law Society of South Africa v Minister of Transport* also held—

“[i]t remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad”.¹⁸¹

The primary concern under rationality review is the relationship between the means and ends. That is, “the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself”¹⁸² and not so much whether there are other available means that are best suited to achieve the purpose.¹⁸³

¹⁸⁰ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) para 114.

¹⁸¹ *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 35.

¹⁸² *Democratic Alliance* supra note 178 para 32.

¹⁸³ *Ibid.*

Without repeating the argument raised under the equality analysis, one would find that the municipality's decision is not rational, because at the centre of the requirement is an imposition of harm against women. The purpose of the bursary was to assist students with their tertiary education tuition, the process used to reach that goal was through virginity testing which eliminated a number of women that would benefit from the bursary, the same women that it sought to assist, merely because they are not virgins. This reasoning was reiterated in *Minister of Education and Another v Syfrets Trust Ltd NO and Another* where the Court noted that the purpose of what was sought to be achieved by the trust was to provide deserving students with limited means with an opportunity to pursue their tertiary education nevertheless, the race, gender and religious condition disqualified deserving candidates, therefore instead of advancing marginalised groups it discriminated against them.¹⁸⁴ It is also clear in this case that disqualifying deserving women because they are not virgins is not achieving the sought purpose. Therefore, there was no rational connection between the means and the ends.

In *Albutt*, the Constitutional Court held that in granting presidential pardons, the former President Thabo Mbeki outlined that the objectives of the special dispensation process were to bring national unity and national reconciliation. Therefore, the failure to give victims or the families of the victims an opportunity to make representation was irrational. It is clear that the Constitutional Court was not saying that the President's decision was wrong, instead it highlighted the improper steps taken to reach that decision.¹⁸⁵ Even in this case, the discrimination does not "reasonably and justifiably differentiate between persons according to objectively determinable criteria, intrinsic to the activity concerned."¹⁸⁶ A girl's virginity status is not intrinsically connected to her ability to perform well, academically.

However, even if one were to find that the decision is rational, I still argue that the decision would in any instance be unreasonable.

6.3.2. Reasonableness

The next question to ask is whether this decision was reasonable. Section 6(2)(h) of the PAJA also bestows powers to the courts or tribunals to review an administrative action if "the exercise

¹⁸⁴ *Minister of Education and Another v Syfrets Trust Ltd NO and Another* supra note 79 para 34.

¹⁸⁵ *Albutt* supra note 179.

¹⁸⁶ Section 14(2)(c) of PEPUDA.

of the power or the performance of the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.” Rationality and reasonableness may overlap¹⁸⁷ however, the two still remain distinct. Reasonableness is concerned about the contents of the decisions, in other words, reasonableness cares about the decision itself.¹⁸⁸

“In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act ‘reasonably’, the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be ‘reasonable’. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”¹⁸⁹

The Constitutional Court in *Bato Star* goes on to say that what constitutes a reasonable decision will be case specific, that is, it will depend on the circumstances of each case. Relevant factors that one may consider include:

“the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”¹⁹⁰

In *Premier Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal*, the Court did not automatically accept the argument that because the bursaries were discriminatory, they were unconstitutional and ought to be terminated. The means used to terminate them could not be subject to a

¹⁸⁷ *Albutt* supra note 179 para 30.

¹⁸⁸ *Ibid* para 29.

¹⁸⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 44.

¹⁹⁰ *Ibid* para 45.

constitutional challenge. Instead the Court held that there should be a balance between the need to eradicate unfair discrimination and fairness. It held further that the goal to create an equal society must be given effect to in a manner that is consistent with the Constitution.¹⁹¹

The decision to include the virginity testing requirement as mentioned above, negatively affects women especially those who are non-virgins. It deprives them of an opportunity on the basis of their, sex, gender and virginity status. Moreover, the decision infringes their constitutional rights to equality, privacy and dignity, in doing so, it deviates from its mandate of assisting financially disadvantaged students. In trying to provide redress measures, it is certainly not a decision that a reasonable decision maker would reach.

6.3.3. Ulterior motives/purpose

Section 6(2)(e)(ii) and (vi) of PAJA permits courts or tribunals to review administrative action if the action was taken for ulterior purpose or motive or arbitrarily or capriciously. The Mayor reasoned that the bursary will help curb the rate of teenage pregnancy and the spread of HIV/AIDS, a reason that is not adequate enough to justify the constitutional violation that is followed by this requirement. Furthermore, considering that this requirement not only violates our Constitution but international instruments that South Africa has signed and ratified, when taking the decision, the municipality did not consider all the merits.

6.3.4. Bad faith

Section 6(2)(e)(v) of PAJA also permits courts or tribunals to review administrative action if the action was taken in bad faith. In imposing the burden of virginity testing on female students only, the Municipality was dishonest and it acted in bad faith.

6.4. LEGALITY

Even if one were to find that the bursary's decision does not constitute administrative action in terms of PAJA, this would not be the end of the enquiry. The municipality's decision can still be contested under the principle of legality. The latter is cemented under the constitutional principle of the rule of law, a founding value of our Constitution.¹⁹² This principle requires the

¹⁹¹ *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* (1999 (2) SA 91 (CC) para 44.

¹⁹² Section 1 of the Constitution enshrines the founding values and section 1(c) specifically highlights the "supremacy of the constitution and the rule of law".

government to act consistently with the Constitution.¹⁹³ This is a reminder that the Legislature and Executive's powers are limited, and may not exercise powers or functions beyond the scope that is provided for by the law.¹⁹⁴ "The doctrine of legality. . . is one of the constitutional controls through which the exercise of public power is regulated by the Constitution".¹⁹⁵

The first question to ask is whether the municipality's decision was in the confines of legal prescripts. If the answer is in the affirmative then this is the end of the enquiry. If not, it may be reviewed and set aside in terms of the principle of legality.¹⁹⁶

The decision as mentioned above infringes constitutional rights. The exercise of public power should not be arbitrary instead "decision must be rationally related to the purpose for which the power was given otherwise they are in effect arbitrary and inconsistent with this requirement".¹⁹⁷ The rationality requirement has been fully explained above and need not be repeated. It is worth emphasising that there is no rational connection between advancing women by providing financial assistance especially to those that are deserving and excluding the same women on the basis that they are not virgins. Such a decision is irrational and is not inconsistent with the principle of legality.

6.5. CONCLUSION

The distribution of bursaries with a virginity requirement, constitute administrative action. It is a decision taken by an organ of state that imposes a limitation and a restriction on women. This decision has a direct and adverse legal effect, and is reviewable under PAJA, on the grounds such as rationality, reasonableness, and bad faith. Even if one were to find that this decision is not reviewable in terms of PAJA, the decision may still be reviewable in terms of the principle of legality as it is an exercise of public power.

¹⁹³ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 17, also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

¹⁹⁴ *Fedsure* supra note 193 para 58.

¹⁹⁵ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 49.

¹⁹⁶ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) para 40.

¹⁹⁷ *Pharmaceutical Manufacturers* supra note 193 para 85.

7. CONCLUSION

The Maiden Bursary's purpose is to give women an opportunity, a chance to access tertiary education without any financial barriers and breaking down the walls of gender disparity when it comes to access to education. It serves as an assurance for redress, that men and women are on an equal playing field. This exclusion of other certain categories is justifiable in our law, in terms of PEPUDA and the Constitution. Though there is no limit for maidens, but there is certainly a negative and adverse effect on women who are not virgins. The gale force to the wind is the virginity requirement, that all its recipients must be virgins and remain virgins during the course of their funding. Failure to remain a virgin leads to the termination of the funding. A government decision that attaches a woman's self-worth, value and respect on her sexual conduct and further concerns over women's virginity, is an interference with their sexual life, which is their private business. This imposition of a burden on women limits the rights to dignity and privacy and unfairly discriminates against women, particularly women who are not virgins. The enforcement of this requirement shows a grave imbalance between the right to culture and gender equality, in that, the infusion of a cultural tradition leads to an unjustifiable limitation. I thus conclude that for these reasons, the Maiden Bursary does not pass constitutional muster.

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Biyela Nokukhanya Angel *VirginitY Testing As Women Empowerment: A Case Study of the Thukela District Municipality's Virgin Bursary Scheme* (LLM thesis, University of KwaZulu-Natal, 2018).

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