VIRGINITY TESTING: IN THE BEST INTEREST OF THE CHILD?

1. Introduction

The proposed Children’s Bill states that every child has the right not to be subjected to social, cultural and religious practices that are detrimental to his or her well-being. Virginity testing is regarded by many as just such a practice, and has been one of the most controversial issues in the slow progress of the Bill through Parliament. Clause 12 of the Bill prohibits virginity testing, as well as genital mutilation of female children, more commonly known as female circumcision. The Bill has recently been approved by the National Assembly; however, the National Council of Provinces raised objections and called for the revision of certain clauses including those regarding virginity testing. This briefing paper considers the question of whether virginity testing is a harmful cultural practice or an important rite of passage and an affirmation of traditional values. But, while we deal with this relatively narrow question, we are also exploring the broader problem that can arise when traditional and deeply-held beliefs appear to clash with the values of a liberal constitution premised on the sanctity of individual human rights.

2. What is Virginity Testing?

Virginity testing is a practice that typically involves a gynaecological examination to establish whether or not the hymen in girls and unmarried young women is intact. Girl children and young women are eligible for testing when they are anywhere between the ages of seven and twenty-six. This examination is usually public. Virginity testing has re-emerged as a traditional cultural practice in the last two decades, although its roots go back far longer than that. Historically, such testing was used to determine a women’s suitability for marriage, but it also reflected societal stress on abstinence from sexual activity on the part of girls and young women. This, in turn, was seen as the most effective method of preventing the spread of sexually transmitted diseases and of preventing premarital sex and teenage pregnancies. The protection of young girls is also an important element: testers claim that they are able to detect the sexual abuse of children, enabling them to intervene on
behalf of the child.¹ A young woman from KwaZulu-Natal echoes this, saying that “virginity testing protects us against abuse by unscrupulous men who want to do as they please with our bodies”.²

However, the practice of virginity testing has come under fire from many human rights and women’s advocacy groups, with the Commission on Gender Equality, for example, describing the testing as “discriminatory, invasive of privacy, unfair, impinging on the dignity of young girls and unconstitutional”.³ Furthermore, these tests often take place in unsanitary conditions, are invasive, sometimes coerced and not necessarily accurate.

3. Virginity Testing and AIDS

Opponents of virginity testing argue that, for several reasons, it is not effective in preventing the spread of HIV/AIDS. Firstly, the testing is restricted to girls and young women. While abstinence on the part of women alone does to some extent prevent the spread of HIV/AIDS, men are also responsible for the spread of the disease and women are often infected by their husbands. Secondly, virginity testing does not take into account involuntary sexual encounters where women have been raped and girl children sexually abused. Thirdly, this approach relies heavily on the stigmatisation of those found to be ‘impure’ and thus discourages those infected and/or abused from seeking appropriate help. Girl children are particularly vulnerable, especially since the unfortunate belief persists in some communities that intercourse with a virgin cures HIV/AIDS. Virginity testing may thus be a double-edged sword that contributes to the vulnerability of girl children.

On the other hand, proponents of the practice see it as an initiative to encourage morality in the young. Furthermore, many see it as part of a revival of indigenous knowledge systems that were marginalized during the apartheid era. However, by placing sexual responsibility on the girls, virginity testing tends to ignore the gender dynamic contributing to the HIV/AIDS pandemic. It does not address the issue of male sexuality and male moral responsibility. The implication is that it is girls’ sexuality, and not that of boys, that is the cause of HIV/AIDS transmission.

4. Parliamentary Hearings

The drafters of the Children's Bill have been faced with the difficult task of dealing with this very controversial issue in a way that respects and promotes the rights and dignity of girl children and young women, including the right to choose whether or not to be tested, while at the same time respecting traditional cultural customs and practices.

To this end additional public hearings were convened and representations were made by various concerned groups, including the National House of Traditional Leaders, the Commission for Gender Equality, the Human Rights Commission and the National Organisation of Circumcision Information Resource Centres. The hearings were also addressed by a group of girls from the OR Tambo District Municipality who participate in virginity testing programmes, a group of girls from the Girls Net Alfred Nzo Club, as well as children from the children’s rights group Molo Songololo. These hearings were distinguished both by the attendance of these children, some of whom had travelled a long way, and by the fact that they addressed Parliament on what they considered to be “in the best interests of the child”. A submission was also made by one Thembisile Toyiya, a social worker and

¹ Interview with a virginity tester in the Mail and Guardian, September 23-29 2005
² Sunday Times 25th September 2005
³ Commission for Gender Equality Report June 2004
father of three daughters. All these diverse representations expressed deep concern and respect for the rights and welfare of children. The maxim “in the best interests of the child” (Section 28 of the Bill of Rights) clearly informed the different submissions, and the hearings as a whole provided a good example of how the successful implementation of constitutional precepts requires the identification of common ground.

The Commission for Gender Equality, tasked with the protection and promotion of gender equality, has consistently campaigned for the criminalisation of harmful social, cultural and religious practices, among which they include virginity testing. It is the contention of the Commission that virginity testing discriminates on the grounds of gender and impacts negatively on the dignity and well-being of girl children, and that it constitutes an invasion of the constitutional rights to privacy and bodily integrity. The proposed Bill was also criticised for failing to make provision for the confidentiality of testing results and for failing to stipulate penalties for non-compliance with health regulations. It was also argued that virginity testing was out of step with international conventions ratified by South Africa. While the Commission did not support virginity testing, it did recognise the importance of the right of individuals to participate in cultural practices and to observe cultural traditions. However, such practices and traditions need to take place within the parameters of the Constitution. It was noted that the Bill does not prohibit virginity testing in general, but rather precludes its application to girl children, a child being any person under the age of 18.

The Human Rights Commission stated that the practice compromises and potentially violates the girl child’s right to equality, dignity, privacy, freedom, security and bodily integrity. Accordingly, the Commission regards the prohibition of virginity testing in the Bill as a justifiable limitation of the cultural rights of the adherents of this practice. Nevertheless, the Commission submitted that proponents of virginity testing might be seeking to uphold positive social values through cultural practices. These values include sexual responsibility, self respect, combating HIV/AIDS, and preventing unwanted pregnancies. Those who support and practice virginity testing were taking proactive steps to address the sexuality of young people. The challenge facing Parliament was to bring these cultural practices into line with the Constitution. Furthermore, those opposed to the practice needed to evaluate what they were doing to promote good morals and a healthy and responsible approach to sexuality. The Commission concluded that “it should be acknowledged that the failure of government and society to raise adequate awareness on issues such as teenage pregnancy, child abuse and the increasing spread of HIV/AIDS amongst the youth, has lead to activities like virginity testing becoming popular in certain communities. Virginity testing is a response to a dire situation”.

The girls from the O.R. Tambo District Municipality condemned the Bill on the grounds that it prohibited the practice of an important cultural tradition and imposed a Eurocentric value system on an indigenous custom. The girls stated that they were willing participants and proud of their cultural heritage. They reiterated that virginity testing protected them from sexually-transmitted diseases and unwanted pregnancies, and affirmed their self-respect. They pointed out that the practice had socio-economic advantages in that it contributed to the prevention of HIV/AIDS, kept girls attending school, and reduced the need for social grants. It was part of a wider programme of cultural education for girls, and gave them the opportunity to learn important life skills that prepared them well for adulthood. They regarded it as empowering and urged that it continue, subject to participation being voluntary and conducted under hygienic conditions.

Mr Thembisile Toyiya, social worker and father of girl children, was opposed to virginity testing. He submitted that testing dehumanises women and girl children. Young children did not have the

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4Submission of the Human Rights Commission to the Select Committee on Social Service, October 2005
capacity to give consent or to withhold it. He contended, therefore, that girls under the age of 16 should not be tested. Virginity testing might also render those marked as virgins vulnerable to sexual abuse and trafficking. Furthermore, the practice placed the responsibility of being sexually active on women and thus discriminated on the grounds of gender and reinforced patriarchal social relations.

The National House of Traditional Leaders (NHTL) vehemently opposed the clause prohibiting virginity testing, condemning it as outrageous. They warned that the passing of the Bill in its present form would invite strenuous opposition from grassroots communities, who would defy the ban. Their submission invoked sections 30 and 31 of the Constitution, which give people the right to participate in cultural activities in a manner consistent with the Bill of Rights. Regarding other practices proscribed by clause 12, it was pointed out that the term ‘circumcision’ is not defined in the Bill, and that there are various forms of female circumcision, which should be distinguished from female genital mutilation. Female genital mutilation can range from clipping or burning the clitoris, to cutting off all the external genitals and sewing the remnant tissue to leave a small opening. Virginity testing was not circumcision or genital mutilation as it did not involve cutting or removing healthy human tissue. The NHTL submitted that “the norms and values entrenched in indigenous law must be recognised, and provision should be made for a deadlocking mechanism in cases of conflict between Westernised norms and values contained in the Constitution and our indigenous legal system”.5

The delegation of children from Molo Songololo reminded the Committee of the rights of children to privacy, respect and dignity. They also submitted that “every child capable of participating meaningfully in any matter concerning that child has the right to participate in those proceedings in an appropriate way, and views expressed by the child must be given due consideration, without dictation or discrimination”.6 Virginity testing was clearly just such a matter.

The Gender Advocacy Programme (GAP) submitted that virginity testing of children without their informed consent was an invasion of their bodily and physical integrity, and an invasion of privacy. It should not be compulsory or coerced, and children should be protected against the public disclosure of their virginity status. GAP also called attention to the Promotion of Equality and Prevention of Unfair Discrimination Act, section 8(d) of which prohibits any practice, including traditional, customary or religious practices, that impairs the dignity of women, or undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.

The submission by the National Organisation of Circumcision Information Resource Centres spoke directly to the issue of bodily integrity. Although their concern was primarily with the circumcision of infant boys, their submission emphasised the need for informed consent on behalf of participants, and suggested that circumcisions be allowed after the age of 18 with the informed consent of the individual concerned. Only a consenting adult over the age of 18 has the right to surgically alter his or her body without medical justification. This was in keeping with proposals regarding traditional male circumcisions in the Bill. The protection that the Bill afforded girls regarding virginity testing, female circumcision and female genital mutilation should be extended to boy children.

5. Analysis

It is not helpful to regard the differing positions regarding virginity testing as simply a conflict between modernity and tradition. There may be different ways of saying the same thing. Culture and cultural practices are not static; they change over time and in response to changing social conditions.

5Submission of the NHTL to the Select Committee on Social Services, October 2005
6Submission of Molo Songololo to the Select Committee on Social Services, October 2005
There is a dynamic interaction between culture and society, both informed by and informing prevailing socio-economic conditions. The reorganization of civil society in post-apartheid South Africa has seen the emergence and re-emergence of different social and cultural forces. Consequently, an outright ban on virginity testing would in all probability not be effective in preventing the practice, given that testing has the strong support of many leaders and that it appears to be gaining in popularity.

A pragmatic approach calls for the identification of common ground, and an acknowledgement of common concerns and of respect for the demands of the Constitution. Such an approach would limit virginity testing to girls over the age of 16; require the informed consent of the participants; take place in private under hygienic condition; and ensure that the results of testing would be kept confidential. Virgins would not be publicly identified, as this practice renders them vulnerable to trafficking and sexual abuse. The implementation of provisions such as these would go a long way toward protecting the rights of girls, and would be enhanced if appropriate penalties were prescribed for acts of coercion or forced testing.

6. Conclusion

The debate surrounding virginity testing and the various submissions made by diverse social groupings highlight the vulnerability of girl children, an issue that needs to be recognised and addressed. The public hearings were a confirmation that girls can speak for themselves, and that they are demanding to be heard. There is a need for support structures such as the Alfred Nzo Girls Club, where girls can come together to discuss common concerns and share their hopes and aspirations. Moreover, such groups provide an ideal forum for life skills training programmes, HIV/AIDS education and career counselling. Legislative initiatives must be accompanied by public education programmes aimed at promoting and protecting the rights of women and girl children and at fostering their well-being, self-respect and dignity. In the words of one submission, “virginity testing cannot be dealt with in a vacuum. We need to approach this cultural practice and resolve the issue in a manner that will set precedents for the future as to how we resolve our cultural differences in constructive ways that give regard to our constitutional values”.

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7 Submission of the Human Rights Commission to the Select Committee on Social Service, October 2005