

**Like a Virgin? Virginity Testing as HIV/AIDS Prevention:
Human Rights Universalism and Cultural Relativism Revisited**

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Like a Virgin? Virginity Testing as HIV/AIDS Prevention: Human Rights Universalism and Cultural Relativism Revisited

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I. INTRODUCTION: VIRGINITY TESTING IN THE BATTLE AGAINST AIDS

*People say to me, 'Why, why are you doing this?' And I say to them, 'What have you done to stop AIDS, to limit abortion? . . . We are going ahead with our virginity testing because we have nothing else.'*¹
Nomagugu Ngobese, tester and traditional healer

Thousands of South African children are being examined to ensure that they have preserved what many view as one of the country's greatest defenses against the HIV/AIDS pandemic—their virginity.² South Africa is presently experiencing an explosive AIDS crisis and is among the world's worst affected countries.³ In many communities, each virgin is seen as another small victory in South Africa's battle with a virus that has by some estimates infected approximately 5.5 million of the country's 47 million people.⁴ South Africa has among the largest number of people living with HIV/AIDS in the world, second only to India which now has 5.7 million people infected.⁵ South Africa now has the sixth highest

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¹ Suzanne Daley, *How South Africans Screen Girls for Abstinence*, NEW YORK TIMES, Aug. 17, 1999.

² Rena Singer, *AIDS in Africa: Chastity Tests: Unusual Tool for Public Health*, CHRISTIAN SCIENCE MONITOR, June 2, 2000; Dean E. Murphy, *A Time of Testing for Virginity*, LOS ANGELES TIMES, July 15, 1999; Miriam Isa, *Virginity Testing Revival Sweeps South Africa*, Reuters Jan. 2, 2001 <http://www.globalhealth.org/news/printview-news.php?id=694>, accessed July 31, 2003; *Virginity Testing Makes Comeback in South Africa*, International Planned Parenthood Federation News, Jan. 8, 2001, http://ippfnet.ippf.org/pub/IPPF_News/News_Details.asp?ID=702, accessed July 31, 2003

³ UNAIDS/WHO Epidemiological Facts Sheets on HIV/AIDS and Sexually Transmitted Infections: South Africa (2006) For a discussion of the limitations of data collection, see Alan Whiteside, *AIDS in Africa: Facts, Figures and the Extent of the Problem*, 1–14 in ETHICS & AIDS IN AFRICA: THE CHALLENGE TO OUR THINKING 54 (Anton A. van Niekerk & Loretta M. Kopelman eds., 2005).

⁴ UNAIDS/WHO Epidemiological Facts Sheets on HIV/AIDS and Sexually Transmitted Infections: South Africa (2006) http://www.who.int/GlobalAtlas/predefinedReports/EFS2006/EFS_PDFs/EFS2006_ZA.pdf.

⁵ Margie Mason, *India Has Most AIDS Cases; 5.7 Million Infections Surpass S. Africa*, CHICAGO SUN-TIMES, May 31, 2006. The population of India is significantly larger than that of South Africa at 1,103 million people. http://www.unaids.org/en/Regions_Countries/Countries/india.asp

prevalence rate in the world.⁶ South Africa is widely regarded as having one of the most severe HIV epidemics in the world.⁷

Young women are particularly vulnerable.⁸ The infection rate for young women is far higher than the rates for young men in Africa.⁹ Females aged 15–24 are four times more likely to be infected with HIV than men in that same age group.¹⁰ In South Africa, a disproportionate share of those infected and affected by HIV/AIDS are women and girls,¹¹ with females estimated to comprise 58 percent of the HIV positive population.¹² UNAIDS, the Joint United Nations Program on HIV/AIDS, has identified South Africa as the country with the highest number of women infected with HIV/AIDS in the world.¹³ South Africa has almost double the number of HIV infected women as India and over triple that of neighboring Zimbabwe.¹⁴

South African mortality rates are rising sharply as a result of the AIDS pandemic. The mortality rate for young South African women aged 25–29 in 1999–2000 was 3.5 times higher than in 1985.¹⁵ In 2005, of the adult deaths aged 15–49, approximately 45–53 percent were believed due to HIV/AIDS.¹⁶ Average life expectancy has also been significantly reduced by the pandemic.¹⁷ According to the United Nations Children’s Fund (UNICEF), the life expectancy from birth of a South African was down from 62 years in

⁶ http://data.unaids.org/pub/GlobalReport/2006/2006GR-PrevalenceMap_en.pdf. The five others are Swaziland (33.4%), Botswana (24.1%), Lesotho (23.2%), Zimbabwe (20.1%), and Namibia (19.6%).

⁷ <http://www.aids.org.za/hiv.htm>; *see also* UNAIDS, 2006 COUNTRY REPORT ON THE GLOBAL AIDS EPIDEMIC, at <http://www.unaids.org/en/geographical+area/by+country/south+africa.asp>.

⁸ A child born in the worst affected countries between 2005 and 2010 can expect to die before his or her fortieth birthday. TONY BARNETT & ALAN WHITESIDE, *AIDS IN THE TWENTY-FIRST CENTURY: DISEASE AND GLOBALIZATION* 22–23 (2002). For a discussion of the challenges AIDS-Affected children in Africa confront; *see also* HUMAN RIGHTS WATCH, *IN THE SHADOW OF DEATH: HIV/AIDS AND CHILDREN’S RIGHTS IN KENYA* (2001).

⁹ BARNETT & WHITESIDE, *supra* note 8, at 10–11.

¹⁰ *Id.*

¹¹ UNAIDS: http://data.unaids.org/pub/EpiReport/2006/04-Sub_Saharan_Africa_2006_EpiUpdate_eng.pdf

¹² UNAIDS/WHO Epidemiological Facts Sheets on HIV/AIDS and Sexually Transmitted Infections: South Africa (2006) (Among the 5.5 million South African adults infected, 3.1 million are women.)

¹³ UNAIDS, the Joint United Nations Programme on HIV/AIDS, brings together the efforts and resources of ten United Nations system organizations to the global AIDS response. Based in Geneva, the UNAIDS secretariat works on the ground in more than 75 countries world wide.

¹⁴ UNAIDS: http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN2_en.pdf. At the end of 2005, it was estimated that South Africa had 3.1 million women infected with HIV/AIDS, compared with 1.6 million in India and 890,000 in Zimbabwe. *Id.*

¹⁵ Alan Whiteside et al., *Through a Glass, Darkly: Data and Uncertainty in the AIDS Debate in ETHICS & AIDS IN AFRICA: THE CHALLENGE TO OUR THINKING* 27 (Anton A. van Niekerk & Loretta M. Kopelman eds., 2005); The death rate among women aged 30–34 because 4.6 times as high as it was seven years earlier jumping to 23 per 1,000. Michael Wines, *AIDS Cited in the Climb in South Africa’s Death Rate*, N.Y. Times (Sept. 8, 2006).

¹⁶ <http://www.hst.org.za/healthstats/86/data>. The estimated number of AIDS deaths in South Africa during 2005 exceeded 320,000. UNAIDS/WHO Epidemiological Facts Sheets on HIV/AIDS and Sexually Transmitted Infections: South Africa (2006)

¹⁷ UNICEF: http://www.unicef.org/infobycountry/southafrica_statistics.html. A child born in the worst affected countries between 2005 and 2010 can expect to die before his or her fortieth birthday. BARNETT & WHITESIDE, *supra* note 8, at 22–23 (2002). For a discussion of the challenges AIDS-Affected children in Africa confront; *see also* HUMAN RIGHTS WATCH, *IN THE SHADOW OF DEATH: HIV/AIDS AND CHILDREN’S RIGHTS IN KENYA* (2001).

1990 to 46 years in 2005.¹⁸ Many South African youth do not know that they are infected and are unaware that they can transmit the virus to others.¹⁹

As a result of the devastation brought by the pandemic, virginity testing enjoys the distinction of being among the most popular—and politically charged—public health initiatives in South Africa’s battle with the HIV/AIDS pandemic.²⁰ While virginity testing was a prenuptial custom previously associated with marriage; proponents of testing now maintain that, with its emphasis on total abstinence from sexual intercourse by girls, the practice is being revived to prevent HIV infection and AIDS. Public labeling of girls as virgins is not without danger. Some South African researchers attribute the increase in sexual violence against very young girls presumed virgins to a belief gaining credence in some communities that sexual intercourse with a virgin can “cleanse” HIV-positive men or men with AIDS of disease.²¹ By 2008, it is expected that children’s rights legislation currently under consideration in South Africa’s Parliament will prohibit virginity testing for children below 16 years of age.

The resurgence and recent expansion of virginity testing—a cultural practice that disproportionately impacts young unmarried women and girls—presents a dilemma for South Africa’s pluralistic society. The South African government is a new constitutional democracy committed to both equality and the preservation of the customs and traditional practices of its many different cultures. Although there are obligations to protect, promote, and preserve equality enshrined in the South African Constitution and in the international human rights treaty obligations that have been assumed by the government since the nation’s transition to democracy, there are also constitutional commitments to cultural rights as well as widespread norms that coexist in the country which are on occasion at variance with gender equality. As such, South Africa has the difficult task of balancing cultural rights with other human rights. This will remain a persistent challenge in post-Apartheid South Africa, compounded by the country’s context of inadequate economic resources, fragile legal enforcement mechanisms, and an explosive HIV/AIDS pandemic. The virginity testing debate as it has been engaged in South Africa exposes the persistent theoretical and practical tensions between human rights universalism and cultural relativism. In this respect, the debate over virginity testing is not unlike women’s rights struggles elsewhere in the world. Yet, in other respects the struggle over virginity testing is unique in that it promotes a return to traditional culture as a public health prevention measure.

The debates on virginity testing have been simultaneously engaging and impoverished highlighting the limitations of prevalent conceptions of rights as rigid, culture as static, and gender equality as conflicting with cultural autonomy. The arguments advanced by testing abolitionists are flawed for failing to appreciate the opportunities that culture may present for change. The arguments advanced by those who maintain that testing should be accepted and accommodated unchanged simply ignore the empirical

¹⁸ *Id.* For the first time, deaths among people in their thirties or forties have exceeded those of people in their sixties or seventies. Michael Specter, *The Denialists; the Dangerous Attacks on the Consensus about HIV and AIDS*, THE NEW YORKER, March 12, 2007.

¹⁹ See http://www.usaid.gov/our_work/global_health/aids/Countries/africa/hiv_summary_africa.pdf, page 2. Approximately two million South Africans living with HIV do not know that they are infected. *Id.*

²⁰ Singer, *supra* note 2; Steven Ntuli, Virginity Testing A Celebration for Some, Concern for Others Maleane, <http://www.lowveldinfo.com/news/showstory.asp?story=2725>, accessed July 31, 2003.

²¹ Prega Govender, *Child Rape: A Taboo Within the Aids Taboo*, SUNDAY TIMES, April 4, 1999; Jean Redpath, Children at Risk, Focus, June 2000. www.hsf.org.za. (“It’s such a sensitive issue with potentially racist overtones people don’t want to confront the issue.”) For a discussion on the role of traditional healers in Africa generally and their role in society see Dennis A. Ityavyar, *Health in Pre-colonial Africa*, in THE POLITICAL ECONOMY OF HEALTH IN AFRICA 35 (Toyin Folola & Dennis Ityavyar eds. 1992)

fact that testing practices have indeed changed over time. The common and disappointing feature shared by both sides of the debate has been their tendency to see virginity testing itself as the problem and to frame the possible solutions as either abolition or accommodation of the practice.

In South Africa, the domain of concern needs to be wider than legislative efforts to eradicate virginity testing. Even if virginity testing is effectively abolished by the legislative prohibition, society will still need to address the HIV/AIDS epidemic and its disproportionate impact on women. What must be recognized is the need to expand the domain of concern beyond abolishing or accommodating virginity testing to alter the broader cultural norms that foster HIV infection and women's inequality in society which served to motivate the testing resurgence in the first instance.

The HIV/AIDS pandemic has given rise to a remarkable array of ethical problems and human rights issues in Sub-Saharan Africa and beyond.²² While the virginity testing phenomenon may initially in itself appear to be the central rights violation at issue, a broader vision of human rights reveals the practice for what it is—a symptom of the challenges confronting a developing nation dealing with pandemic disease. Understood in this light, as a public health measure, the virginity testing phenomenon presents two distinct challenges for human rights discourse. First, it highlights the persistent divisions between the competing normative orders of rights universalism and rights relativism. Second, the relative silence about the unrealized right to health in the debates about the testing ban speaks to the difficulty human rights discourse continues to have in dealing with issues concerning economic, social and cultural rights.

This Article explores the tension between the rights of women and girls to equality, privacy, and sexual autonomy and the politics of culture in the context of pandemic disease. Specifically, this article examines the political debate surrounding the resurgence of virginity testing and its widespread popular support and the South African government's recent prohibition of the practice. This article argues that the current debate on virginity testing which focuses on abolition or accommodation of the practice is misguided and polarizing, and increases the likelihood that the problem driving the testing resurgence—high rates of HIV infection which disproportionately impacts women and girls—will remain unresolved. Recognizing that recent bans on virginity testing will not effectively end testing, just as virginity testing will not end the HIV/AIDS pandemic, the article calls for a discursive shift in the debate.

Rather than focusing on an assumed inherent conflict between gender equality and cultural autonomy there should be an engaged public discourse on the right to health and the ethical obligation of government to, at a minimum, provide accurate health information and adequate health services in a manner sensitive to and respectful of cultural differences. Such a shift would cause the government and civil society to recognize that legal and medical approaches cannot in isolation sufficiently improve public health—it is necessary to acknowledge and embrace cultural norms while at the same time recognizing that such norms must evolve over time to accommodate contemporary lifestyles and trends.

Part II of the Article explains the virginity testing procedure, tracks its revival, and discusses complications and concerns associated with testing. Part III situates virginity testing within the human rights literature on gender equality and cultural self-determination, discusses the rights based arguments advanced by both opponents and proponents of the practice and the pertinent provisions of international human rights instruments and the South African Constitution. Part IV reviews the limits of the legislative battle lines drawn between gender equality and cultural practices and explains the shortcomings of the arguments advanced by both sides. It is argued that stakeholders in the virginity testing legislative battle

²² See, e.g., Anton A. van Niekerk, *Moral and Social Complexities of AIDS in Africa* in ETHICS & AIDS IN AFRICA: THE CHALLENGE TO OUR THINKING 54 (Anton A. van Niekerk & Loretta M. Kopelman eds., 2005).

have drawn the wrong battle lines by failing to focus more fully on the unrealized right to health. Part V offers that the divergent positions taken by stakeholders in the testing debate can be reconciled through not only the discursive shift towards a substantive right to health; but also a pragmatic approach to cultural pluralism and an understanding of both rights and culture as contextual and adaptable. It is also argued that both these approaches could be enhanced by a human rights discourse informed by “capabilities theory” which through its appreciation of diversity and emphasis on positive freedoms would redirect the focus of government and civil society efforts on the underlying issues surfaced by the virginity testing resurgence.²³ Finally, the Article briefly concludes noting that the resurgence in virginity testing as a community self-help solution signals a systemic failure on the part of the South African government and the international community to adequately address the HIV/AIDS pandemic. It observes that virginity testing is illustrative of how human rights discourse raises problems that are practical and urgent on one hand and theoretical and abstract on the other. The Article offers a pragmatic approach to address the practical problems of cultural pluralism in diverse developing countries and advances capabilities theory as a way to address the theoretical difficulty socioeconomic rights present to human rights discourse.

II. VIRGIN TERRITORY: TEST REVIVAL AND SOUTH AFRICA’S PROBLEMATIC AIDS POLICIES

Since the beginning of the pandemic, the AIDS issue in South Africa has been highly politicized and racially charged.²⁴ Although there have recently been some improvements in the government’s AIDS policies, several international commentators have described President Thabo Mbeki’s early denial of a link between HIV and AIDS as “irresponsibility bordering on criminality.”²⁵ Others have suggested that the government’s stance created confusion among the public and fostered a climate of misinformation that was “genocidal” in its effect.²⁶

In 2000, South African President Thabo Mbeki came under fierce international criticism from mainstream scientists and medical experts after appointing an international advisory panel of AIDS

²³ Originally conceived as a challenge to classical development economics by Nobel Laureate in Economics, Amartya Sen, and expanded by legal philosopher Martha Nussbaum, capabilities theory maintains normatively that economic, political, legal and other social policies should be evaluated according to how they expand people’s capabilities to achieve freedom to function in ways they find valuable. *See generally* AMARTYA SEN, *INEQUALITY REEXAMINED* (1999); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

²⁴ VIRGINIA VAN DER VLIET, *THE POLITICS OF AIDS* 49–50 (1996) (“right-wing politicians used the threat of an epidemic in the black community to stir up racial prejudice, win political support and demand renewed segregation, by suggesting that AIDS could be passed on in social or physical contact in desegregated facilities such as schools, hospitals and swimming pools.”)

²⁵ Green Left Online, *South Africa: Mbeki’s AIDS Stance Slammed* (July 26, 2000), at <http://www.greenleft.org.au/2000/413/23244>; *see also* BARNETT & WHITESIDE, *DISEASE AND GLOBALIZATION*, *supra* note 8, at 298.

²⁶ *Id.*, *see also* Michael Specter, *The Denialists: The Dangerous Attacks on the Consensus about HIV and AIDS*, *THE NEW YORKER*, March 12, 2007 (quoting a leading AIDS expert referring to promotion of dissident AIDS science as “murder”).

experts and scientists which included a small group of dissident scientists who maintained that HIV is not the cause of AIDS.²⁷ Mbeki refused to accept that HIV causes AIDS and expressed this view publicly.²⁸

At the opening ceremonies of the 13th International AIDS Conference in Durban South Africa in July 2000, President Mbeki blamed poverty and poor nutrition, not HIV, as the primary causes of AIDS in South Africa.²⁹ He demanded that policy priorities be directed towards poverty generally, rather than AIDS specifically.³⁰ He referred to AIDS as a “catch-all” categorical term associated with other diseases like malaria and tuberculosis.³¹ President Mbeki also claimed that antiretroviral drugs (ARVs) potentially do more harm than good asserting that ARVs “ineffective” and “toxic” and suggested that foreign drug companies exaggerated the efficacy of ARVs to maximize profits.³² Initially, the government refused to supply ARVs to pregnant women to reduce the risk of transmission of the virus from mother to child.³³ It was not until after a Constitutional Court judgment ordering the government to act, *Minister of Health v. Treatment Action Campaign*, that the government made ARVs widely available to pregnant women throughout the country.³⁴

In September 2001, President Mbeki began to question the country’s mortality data and to minimize the magnitude of the HIV epidemic as reported by international community observers.³⁵ Only one cabinet minister from the ANC, Labor Minister Membathisi Mdladlana, publicly declared that HIV causes AIDS

²⁷ BBC News, Mbeki Digs In On AIDS, Sept. 20, 2000, available at <http://news.bbc.co.uk/2/hi/africa/934435.stm>

²⁸ *Id.* For Mbeki’s response to condemnation of his AIDS policy as a “criminal abandonment of the fight against HIV/AIDS,” see his editorial commentary, Thabo Mbeki, *Reciting Comfortable Catechisms on AIDS is not Good Enough*, THE SUNDAY TIMES, April 23, 2000; see also *Chasing the Rainbow: A Survey of South Africa*, THE ECONOMIST, April 8, 2006 (positing “Mbeki’s unorthodox views on the causes and cures of HIV/AIDS undoubtedly have something to do with his agenda of finding African solutions (rather than expensive Western ones) to Africa’s problems...”).

²⁹ CNN.com, Mandela Repudiates Mbeki on AIDS Stance, Sept. 29 2000, <http://archives.cnn.com/2000/WORLD/africa/09/29/safrica.mandela.reut/index.html>.

³⁰ Patrick Bond, A Political Economy of South African AIDS, <http://www.zmag.org/bondsaid.htm>.

³¹ Green Left Online, South Africa: Mbeki’s AIDS Stance Slammed (July 26, 2000), at <http://www.greenleft.org.au/2000/413/23244>

³² *Id.*

³³ BBC News, Mbeki Digs In On AIDS, Sept. 20, 2000, available at <http://news.bbc.co.uk/2/hi/africa/934435.stm>

³⁴ *Minister of Health v. Treatment Action Campaign* CCT8/02 (declaring that the Constitution requires the government to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV)

³⁵ Schneider, Helen; Fassin, Didier (2002). “Denial and defiance: a socio-political analysis of AIDS in South Africa.” *AIDS, Supplement* 16 (Supplement 4): S45–S51, available at <http://www.aidsonline.com/pt/re/aids/pdfhandler.00002030-200216004-00007.pdf>; see also Mbeki in *Bizarre AIDS Outburst*, MAIL & GUARDIAN, Oct. 26–Nov. 1(2001) (reporting on an address by Mbeki at the University of Fort Hare and attributing to him the following comments: “others who consider themselves to be our leaders take to the streets carrying their placards, to demand that because we are germ carriers, and human beings of a lower order that cannot subject its passions to reason . . . convinced that we are but natural-born promiscuous carriers of germs, unique in the world, they proclaim that our continent is doomed to an inevitable mortal end because of our unconquerable devotion to sin and lust.”)

during Mbeki's efforts to deny the connection.³⁶ Finally in August 2003, the cabinet, who can override presidential decisions in the South African system, declared HIV to be the cause of AIDS.³⁷ Responding to repeated accusations of failing to adequately address to the AIDS epidemic, eventually Mbeki stated that although he was not convinced that the link between HIV and AIDS was conclusively established, his government would remain committed to fighting the disease.³⁸

The government has to date demonstrated its commitment in a bizarre manner. For example, Minister of Health Manto Tshabalala-Msimang, who has served since June of 1999, promoted nutritional approaches to AIDS while highlighting potential toxicities of ARVs and the claim that they might even cause AIDS.³⁹ She also voiced support for the Dr. Rath Health Foundation, an organization that promoted vitamin supplements as a substitute for ARVs.⁴⁰ Finally, in August 2005, South Africa's Advertising Standards Authority ruled that such statements were a threat to public health.⁴¹

In September 2006, the Minister of Health was sidelined, although not removed,⁴² after repeatedly questioning the efficacy of ARVs and instead promoting the use of garlic, lemon, beetroot and African potatoes as a more effective way of treating AIDS.⁴³ South Africa came under severe criticism recently at the 19th international AIDS conference in Toronto in 2006 after Dr. Tshabalala-Msimang openly said that these methods were preferable to ARVs.⁴⁴ International scientists attending the conference called the South African government's policies "disastrous [and] pseudo-scientific."⁴⁵ At this writing, however, the

³⁶ CNN.com, *Mandela Repudiates Mbeki on AIDS Stance*, Sept. 29 2000, <http://archives.cnn.com/2000/WORLD/africa/09/29/safrica.mandela.reut/index.html>.

³⁷ Human Rights Watch, *Deadly Delay: South Africa's Efforts To Prevent HIV in Survivors of Sexual Violence* 24 (March 2004), available at <http://hrw.org/reports/2004/southafrica0304/southafrica0304.pdf>.

³⁸ BBC News, *Controversy Dogs AIDS Forum* (July 10, 2000), <http://news.bbc.co.uk/2/hi/africa/826742.stm>. Mbeki's denials led 5000 leading scientists from around the world to sign the "Durban Declaration" which insisted that "[t]he scientific evidence that HIV causes AIDS is unambiguous." Green Left Online, *South Africa: Mbeki's AIDS Stance Slammed* (July 26, 2000), at <http://www.greenleft.org.au/2000/413/23244>;

³⁹ Basildon Peta, *Mbeki Demotes AIDS Minister Who Urged 'Garlic' Treatment*, THE INDEPENDENT (Sept. 9, 2006), available at <http://news.independent.co.uk/world/africa/article1431071.ece>.

⁴⁰ Avert, *HIV & AIDS in South Africa*, <http://www.avert.org/aidssouthafrica.htm>; see Sarah Boseley, *Discredited Doctor's 'Cure' For AIDS Ignites Life-And-Death Struggle in South Africa*, THE GUARDIAN (May 14, 2005), available at <http://www.guardian.co.uk/aids/story/0,7369,1483821,00.html>.

⁴¹ Avert, *HIV & AIDS in South Africa*, <http://www.avert.org/aidssouthafrica.htm>;

⁴² Msimang was replaced by an interim director Feb. 28, 2007 due to health complications associated with an undisclosed illness, not because of her principles and position on HIV/AIDS. See, *Ailing Manto Put On Sick Leave* MAIL & GUARDIAN (Feb. 27, 2007), available at

http://www.mg.co.za/articlePage.aspx?articleid=300374&area=/breaking_news/breaking_news__national/.

Transport Minister Jeff Radebe has been appointed interim health minister. South African officials have not said whether Msimang will return to the post. Craig Timberg, *South Africa Replaces Health Minister*, WASHINGTON POST, Feb. 28, 2007.

⁴³ Basildon Peta, *Mbeki Demotes AIDS Minister Who Urged 'Garlic' Treatment*, THE INDEPENDENT (Sept. 9, 2006), available at <http://news.independent.co.uk/world/africa/article1431071.ece>.

⁴⁴ *Id.*

⁴⁵ *Id.*

South African government has recently released a new HIV/AIDS policy document that has to date been well received by civil society HIV/AIDS advocates.⁴⁶

In sum, for long while, the South African government has proved unwilling or unable to effectively meet the challenges presented by the HIV/AIDS epidemic. Meanwhile, the brunt of the illiberal self-help solutions that have arisen to fill this governance gap in addressing HIV/AIDS, such as virginity testing, is being borne by the least powerful members of South African society. It is within this context that the practice of virginity testing has re-emerged, advanced by its proponents as both a return to African tradition and an HIV/AIDS prevention strategy in a country ravaged by the disease.

A. *Origins and Evolution of Virginity Testing*

*Three years ago if you had talked about virginity testing people would laugh and say that was something that their grannies did. But it's really a growing phenomenon now. This year it is bigger than last year and next year it will be even bigger again.*⁴⁷

Futhi Zilkala, Commission for Gender Equality

In general, virginity testing refers to the exercise of examining young women and girls to ascertain whether or not they are sexually chaste.⁴⁸ The testing tradition among Zulus was originally intended to assure the purity of young brides who were required to prove their chastity before their parents and future in-laws settled on an amount to be transferred by the groom's family to the bride's family (*Ilobolo*).⁴⁹ Virginity testing apparently fell into disuse when migrant labor and forced migration eroded family structures.⁵⁰

While there is a general consensus that virginity testing was rather widely conducted in the past, presently, there is uncertainty regarding its frequency and the manner in which tests were conducted.⁵¹ There is also general agreement that chastity before marriage was greatly valued and socially regulated in traditional cultures.⁵² In particular, differential *ilobolo* amounts demonstrate the importance placed on a

⁴⁶ Amy Musgrave, *New AIDS Plan Needs Business Help*, BUSINESS DAY, March 15, 2007; Charlene Hunter-Gault, *New Policy on AIDS*, National Public Radio Morning Edition Broadcast, March 14, 2007; Craig Timberg, *In South Africa, A Dramatic Shift on AIDS*, WASHINGTON POST, Oct. 27, 2006.

⁴⁷ Daley, *supra* note 1.

⁴⁸ Susan LeClerc-Madlala, *Virginity Testing: Managing Sexuality in a Maturing HIV/AIDS Epidemic*, 15 MEDICAL ANTHROPOLOGY QUARTERLY (2001). It should be noted that virginity testing in neither a recent phenomenon nor an exclusively African practice. Indeed, the condition of virginity has been contested throughout the ages. *See generally*, KATHLEEN COYNE KELLY, PERFORMING VIRGINITY AND TESTING CHASTITY IN THE MIDDLE AGES (2000) (examining a variety of medieval and modern narratives across a number of genres in which virginity is ostensibly tested and concluding: "The gendered nature of virginity has been an inescapable feature of Western discourses on the body for more than two thousand years. How one goes about defining and verifying virginity may change over time, but the general belief that the body is readable, and virginity is verifiable, has remained fairly consistent."); *see, e.g.*, HUMAN RIGHTS WATCH, A MATTER OF POWER: STATE CONTROL OF WOMEN'S VIRGINITY IN TURKEY (1994) (virginity testing in Turkey); Fungai Machirori, *Virginity Tests Unjust*, The Herald (Harare) Jan. 19, 2007 (virginity testing in Zimbabwe).

⁴⁹ Singer, *supra* note 2.

⁵⁰ Chris McGreal, *Virginity Tests Make a Comeback*, DAILY MAIL & GUARDIAN, Sept. 29, 1999.

⁵¹ LeClerc-Madlala, *supra* note 48.

⁵² LeClerc-Madlala, *supra* note 48.

girl's virginity at marriage.⁵³ The main exchange commodity in the *ilobolo* transactions were cattle.⁵⁴ If the potential bride was found to be a virgin after testing, the standard ten head of cattle could be supplemented by an additional head.⁵⁵ This additional cow was known as *inkomo kamama*, or mother's cow, and was given to the girl's mother as a token of gratitude from the future groom's family for providing them with a "pure" bride.⁵⁶ The responsibility for examining a young woman to establish her chaste status prior to a marriage is believed to have belonged to the elderly female relatives of the girl's family with the prospective groom's mother as a witness.⁵⁷

Whether or not girls eligible for marriage were historically subjected to public, collective, routine inspections absent an engagement or marriage proposal, as practiced today, remains an open question.⁵⁸ There is minimal ethnographic evidence to support assertions about testing frequency.⁵⁹ Nevertheless, other forms of social control likely helped to instill the value of premarital chastity. For example, talking to girls about the importance of maintaining virginity before marriage formed part of the traditional puberty ritual known as *umhlonyane*.⁶⁰ Ideally, virginity testing "coincided with the commencement of a girl's first menses and was marked by her seclusion and instruction by elderly women in how to sit properly and generally how to conduct herself with modesty and dignity."⁶¹

In contrast to what is known of the virginity testing that occurred in the past, contemporary virginity testing takes place in a wide variety of settings that range from the privacy of the family home, to the *kraal* of a village chief, to school halls, to community centers and even large public sports stadiums.⁶² Virginity tests today are often conducted in connection with a three-day festival and ritual of appeasement dedicated to Nomkhubulwana, a goddess once prominent in Zulu cosmology.⁶³ The three-day rite culminates in a celebratory sowing of seeds in a garden, the tradition that only virgins may perform this task is offered as a justification for testing.⁶⁴

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (Significantly, female genitalia are also referred to as *inkomo kamama*.)

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Fiona Scorgie, *Virginity Testing and the Politics of Sexual Responsibility*, 61 AFRICAN STUDIES 1 (2002) (citing M. Kohler, *Marriage Customs in Southern Natal*, Ethnological Publications, 4 Department of Native Affairs, Pretoria (1933); Gluckman, *M. Zulu Women in Hoecultural Ritual*, 9 Bantu Studies 255–71 (1935); Krige, E.J. *The Social System of the Zulus* (1936); Van der Vliet, V. *Growing up in Traditional Society in Hammond-Tooke*, W.D. (ed) *The Bantu-speaking peoples of Southern Africa* (1974))

⁶³ Scorgie at 57 (Most commentators have traced the current revival of *ukuhlolwa kwezintombi* or virginity testing in KwaZulu-Natal to around 1994).

⁶⁴ Scorgie at 57 (Nomkhubulwana is a female deity described as the "female principle, immortal virgin, mother and protector of all Zulu girls and the source of growth and creation"). Virginity testing festivals are promoted by individuals who have formed non-governmental organizations aimed at cultural preservation and fostering a return to tradition. such as Isivivane, AmaGugu, aseAfrika, IsiggiseSintu and the All Africa Cultural Group. Presently, cultural organizations are reportedly conducting virginity testing among Zulu girls throughout the province of KwaZulu-Natal. See, e.g., Gabi Khumalo, *The Champion of Virginity Testing*, NATAL WITNESS June 26, 2003. http://witness.co.za/content\2003_06\16334.htm; see also LeClerc-Madlala, *supra* note 48; see also Landiwe Dlamini, *Virginity Testing Reintroduced to Fight AIDS*, SUNDAY TIMES Jan. 17, 1999.

Formally, there is no central governmental cultural organization managing or directing virginity testing.⁶⁵ “The provincial health department of KwaZulu-Natal, while not officially advocating virginity testing, is reported to be actively involved in assuring that proper health precautions are taken during genital inspection by providing rubber gloves for testers and facilitating workshops to educate testers about female reproductive anatomy.”⁶⁶

B. Testing Practices and Procedures

*This shows I have not been touched by evil things.*⁶⁷

Valentia Hlophe, age 14, virgin

Virginity assessments are derived from indigenous rather than biomedical knowledge.⁶⁸ According to South African medical anthropologist Suzanne LeClerc-Madlala, to understand virginity testing among the Zulu, “one must be conversant in the metaphorical language used in the folk descriptions of the human body and human bodily processes.”⁶⁹ Accordingly, “biomedical ‘reality’ and scientific ‘truth’ are of little import.”⁷⁰ The qualities testers look for as evidence of virginity are derived from folk constructs of the body and ethno-medical beliefs of health and illness.⁷¹

Members of the medical establishment have questioned whether many of the testers, often traditional healers, are drawing accurate conclusions as there is no standard medically accepted test for virginity. Hymens can tear accidentally and occasionally a girl may be born without one.⁷² Because the standards used by testers are unscientific and are grounded in folk metaphorical conceptions of the body, the fact that hymens can be broken during sporting activity or that there is no medically accepted screen for virginity is of little relevance to traditional virginity testers.⁷³ For example, testers talk about virginity being in evidence if there is a visible “white dot” or a “white lacy barrier” somewhere deep in the vaginal canal.⁷⁴

Though the political lobby which supports testing is often skeptical of Western forms of knowledge, some testers have borrowed some Western constructs. For example, grades such as those used to mark examinations in schools have been incorporated into some testing practices. An “A” is earned by girls who rate high in all assessments associated with virginity.⁷⁵ She must meet a combination of criteria, the most important relate to the genitalia, but in addition her eyes should reflect virginity in that “they look innocent,” her breasts and abdomen should be “firm and taut,” and the muscles behind her knees should

⁶⁵ LeClerc-Madlala *supra* note 48

⁶⁶ *Id.*, see also Landiwe Dlamini, *Virginity Testing Reintroduced to Fight AIDS*, SUNDAY TIMES Jan. 17, 1999.

⁶⁷ McGreal, *supra* note 50.

⁶⁸ LeClerc-Madlala, *supra* note 48.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; see also CECIL G. HELMAN, *CULTURE HEALTH AND ILLNESS* (4th ed. 2000) (explaining how the culture in which humans are socialized informs how people perceive and interpret changes in the body “the human body is more than just a physical organism fluctuation between health and illness. It is also the focus of a set of beliefs about its structure and function”);

⁷² Daley, *supra* note 1.

⁷³ LeClerc-Madlala, *supra* note 48

⁷⁴ LeClerc-Madlala, *supra* note 48

⁷⁵ LeClerc-Madlala, *supra* note 48

be “tight and straight.”⁷⁶ A “B” grade virgin may have had intercourse once or twice or “may have been abused.” Active complicity in sexual intercourse may mean the difference between a “B” and a “C.”⁷⁷

While the parents of a “B” grade girl will be warned to watch their daughter more closely; a “C” grade is tantamount to failure.⁷⁸ Here, no evidence of hymen is present and the girl’s eyes may indicate she is someone “who knows men.”⁷⁹ Most testers say it is useless to do anything further with these girls, as “it is too late” and “nothing will change them.”⁸⁰ A minority of testers claim that they counsel such girls and try to impress on them the dangers of sexually transmitted diseases, AIDS and pregnancy.⁸¹ Nevertheless, to receive a C is to be marked with shame and disgrace.⁸²

Depending on the particular tester and the host or organizer of the testing event a girl’s family may be asked to pay a fine if she fails her exam. A girl’s loss of virginity is sometimes conceived of as a contagion that could cause other chaste girls to lose their virginity as well should they remain in close company with her.⁸³

Presently, testing practices vary greatly across the KwaZulu-Natal province, with testing now being conducted on children as young as five years old in some areas. In some communities testing is performed at home with the child inspected in the presence of her mother. The mother is then educated and equipped with virginity testing skills where the inspection is started before the puberty stages (*ukuthomba*). Testing advocates say this process better prepares the child and her mother for better communication during puberty.⁸⁴ In most communities, however, tests are still conducted in a public, though gender segregated, forum.⁸⁵

C. Popular Support for Testing, Growing Participation

*Our parents encouraged us. They want us to stay virgins. People are happy about what we are doing and they are encouraging us.*⁸⁶

Susan Hadebe, age 15

*I think the testing is good because they must stop AIDS. A lot of teenagers don’t take care of themselves—they don’t use condoms. And you mustn’t have sex with just anyone who doesn’t care. But sex education could do the same thing as virginity testing. People should come and talk about sex in the schools.*⁸⁷

⁷⁶ LeClerc-Madlala, *supra* note 48

⁷⁷ LeClerc-Madlala, *supra* note 48.

⁷⁸ LeClerc-Madlala, *supra* note 48

⁷⁹ LeClerc-Madlala, *supra* note 48

⁸⁰ LeClerc-Madlala, *supra* note 48

⁸¹ LeClerc-Madlala, *supra* note 48 (reporting minimal, if any counseling for girls at the tests she attended in connection with her research)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ LeClerc-Madlala, *supra* note 48.

⁸⁵ Kathryn Strachan, *Going Back to Poisonous Roots*, YOUTH HEALTH UPDATE, Issue No. 44, July 1999, <http://www.hst.org.za/update/44/policy4.htm> (reporting that there have been unconfirmed reports of testing being carried out in medical clinics).

⁸⁶ McGreal, *supra* note 50.

⁸⁷ *To Test or Not to Test—That is the Question*, DAILY MAIL & GUARDIAN, Sept. 22, 1998.

Yvette Nhlanhla, age 18

The belief that virginity testing may provide a culturally appropriate solution to a myriad of problems, including the AIDS epidemic, is shared across various levels of society. While virginity testing was a prenuptial custom previously associated with marriage; proponents of testing now maintain that, with its emphasis on total abstinence from sexual intercourse by girls, the practice is being revived: to prevent HIV infection and AIDS, to reduce teen pregnancy, to detect incest and abuse, and to re-install and promote lost cultural values.⁸⁸ “Many rural women, perhaps the most marginalized group in South Africa, see virginity testing as the only way to re-install self-respect, and pride.”⁸⁹

The AIDS epidemic is stressing the extended family network as more elderly women are confronting the prospect of caring for a growing number of grandchildren along with their sick, dying, or dead parents.⁹⁰ In addition, these grandchildren may need more care than ever before because an increasing number of young children have contracted HIV from their infected mothers.⁹¹ Indeed, grandmothers have become the “shock troops of the maturing AIDS epidemic, absorbing the initial social impact of AIDS-related death and the growing problem of orphans.”⁹²

With death rates of people between the ages of 25 to 49 believed to have increased by an estimated 161 percent between 1997 and 2004, the care-giving burden being borne in large part by elderly women is enormous. It is therefore not surprising that the most “vociferous” advocates of reviving the testing tradition are older women who are heads of households supporting a number of young children.⁹³

Community youth groups are also urging their members to be tested in an effort to combat the spread of HIV/AIDS.⁹⁴ Those found chaste are rewarded with colorful certificates, praise from their parents, and bragging rights in their communities.⁹⁵ There seems to be tacit agreement that girls who are not virgins should not take the test.⁹⁶

To address claims of gender discrimination, some virginity testers have started to test boys as well.⁹⁷ Critics of testing among the medical community assert that there is no scientific standard by which to ascertain whether a girl is a virgin, let alone a boy.

There are no precise statistics on how many young women and girls participate but some examination sites in the KwaZulu-Natal region are reportedly so crowded that hundreds of girls wait in line for up to three hours for their turn. Virginity testing sessions are advertised on radio, and groups of

⁸⁸ *Virginity Testing as Cultural Practice, Proceedings of the Commission on Gender Equality’s Consultative Conference Report* (June 2000) (on file with author).

⁸⁹ LeClerc-Mandala, *supra* note 48.

⁹⁰ LeClerc-Mandala, *supra* note 48.

⁹¹ *Id.*

⁹² *Id.*

⁹³ LeClerc-Madlala, *supra* note 48. There are a number of child-headed households in South Africa as well.

⁹⁴ Landiwe Dlamini, *Virginity Testing Reintroduced to Fight AIDS*, SUNDAY TIMES, Jan. 17, 1999.

⁹⁵ Singer, *supra* note 2.

⁹⁶ Kerry Cullinan, *Virginity Testers Say They Will Never Quit*, Health-E, Dec. 13, 2001. http://www.health-e.org.za/news/easy_print.php?uid=20010918.

⁹⁷ McGreal, *supra* note 50; Jo Stein, *Pissing in the Wind*, Aug. 9, 2000 (Testing techniques include urinating in the air, “if [urine] goes straight up in the air, the boy is a virgin. If it sprays, it means that hot sperm has come out.”); Ajith Bridgraj, *Much Ado About Virginity*, MAIL & GUARDIAN, Sept. 22, 1998 (“The power with which a boy urinates will indicate whether he is a virgin or not.”).

testers tour regional schools to spread the Zulu tradition that girls should remain virgins until marriage.⁹⁸ And government officials and Zulu leaders estimate that tens of thousands are being examined each month. Yet no one has to date conducted an official study of virginity testing's impact on infection rates.⁹⁹

Until the Central Ministry of Education banned virginity testing on school property¹⁰⁰ some local teachers in rural regions of KwaZulu-Natal province had informally taken up the cause, counseling chastity and administering virginity tests to their students in classrooms.¹⁰¹ For a time, virginity testing was openly conducted with the tacit approval of the KwaZulu-Natal education department, which encouraged testing conducted by teachers at several schools in Osizweni, an area in northern KwaZulu-Natal.¹⁰² In 1998, with the support of parents and the local education superintendent, teachers in Osizweni administered tests to more than 3,000 girls and boys some as young as six years old, and tests were repeated as often as every three months.¹⁰³ The acting principal of one school reportedly said she supported the tests and "didn't mind [female teacher testers] using school time or the school premises. After all, it is for a good cause."¹⁰⁴ Young unmarried teachers in Osizweni were also tested.¹⁰⁵ At the same time however, sex education was not an option in the Osizweni schools, one teacher explained: "we are against the use of condoms. We think condoms promote lust for sex . . . I don't think we should teach children about such things."¹⁰⁶

Although the practice is believed to have originated and remains most popular among Zulus in South Africa, virginity testing is increasingly being used elsewhere by other communities outside of KwaZulu-Natal. Eastern Cape women's and children's rights organizations report the use of testing among Xhosa communities.¹⁰⁷ In the Eastern Cape Province, where most people are of Xhosa descent, there are now three-days of celebrations and workshops on health issues and speeches from local dignitaries organized around the recognition of about girls who have remained virgins for two years. Girls attending were examined by a committee of women and awarded a certificate.¹⁰⁸

*D. VIRGINITY TESTING TESTED:
DEBATING THE COMPLICATIONS AND CONCERNS*

⁹⁸ Anton La Guardia, *Zulu Maidens Put Safety First*, THE DAILY TELEGRAPH, July 11, 2000. <http://old.smh.com.au/news/specials/intl/aids/aids12.html>. ("The fashion may be spreading to other groups. Among the teenagers being tested was an Indian girl . . .")

⁹⁹ Singer, *supra* note 2.

¹⁰⁰ South Africa: Communities Use Virginity Tests to Prevent Spread of HIV, Kaiser Daily HIV/AIDS Report, June 5, 2000; *Chastity Tests are Becoming Popular in South Africa*, International Planned Parenthood Federation, June 9, 2000 http://ippfnet.ippf.org/pub/IPPF_News/News_Details.asp?ID=317 accessed July 31, 2003; South Africa Communities Use Virginity Tests to Prevent Spread of HIV, Kaiser Daily HIV/AIDS Report, June 5, 2000 <http://report.kff.org/archive/aids/2000/06/kh000605.4htm>, accessed July 31, 2005.

¹⁰¹ As a researcher for Human Rights Watch, I received reports of tests conducted by school teachers after the Education Department's ban in 2001.

¹⁰² Prega Govender, *School Kids in Virginity Test*, SUNDAY TIMES, May 17, 1998.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ McGreal, *supra* note 50.

¹⁰⁷ *Activists Challenge Girls' Virginity Testing*, THE INDEPENDENT, July 17, 2003.

¹⁰⁸ Daley, *supra* note 1.

Although virginity testing in South Africa enjoys popular support as a grassroots chastity movement it is vigorously opposed by some African feminists, AIDS activists, and many medical experts.¹⁰⁹ These opponents argue that the practice is unconstitutional, unhygienic, counterproductive, and potentially dangerous in addition to violating the human rights of the children—predominantly girls—being tested.¹¹⁰ The concerns about virginity testing are numerous and the practice is complicated by many factors.¹¹¹

1. Corruption and Commercialization

Along with the spread and popularity of virginity testing, has come commercialization and corruption.¹¹² Nise Malange's research in Hlabisa among testers found that the commercialization of African culture has moved the custom of virginity tests out of the private sphere where it once belonged and into the public domain at the community level.¹¹³ Testing costs vary, although typically, exams cost about 10 cents, and a certificate 90 cents.¹¹⁴ Aside from traditional testers, nurses at several clinics have reportedly been charging parents a fee to conduct virginity tests on their children.¹¹⁵ "Among the better known traditional testers in KwaZulu-Natal, there seems to be fair degree of rivalry and jealousy with some testers attempting to undermine their rivals' reputations and limit their practices." There have also been allegations of corruption among testers. In some instances, girls who have been pronounced virgins have given birth a few months later, indicating that they were pregnant at the time of the test.¹¹⁶ Many such "errors" have been attributed to corruption among testers.

2. Consent vs. Coercion?

Opponents argue that not only is virginity testing discriminatory and highly invasive, it is also often involuntary. In practice, girls rarely exercise their right to refuse virginity testing because of pressure from their family. Young women who refuse virginity testing are generally assumed to be non-virgins which may bring shame and disgrace to the family. There are many reports of young women and girls being forced to participate in testing.¹¹⁷ Opponents of testing maintain that it is difficult to determine whether girls may opt out of testing in certain

¹⁰⁹ *Activists Challenge Girls' Virginity Testing*, THE INDEPENDENT http://www.itechnology.co.za/index.php?sf=2837&art_id=qw105841331180B216&click_id=283 accessed July 31, 2003; Simpiwe Piliso, *Virginity Testing Chic but Condemned*, DISPATCH ONLINE, Feb. 12, 2001 <http://www.dispatch.co.za/2001/02/12/features/VIRGIN.HTM> accessed July 31, 2003.

¹¹⁰ *Virginity Testing Under Fire*, News 24, July 17, 2003 www.news24.com/News24/South_Africa/News/0,,2-7-1442_1388713,00html accessed Oct. 20, 2003.

¹¹¹ Cleopatra Ndlovu, *Virginity Testing Raises Many Questions*, Vol. 23, No. 4 FAMILY HEALTH INTERNATIONAL (2005).

¹¹² See, e.g., Emily Wax, *Virginity Becomes a Commodity in Uganda's War Against AIDS*, WASHINGTON POST, Oct. 7, 2005.

¹¹³ Ansuyah Maharaj, *Virginity Testing: A Matter of Abuse or Prevention?* AGENDA 41, 1999 p. 96.

¹¹⁴ Daley, *supra* note 1.

¹¹⁵ Prega Govender, *Outcry as Nurses Cash in on Virginity Testing*, SUNDAY TIMES, March 28, 1999.

¹¹⁶ *Chastity Tests are Becoming Popular in South Africa*, International Planned Parenthood Federation, June 9, 2000 http://ippfnet.ippf.org/pub/IPPF_News/News_Details.asp?ID=317 accessed July 31, 2003.

¹¹⁷ *Dozens Tell Their Own Story of Abuse at KZN Mission*. (At a Christian mission school in KwaZuluNatal, a student complained that she and other girls at the mission school were made to sign a "true love waits" pledge vowing not to have sex before marriage.)

communities, where strong parental persuasion— whether in the form of praise or punishment—amounts to coercion absent the freedom to decline testing without social sanction. For instance, most of the girls interviewed by researchers at a test in Mafakathini, said they had been sent by their mothers.¹¹⁸

3. *Sexual Assault of Virgins*

Public labeling of girls as virgins is not without danger. Complicating the virginity testing issue is recent data suggesting that virgins may be more likely to be targeted for sexual assault by men who are HIV positive.¹¹⁹ Some South African researchers attribute the increase in sexual violence against very young girls presumed virgins to a belief gaining credence in some communities that sexual intercourse with a virgin can “cleanse” HIV-positive men or men with AIDS of disease.¹²⁰ This has given rise to fears that girls tested as virgins will be exposed to abuse by men from those communities that believe that having sex with a virgin will cure them of AIDS.¹²¹

Virginity testing opponents and some in government blame traditional healers (*sangomas*) for encouraging HIV infected men and men with AIDS to have sexual intercourse with virgins as a cure for the disease. Traditional healers apparently believe that the disease can be cured by obtaining an infusion of clean blood through intercourse with a virgin.¹²² Virgin girls are perceived as clean, dry, and uncontaminated. Testing opponents fear that this myth is more prevalent than local authorities and AIDS educators are willing to acknowledge.¹²³

Researchers have noted disturbing similarities between the way in which sexually transmitted diseases were dealt with in Europe in the last century and the manner in which AIDS is being addressed through the virgin cure myth.¹²⁴ Some scholars have suggested the belief that sexual intercourse with a virgin can cure disease is in fact a cross-cultural myth. AIDS researchers in Zambia, Zimbabwe, Nigeria and China have reported existence of similar misconceptions.¹²⁵

Researchers also have found that younger girls are increasingly sought as sex partners by older men as a preventive measure to avoid contracting the HIV/AIDS virus from older sexually active women who

¹¹⁸ Daley, *supra* note 1.

¹¹⁹ B.L. Meel, *The Myth of Child Rape as a Cure for HIV/AIDS in Transkei: A Case Report*, Vo. 43 No. 1 MED. SCI LAW 85 (2003); Maharaj, *The Virgin Rape Myth—What Is the Cause?* CITY VISION Dec. 14, 2001 http://www.news24.com/Regional_Papers/Components/Category_Article_Text_Template/0,2430, accessed July 31, 2003; South Africa’s Child Sex Shame Revealed, Aug. 24, 2000

¹²⁰ Prega Govender, *Child Rape: A Taboo Within the Aids Taboo*, SUNDAY TIMES, April 4, 1999; Jean Redpath, *Children at Risk*, Focus, June 2000. www.hsf.org.za. (“It’s such a sensitive issue with potentially racist overtones people don’t want to confront the issue.”). For a discussion on the role of traditional healers in Africa generally and their role in society see Dennis A. Ityavyar, *Health in Pre-colonial Africa*, in THE POLITICAL ECONOMY OF HEALTH IN AFRICA 35 (Toyin Folola & Dennis Ityavyar eds. 1992)

¹²¹ Prega Govender, *Child Rape: A Taboo Within the Aids Taboo*, SUNDAY TIMES, April 4, 1999.

¹²² The Virgin Rape Myth-What is the Cause?, City Vision, Western Cape, Dec. 14, 2001 (still others deny it exists)

¹²³ Peter Dickson, *Myth of Virgin Cure Linked to Rape*, SUNDAY TIMES, Sept. 27, 1998; The National Prosecuting Authority has published and distributed a poster debunking the myth suggesting that the government is now acknowledging the problem of the perception that sex with a virgin will cure HIV/AIDS.

¹²⁴ Christopher Stones & Mike Earl-Taylor, HIV/AIDS, the So-Called “Virgin Cure” and Child Rape in South Africa, Global Dispatch, Dec. 13, 2004 at http://www.gig.org/Features/gig_GD_Letter_16.php accessed Aug. 4, 2006 (explaining that the myth of the virgin cure has a rich and culturally diverse history)

¹²⁵ *Id.*

may be infected. Independent of seeking a cure for HIV, some men have indicated a preference for sex with younger and younger girls reasoning that there is less chance that a younger and less sexually experienced girl will be infected with HIV.¹²⁶

4. *Ostracism and Abuse*

Girls and young women who are not deemed virgins risk being ostracized by the community. They may be referred to as (*izeqamgwaqo*) or prostitutes by people in their communities.¹²⁷ Depending on the particular tester and the community, a girl's family may be asked to pay a fine for "tainting" the community. In those areas where chiefs host virginity testing ceremonies at their kraals, the names of girls who have lost their virginity are given to the chief.¹²⁸ Outcast socially and unmarriageable, some of these young women eventually are forced into prostitution, placing them at even greater risk of contracting sexually transmitted infections.¹²⁹

Child abuse counselors are concerned that virginity testing may raise the threat of abuse or of discrimination against children who fail the test. Some child advocates and woman's rights groups have found that the testing movement has potentially dangerous consequences and has caused hardship for some young women. For example, social workers at Childline, a child advocacy group that offers rape counseling in Durban and other areas, reported seeing about 40 young girls in 1999 who were brought in by their parents after they failed the virginity tests. The parents want the girls to explain what has happened to them and have in some cases beaten them to try to get the information. "Sometimes these inspections destroy the child and divide the family. The children we have seen are quite frightened. There is so much [sexual] abuse out there and often it is not the girl's choice."¹³⁰ In one case reported to Childline, a girl's relatives had broken both of her arms after she failed her virginity test.¹³¹

Other children's rights advocates have raised questions about the consequences of testing children who are not virgins because they have been sexually abused. It is maintained that virginity testing could contribute further to their existing and untreated trauma.¹³²

5. *Risk of Increase in Infection and Abuse*

Opponents in the medical community fear that virginity testing may have the unintended effect of increasing the risk of adolescent HIV infection because it may encourage young people to engage in even more risky conduct. For instance, adolescents who are sexually active may engage in anal sex rather than genital sex to avoid detection of their sexual activities given the possibility of a periodic vaginal chastity screening.¹³³ Opponents also question the hygiene conditions of the tests, noting for example that if one

¹²⁶ Prega Govender, *Child Rape: A Taboo Within the Aids Taboo*, SUNDAY TIMES, April 4, 1999.

¹²⁷ Maharaj, *supra* note 113 or 119.

¹²⁸ Stein, *supra* note 97.

¹²⁹ Maharaj, *supra* note 113 or 119.

¹³⁰ Daley, *supra* note 1.

¹³¹ HUMAN RIGHTS WATCH, SCARED AT SCHOOL (2001), p. 27.

¹³² Ajith Bridgraj, *Much Ado About Virginity: the Traditional and Controversial Practice of Virginity Testing*, MAIL & GUARDIAN, Sept. 22, 1998. <http://www.teacher.co.za/9809/9809-02.htm>.

¹³³ Jo Stein, *Virginity Tests in AIDS War* Feb. 9, 2000 or Sept. 2, 2000, News24, www.news24.com/City_Press/City_Press_News/0,1885,186-187_906042,00.html.

girl inspected has a sexually transmitted infection and unwashed hands or the same pair of gloves inspects the rest of the line of girls then the entire group could be infected as a result of submitting to inspection.¹³⁴

Child welfare advocates believe testing may serve to facilitate child abuse because children will become confused about the rights they have over their bodies.¹³⁵ As one children's rights advocate explained: "we are trying to teach our children, 'your body is your body' and then we send them to a woman who invades it."¹³⁶ Many fear that testers are not giving sufficient consideration to the destructive messages the exams may impart to children and adolescents about their bodies and sexuality.¹³⁷

III. THE DEBATE: ABOLITION VS. ACCOMMODATION

*Virginity Testing reinforces gender inequality because it reflects the attitude that women don't have ownership or control of their own bodies . . . we need to ask 'is this something that leads to the respect of women?' what values is it upholding, and if girls have to preserve themselves for marriage, are we asking the same of boys?*¹³⁸

Beatrice Ngcobo, Commissioner for Gender Equality, KwaZulu-Natal

*This is about empowering the girl child to say no to sex, teaching her to care about her body. Some people see it as oppression. But we are burying our youth every Saturday here. We must do something . . . Some people are saying we are interfering with the privacy of the individual but we are not forcing anyone. We believe the problems of today can be eradicated by going back to the old ways. Here is the solution.*¹³⁹

Nomagugu Ngobese, tester

Heterogeneity is a defining feature of South Africa; there are eleven official languages¹⁴⁰ and several different racial and ethnic groups. The legacy of Apartheid, and its policy of strict racial separation, which was officially advanced and violently enforced by the white minority National Party government from 1948 until 1990 continues to influence South Africa's political culture. Under white colonial and later Apartheid rule, indigenous African cultural practices were often exploited by various white administrations to bolster the authority of local state appointed rulers.¹⁴¹ The triad of "culture, tribe, and

¹³⁴ Strachan, *supra* note 85.

¹³⁵ *Activists Challenge Girls' Virginity Testing*, THE INDEPENDENT, July 17, 2003.

¹³⁶ Dean E. Murphy, *A Time of Testing for Virginity*, LOS ANGELES TIMES, July 15, 1999.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Constitution of the Republic of South Africa (Act 108 of 1996) [hereinafter S. AFR. CONST.] Chapter I, Art. 6(1). The eleven languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

¹⁴¹ T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 1–2 (1999); *see also* Barbara Oomen, CHIEFS IN SOUTH AFRICA: LAW, POWER & CULTURE IN THE POST-APARTHEID ERA 13–17 (2005) ("In recognizing 'tribal governance' and 'native laws and customs' the governments of Verwoerd and his successors built on and refined the British policy of 'native administration.'")

chiefdom” was used to deny Africans access to participation in democracy because “they already had their own system of governance.”¹⁴²

Since the first multi-party elections marking the country’s transition to an open and democratic society in 1994, however, South Africans have sought to free themselves from this Apartheid legacy. They have done so by embracing a constitutional legal order that is based on democratic values, social justice and fundamental rights¹⁴³ where all would be “united in [their] diversity.”¹⁴⁴ Accordingly, the South African Constitution, while explicitly committed to equality, also protects cultural, linguistic and religious communities.¹⁴⁵

Although there are obligations to protect, promote, and preserve equality enshrined in the South African Constitution and in the international human rights treaty obligations that have been assumed by the government since the nation’s transition to democracy, there are also widespread norms that coexist in the country which are on occasion at variance with the regime of constitutional rights. Virginity testing is but one of the practices inconsistent with human rights norms and protection obligations. Indeed, the United Nations Committee on the Rights of the Child, a treaty monitoring body for the U.N. Convention on the Rights of the Child has already condemned the practice of virginity testing in South Africa. In its concluding remarks on the report submitted by the South African government on implementation of the Convention rights, the Committee expressed concern about “the traditional practice of virginity testing which threatens the health, affects the self-esteem, and violates the privacy of girls.”¹⁴⁶

A. *The Legislative Battle to Ban Virginity Testing*

Legal debates concerning cultural practices in South Africa have been structured as a choice between abolition or accommodation. This oppositional conflict between culture and rights was manifested in the arguments advanced by testing proponents and opponents alike in public hearings on provisions of draft legislation to protect children’s rights. The legislative battle has pitted women’s rights organizations and officials from South Africa’s Commission on Gender Equality¹⁴⁷ against members of the National House of Traditional Leaders.¹⁴⁸

¹⁴² BARBARA OOMEN, CHIEFS IN SOUTH AFRICA: LAW, POWER & CULTURE IN THE POST-APARTHEID ERA 3 (2005) (The Apartheid government’s homelands policy gave effect to its central ideology—that each race and nation within South Africa had a unique, divinely ordained destiny and cultural contribution such that they should be kept apart so that each could develop along its own inherent lines.)

¹⁴³ See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 85–92 (2000).

¹⁴⁴ S. AFR. CONST., Preamble.

¹⁴⁵ Constitution of the Republic of South Africa, Chapter II, Art.31.

¹⁴⁶ Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: South Africa, Twenty-Third Session CRC/C/15/Add.122 Jan. 2000 Para. 33. The Committee also expressed concern about the practice of Female Genital Mutilation.

¹⁴⁷ The Commission on Gender Equality is an independent statutory body established in terms of Section 187, Chapter 9 of the Constitution of South Africa charged with promoting respect for “the protection, development and attainment of gender equality” and empowered “to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.” S. Afr. Const. (Act 108 of 1996) Ch. IX (State Institutions Supporting Constitutional Democracy) Sections 187(1), 187(2).

¹⁴⁸ Traditional leaders are accorded status and recognition is granted the institution, status and role of traditional leadership according to customary law pursuant to Section 211, Chapter 12 of the Constitution of South Africa. S. Afr. Const. (Act 108 of 1996) Sections 211(1), 211(2); SAPA, *Cultural Groups to Protest at Commission*

To promote and protect gender equality the Commission has robustly campaigned to criminalize all harmful social, cultural and religious practices that affect girl children. Recent efforts have focused on the eradication of virginity testing and female genital mutilation. As early as 2000, the Commission in cooperation with the South African Human Rights Commission¹⁴⁹ hosted a conference on virginity testing inviting all interested stakeholders to discuss abolition of the practice.¹⁵⁰ Agreement and compromise over testing practices then proved illusive.¹⁵¹

Over objections from traditional leaders,¹⁵² the South African Parliament initially chose an aggressive abolition approach and decided to ban virginity testing entirely. In June 2005, the National Assembly passed South Africa's first Children's Bill intended to give effect to children's constitutional rights and stipulate principles relating to the care and protection of children.¹⁵³ After hearing submissions from the public in 2004, the National Assembly decided to ban testing in the draft Children's Bill. Cultural, religious and social practices that have the potential to harm children were prohibited or regulated in the legislation.¹⁵⁴

When the Assembly's Bill banning testing was referred to the second body of parliament, the National Council of Provinces, the Council reopened debates and called for additional rounds of public hearings on the Bill, mainly due to continuing controversy over the banning of virginity testing.¹⁵⁵ The Council of Provinces offered stakeholders who had not yet been heard by Parliament an opportunity to make submissions. Representatives the National House of Traditional Leaders, the Commission on Gender Equality, and general public were heard on the social costs and benefits of virginity testing.¹⁵⁶

on Gender Equality Offices About Children's Bill Outlawing Virginity Testing, Sept. 15, 2005; Elsjie Bonthuys, *Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity*, 18 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 41 (2002).

¹⁴⁹ The Human Rights Commission is an independent statutory body established in terms of Section 184, Chapter 9 of the Constitution of South Africa charged with promoting a "culture of human rights" and respect for "the protection, development and attainment of human rights." The Commission annually reviews the measures taken by relevant organs of state towards the realization of rights in the Bill of Rights concerning housing, health care, food, water, social security education and the environment. S. Afr. Const. (Act 108 of 1996) Ch. IX (State Institutions Supporting Constitutional Democracy) Sections 187(1), 187(2).

¹⁵⁰ Virginity Testing Debate Planned, Dispatch Online, June 10, 2000
<http://www.dispatch.co.za/2000/06/10/southafrica/VIRGIN.HTM> accessed July 31, 2003

¹⁵¹ Virginity Testing, Vol.2 No. 6 PPP News Bulletin, Aug–Sept 1999
<http://www.ppp.org.za/pages/news/AugSept99/Page8.html>, accessed July 31, 2003.

¹⁵² Jonathan Clayton, *South Africa Ready to Ban 'Degrading' Virginity Tests*, THE TIMES (London), Dec. 14, 2005.

¹⁵³ The Bill will eventually repeal the 1983 Child Care Act written by the Apartheid government before the democratic transition and prior to the enactment of the Bill of Rights child protection provisions. The 1983 Act was not written from a child rights perspective and did not include concepts such as equality for all children and the principle of best interests of the child.

¹⁵⁴ Accordingly, in the June 2005 version of the Bill among other things, "harmful social and cultural practices" were expressly banned and every child granted: "the right to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice" as well as the right not to be subjected to unhygienic virginity testing. Female genital mutilation has also been banned. Male children now have the right to refuse to be circumcised. Anyone violating these provisions or who fails to protect the child from such an act is guilty of a criminal offense.

¹⁵⁵ Shashank Bengali, *South Africa to Outlaw Virginity Testing for Girls*, Knight Ridder, Nov. 8, 2005.

¹⁵⁶ Fienie Grobler, *Virginity Testing May Soon be Banned Custom*, MAIL & GUARDIAN, Dec. 13, 2005.

In response to pressure from traditional leadership, the National Council of Provinces proposed amendments to the Bill including a compromise on testing by introducing an age threshold instead of an outright ban and returned the issue to the National Assembly for reconsideration. The full Parliament, consisting of the National Assembly and the National Council of Provinces, later entertained and agreed upon a revised measure.

During Parliament's final session on December 15, 2005, the National Assembly and the National Council of Provinces passed the Children's Act.¹⁵⁷ Under the present compromise, testing is prohibited for children under the age of 16. For girls and women over the age of 16, testing can only be performed after counseling, in private and with consent. The test results may not be publicly disclosed, and the individual must not be marked in any way to indicate her passage or failure of a virginity test. Regulations to be drafted at a later date will prescribe the conditions under which the virginity testing procedure may permissibly be carried out on children above the age of 16.¹⁵⁸

At this writing, it appears that additional procedural difficulties have now arisen concerning certain provisions of the Children's Act which will further delay implementation,¹⁵⁹ and a second Children's Bill is working its way through Parliament that may also slow implementation. Again against the backdrop of the HIV/AIDS pandemic, one issue, in the second Children's Bill is the age at which a child can access medical treatment or contraception without their parents consent or knowledge.¹⁶⁰ Eventually, when both Bills have passed both bodies of Parliament, they will be consolidated and merged into a single

¹⁵⁷ Republic of South Africa, Children's Bill B70-2003.

¹⁵⁸ Children's Bill B70D, Art.12 In pertinent part, with respect to virginity testing the legislation now provides:
→12 (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

(4) Virginity testing of Children under the age of 16 is prohibited.

(5) Virginity testing of children older than the age of 16 may only be performed

→→(a) if the child has given consent to the testing in the prescribed manner;

(b) after proper counseling of the child; and

(c) in the manner prescribed.

(6) The results of a virginity test may not be disclosed without the consent of the child.

(7) The body of a child who has undergone virginity testing may not be marked.

¹⁵⁹ The South African Parliament follows different processes for different types of bills. Bills that deal with matters that national government has authority over are processed according to the procedure set out in Section 75 of the Constitution, the National Assembly has a veto power over any amendments proposed by the National Council of Provinces. The Children's Bill containing the testing ban was passed as a Section 75 Bill. If a Bill deals with a matter that national and provincial government both have authority over, then in addition to the National Assembly and the National Council of Provinces debating the Bill, provincial parliaments must also be consulted as part of the country's law reform process. The procedure for these types of Bills are set forth in Section 76 of the Constitution. For Section 76 Bills, the National Assembly does not enjoy veto power over amendments proposed by the National Council of Provinces. If the National Assembly and the National Council of Provinces cannot agree on an amendment, then the matter is set for mediation. The second Children's Bill that still must be passed before either is enacted is a Section 76 Bill. Once the President signs the Bill it will become an Act but will only come into force when the President announces a commencement date.

¹⁶⁰ The same constituency advocating virginity testing, the representatives of traditional leadership, opposes the proposed contraception access provisions in the companion Children's Bill.

Children's Act and the virginity testing ban given effect by 2008. Implementation of a final Children's Act before 2008 is now believed unlikely by most South African children's rights advocates.¹⁶¹

The successful implementation of any new children's legislation will depend heavily on the cooperation of all levels of government as well as civil society. In any event, the balancing of cultural rights with other human rights will remain a persistent challenge and in post-Apartheid South Africa's plural society especially in the context of HIV/AIDS.

*B. Universal Rights and Cultural Differences:
Gender Equality vs. Cultural Autonomy*

The controversy over virginity testing in South Africa echoes a certain theme in human rights discourse more generally over the universal or relative character of the rights enshrined in the major human rights instruments. There are rights which virginity testing arguably violates, such as gender equality, and rights that testing furthers such as cultural autonomy and self-determination. The arguments advanced from both sides of the legislative debate can find some support in international human rights instruments as well as the South African Constitution.

Tensions between the "universal" and the "relative" character of rights have been a source of debate since modern international human rights instruments were first framed.¹⁶² In 1947, when a Commission on Human Rights created pursuant to the U.N. Charter considered proposals for the content of what would become a basic declaration on human rights, the American Anthropological Association's (AAA) submission to the Commission challenged the drafters to acknowledge that while "respect for the personality of the individual as such and his right to its fullest development as a member of his society" was important, it was equally important that any Declaration emerging from the Commission's process demonstrate "respect for the cultures of differing human groups."¹⁶³ Observing that "[s]tandards and values are relative to the culture from which they derive" such that "what is held to be a human right in one society may be regarded as anti-social by another people" the AAA's submission to the Commission raised the question: "how can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?"¹⁶⁴ The AAA's response to attempts to draft what would become the Universal Declaration of

¹⁶¹ While the first Children's Bill containing the testing ban has passed Parliament, an additional Children's Bill which is to be consolidated into the earlier legislation is presently being debated by the Parliament. This second Children's Bill began its parliamentary process in 2006 and will be debated by both the National Assembly and the National Council of Provinces over the course of 2007. Where the first Children's Bill contains sections intended to enact constitutional rights, the second Children's Bill contains sections intended to govern child protection service delivery and child safety. As the second Bill is debated, technical amendments to the first Bill may need to be made due to changes in numbering and definitions which opens the door for amendments of substance to be introduced.

¹⁶² For discussion of the universalism versus relativism debate, see generally, ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS: IN THEORY & PRACTICE* (2nd ed. 2003); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi An-Na'im ed., 1992)

¹⁶³ American Anthropological Association, Statement on Human Rights 49 *Amer. Anthropologist*, No. 4 539 (1947) in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 372 (2000).

¹⁶⁴ *Id.*

Human Rights captured the basic concerns animating the contemporary cultural relativist position: if standards and values are understood to be relative to the culture from which they derive, any attempt to formulate postulates from the beliefs or moral codes of any one culture will detract from the universal applicability of any declaration of human rights.

Despite the apparent consensus reflected in the draft which eventually became the Universal Declaration of Human Rights. These differences have persisted over the scope and priorities of the international human rights agenda, and are played out in rhetorical conflicts between universality versus cultural relativism, imperialism versus self-determination or tradition versus modernity and westernization. Today, the universalism-relativism debate takes place primarily along perceived fault lines between the norms emanating from the North as opposed to the global South, or from the secular West as opposed to the religious Islamic East, or from the developed nations as opposed to the developing nations of the Third World.¹⁶⁵ This debate may also be engaged in multiethnic states where politics are influenced by indigenous community rights movements.¹⁶⁶

1. *Universalism*

The fundamental human rights covenants were the international community's response to the atrocities of World War II. As a result, international human rights treaties are animated by the principles that all individuals are entitled by virtue of their common humanity to dignity such that certain human rights must be understood as universal, fundamental, inalienable and not to be violated by the state or overridden by cultural or religious traditions. Accordingly, the accident of birth into a particular social group, society or culture is irrelevant to an individual's basic intrinsic worth and his or her entitlement to be treated with dignity.

The United Nations Charter (Charter), the Universal Declaration of Human Rights (Declaration) as well as the subsequently agreed legal instruments which comprise the modern system of international human rights treaties also evoke universal principles. With the Declaration, the founding member states of the U.N. sought to establish "a common standard of achievement for *all* peoples and *all* nations" and called for the "*universal* and effective recognition and observance" of the enumerated rights contained within the document.¹⁶⁷ The Declaration makes clear that all human beings are born free and equal in dignity¹⁶⁸ and that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind such as race, sex, language, religion, and irrespective of the jurisdiction or country to which a person belongs.¹⁶⁹

Both of the fundamental human rights covenants: the International Convention on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) proclaim that the rights contained within them are "derive[d] from the inherent dignity of the human

¹⁶⁵ *Id.*

¹⁶⁶ See generally ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES (RICHARD SHWEDER, MARTHA MINOW & HAZEL ROSE MARKUS, EDs., 2002); THE RIGHTS OF MINORITY CULTURES (Will Kymlicka, ed., 1995); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism* in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi An-Na'im ed., 1992).

¹⁶⁷ Universal Declaration of Human Rights, Preamble, Dec. 10, 1948. Emphasis added.

¹⁶⁸ Universal Declaration of Human Rights, art. 1, Dec. 10, 1948

¹⁶⁹ Universal Declaration of Human Rights, art. 2, Dec. 10, 1948

person” and reaffirm that all members of the human family possess equal and inalienable rights.¹⁷⁰ Both Covenants maintain that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family provide the foundation of freedom, justice and peace in the world.

Universalism is at the heart of modern human rights law. In brief, universalism maintains that there is a fundamental common humanity which entitles all individuals to certain basic minimal rights irrespective of their origins—cultural, religious or otherwise. The international legal community has generally subscribed to the view that human rights should be universal and that the human rights regime created through the U.N. as well as other regional human rights instruments such as those promulgated by the European, African and Inter-American regional human rights systems,¹⁷¹ must be enforced uniformly despite differences in cultural and religious traditions. Were human rights to have different meanings in Western and non-Western countries it is argued, the entire edifice of human rights law would be significantly undermined and possibly rendered meaningless.¹⁷² Thus, universality informs the discourse and content of the rights in the Declaration and all subsequent basic human rights treaties.

Human rights universalism finds theoretical foundations in natural law and liberalism originating in Western philosophical thought.¹⁷³ The moral theories evident in the UN documents are grounded in the liberal tradition of Western philosophy and political theory.¹⁷⁴ The central normative commitment of liberalism places priority exclusively on the individual over society and community; rights are considered immutable; and they are universal for all human beings.¹⁷⁵

The current formulation of human rights contains three elements which reflect western values: the fundamental rights possessing unit in society is the individual; the primary basis for securing human existence in society is through rights, not duties; and, the primary method for securing rights is through the rule of law where rights are claims subject to adjudication not reconciliation or negotiation.¹⁷⁶

Generally speaking because most liberal rights universalists are committed to the principle that the individual is the relevant moral unit of concern for rights protection and that certain fundamental rights

¹⁷⁰ International Covenant on Economic, Social and Cultural Rights, Preamble, Dec. 16, 1966; International Covenant on Civil and Political Rights, Preamble, Dec. 16, 1966.

¹⁷¹ See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms; African Charter on Human and Peoples Rights; American Convention on Human Rights.

¹⁷² Elizabeth Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 JOURNAL OF ANTHROPOLOGICAL RESEARCH 319, 322 (1997).

¹⁷³ See Makau Wa Mutua, *The Ideology of Human Rights*, VIRGINIA JOURNAL OF INTERNATIONAL LAW (1996) (arguing that although the concept of human rights is not unique to European societies “the specific philosophy on which the current “universal” and “official” human rights corpus is essentially European”).

¹⁷⁴ Michael Freeman, *The Philosophical Foundations of Human Rights*, 16 HUMAN RIGHTS QUARTERLY 4910514 (1994). While there are many different variants of liberal ideology with more contemporary expressions of liberal thought on questions of rights, equality and liberty by theorists such as Dworkin and Rawls departing from earlier classical theorists such as Mill and Locke; human rights employs many of the basic concepts and premises introduced by liberalism such as the dignity and autonomy of the individual and the equal dignity of all human beings. STEINER & ALSTON, *supra* note 163, at 361–66.

¹⁷⁵ The modern theoretical tradition of human rights remains strongly individualistic. Some theorists argue that all collective rights, including the rights of minority cultural groups must be reducible to individual rights. Others argue for a distinct set of group rights. This dispute raises the theoretical question of who can have rights. Freeman, *supra* note 174.

¹⁷⁶ Alison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUMAN RIGHTS QUARTERLY 514 (1985) (citing S. Prakash Sinha, “Human Rights: A Non-Western Viewpoint,” *Archiv fur Rechts-und Sozialphilosophie* 67 (1981):77).

are inviolate, an abolitionist response to harmful traditional or discriminatory cultural practices easily follows from the enshrined rights and their theoretical foundations. From this perspective, a central challenge for women's rights activism in Africa and other developing countries is that while laws in the public sphere have often been modernized through colonial contact or post-independence constitutionalism, the laws and norms in the private sphere may remain repressive. Custom is seen by many liberal feminists as something that perpetuates the subordination of women to men and that serves as an impediment to the implementation of universal laws.¹⁷⁷ Nevertheless, feminists and human rights activists who claim universal rights in the face of the empirical reality of great diversity and divergence from the asserted norms are hard pressed to respond to questions raised by cultural relativists.

2. *Cultural Relativism*

The concept that human rights are universal, and that the rule of law provides the best framework for constructing common norms across nations and cultures, has proved rhetorically powerful and attractive. As human rights have gained broad international respect "states regularly proclaim their acceptance of and adherence to international human rights norms and charges of human rights violations are among the strongest charges that can be made in international relations."¹⁷⁸ While appealing in theory and widely accepted by the many nations that have ratified human rights treaties and embraced constitutionalism and the rule of law to protect rights, rights universality has proved problematic in practice. As a result, the foundations of human rights universalism have become subject to attack in certain quarters.¹⁷⁹ International human rights institutions monitoring rights protection and promotion are increasingly exposed to a growing variety of norms, values, and belief systems that depart from those norms enshrined in the treaty instruments. Competing claims for legitimacy from various cultures and subcultures within states are increasingly challenging the ideal of any universals.

Proponents of cultural relativism present a formidable challenge to the concept of universal norms, rejecting the fundamental claim of the human rights regime to the universality of rights for everyone, everywhere without exception. Relativists question the theoretical validity and intellectual coherence of the various theories advanced to support a universal international human rights law. In recent years, Islamic and Asian governments in particular have argued against rights universalism on grounds of culture especially as it may pertain to the rights of women—their ratifications of most major human rights covenants and conventions notwithstanding. Often, it is argued that because human rights ideals were first recognized and developed by the Western powers victorious at the end of the WWII they are alien to non-Western cultures.¹⁸⁰ The development of international human rights law since that time has primarily been led by Western nations, lending credence to the perception that the international human rights regime has been deployed in a manner that is ethnocentric and unjust.¹⁸¹ Indeed, "[c]ultural relativists

¹⁷⁷ See, e.g., Annie Bunting, *Theorizing Women's Cultural Diversity in FEMINIST INTERNATIONAL HUMAN RIGHTS STRATEGIES* (1993); For a survey of how different feminists have approach the issue of culture see also Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L LAW 517, 545.

¹⁷⁸ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 1 (1989).

¹⁷⁹ Kory Sorrell, *Cultural Pluralism and International Rights*, 10 TUL. J. COMP. & INT'L L. 369, 370 (2002–2003).

¹⁸⁰ Cf. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001)

¹⁸¹ Cf. Makau Wa Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARVARD INTERNATIONAL LAW JOURNAL 201 (2001).

have targeted feminist human rights activists for imposing Western standards on non-Western cultures in much the same way that feminists have criticized states for imposing male-defined norms on women.”¹⁸²

In addition, representatives of newly organized indigenous communities around the world who desire autonomy and legitimacy for their group identities and cultural practices, as well as others who fear that universalism may invite unwarranted interference in ancient cultures, argue that universal norms are simply impossible to defend in the reality of such great diversity.¹⁸³ Critics of universalism argue that the very proclamation and purported promulgation of universal human rights laws simply cannot account for the great diversity of cultures and religions found around the world. In this view, human rights should therefore be subordinate to local cultural and religious norms.

Cultural relativism theory gained prominence in anthropological and social scientific literature in the years after WWII.¹⁸⁴ Stated briefly, in anthropology, cultural relativism is a theory which asserts that there is no absolute truth whether ethical, moral, or cultural. Accordingly, there is no meaningful way to make principled judgments in different cultures because all judgments are inescapably ethnocentric.¹⁸⁵ The rise of relativism in fields outside of international human rights law was a reaction to the ethnocentric assumptions of nineteenth-century science which viewed the evolution of human societies as a process of progressive change from the “primitive” to the “advanced”¹⁸⁶ and incorporated extraneous value judgments into research on the basic scheme of socioeconomic evolution of human societies which invariably glorified Western civilizations and diminished the achievements of non-Western societies.¹⁸⁷ Initially, in the field of anthropology, cultural relativism emerged as a challenge to the notion of the inherent natural superiority of Western civilizations and skeptical of the broad generalizations being advanced about other civilizations.¹⁸⁸ Early relativists emphasized the endless diversity of humanity and sought to demonstrate that even cultures placed at the bottom of the evolutionary scale were advanced and sophisticated in at least some respects.¹⁸⁹

In human rights scholarship, the relativist challenge can be summarized as follows: norms of morality are relative to a given society; the ethical basis for international human rights is Western; therefore, international norms should not be the basis of value judgments in other cultural contexts. In other words, contrary to the claim of universality that human rights discourse makes, the origins of

¹⁸² Tracy Higgins, *Anti-Essentialism, Relativism and Human Rights*, 19 HARV. WOMEN’S L. J. 89 (1996)

¹⁸³ Cf. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L 13 (2004).

¹⁸⁴ Cultural relativism today takes a number of different forms ranging from the epistemological position that human beings are shaped exclusively by their culture and as a consequence there exist no unifying cross-cultural human characteristics to the normative claim that because all standards are culture bound there can be no trans-cultural moral or ethical standards discovered or established; to the descriptive empirical observation that there are different cultures in the world and their cultural practices vary.

¹⁸⁵ Elizabeth Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 JOURNAL OF ANTHROPOLOGICAL RESEARCH 319, 322 (1997).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ The relativist critique focused so much on exposing such vast differences that they disregarded data of similarities. Ellen Messer, *Pluralist Approaches to Human Rights*, 53 JOURNAL OF ANTHROPOLOGICAL RESEARCH 293 (1997).

notions of human rights is historically and philosophically Western. Cultural relativism thus undermines one of the most fundamental tenets of international human rights discourse.¹⁹⁰

The relativists' normative commitments would necessitate at the very least an accommodation of virginity testing practices and possibly even active facilitation and encouragement of testing were it shown to be central to the cultural life of the community. Anti-colonialism and cultural integrity arguments are politically potent in regions that have emerged from the colonial experience, especially perhaps in South Africa coming out of an Apartheid history. Complaints about the perceived imposition of international human rights norms, asserting that the international human rights agenda reflects the ideology of the West and represent "another attempt at imperialist capitalist domination of the south"¹⁹¹ have gained currency from the relativist critique. The contingency of the cultural relativist approach is alarming to the liberal human rights advocate because rights are reduced from universal values to either arbitrary products of power or particular cultural developments.¹⁹²

C. *Virginity Testing as Discrimination*

Presently, in South Africa the abolitionist position appears to have prevailed for now—at least in part. Some testing opponents view the fact that virginity testing was not banned outright for girls and women of all ages as a defeat for abolitionists. Various international human rights treaties and the South African Constitution support the position that abolition of virginity testing is necessary because as presently practiced in South Africa it is discriminatory. The violation of bodily integrity, degradation, humiliation, and invasion of privacy perceived by gender equality groups to accompany virginity testing would violate the following international instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, the African Charter on the Rights of the Child and the South African Constitution. South Africa has signed each of these international conventions and has ratified all but the International Covenant on Economic, Social and Cultural Rights.

1. *Gender Equality*

Both international human rights law and the South African Constitution contain broad prohibitions of discrimination based on sex and recognize equality of the sexes. The Universal Declaration provides: all human beings are born free and equal in dignity and rights.¹⁹³ Everyone is entitled to all the rights and

¹⁹⁰ Numerous writers on international human rights have debated the cross-cultural applicability of codified norms, e.g., Richard Falk, *Cultural Foundations for International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1992); Alison Dundes Renteln, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990).

¹⁹¹ Fareda Banda, *Global Standards: Local Values*, 17 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 1 (2003).

¹⁹² Freeman (citing Joseph Raz who suggests that in practical terms the specific role of rights is to ground duties in the interests of others. Assertions of rights are typically intermediate conclusions that exist between ultimate values and duties. A consensus on intermediate conclusions about rights is constituted by particular cultures), *supra* note 174.

¹⁹³ UDHR Art. 1.

freedoms in the Universal Declaration without distinction of any kind such as sex and all are equal before the law and entitled to equal protection of law.¹⁹⁴

The International Covenant on Civil and Political Rights (ICCPR), which South Africa has ratified requires the government to respect and ensure to all individuals within its territory as well as those individuals subject to its jurisdiction the rights recognized in the Covenant without distinction as to sex.¹⁹⁵ The ICCPR obligates South Africa as a state party to undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant,¹⁹⁶ which includes the right not to be subjected to degrading treatment.

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which South Africa has ratified in its entirety without registering any reservations or objections to particular provisions of the treaty, prohibits discrimination against women and offers a detailed definition of what discrimination against women must be understood to encompass. Article 1 of the Convention defines the term “discrimination against women” as 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 with men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁹⁷

To bring about the end of discrimination against women as so comprehensively articulated in the Convention’s definition, it expressly calls upon state parties to condemn discrimination against women in all its forms and agree to pursue policy of eliminating discrimination by undertaking: to embody the principle of equality of men and women in national constitutions and other legislation;¹⁹⁸ to adopt appropriate legislative and other measures prohibiting all discrimination against women;¹⁹⁹ to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities conform to this obligation;²⁰⁰ to eliminate discrimination against women by any person, organization or enterprise;²⁰¹ to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.²⁰²

Pursuant to the CEDAW, state parties are also required to take affirmative measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either sex or stereotyped roles for men and women.²⁰³ The Convention on the Rights of the Child (CRC) also includes an anti-discrimination provision calling upon state parties to respect and ensure the rights of all children irrespective of the child’s sex.²⁰⁴

The South African Constitution is the supreme law of the country—any law or conduct inconsistent with it is invalid. The legislature, the executive, the judiciary and every organ of the state are all bound to

¹⁹⁴ UDHR Art. 2.

¹⁹⁵ ICCPR Art. 2.

¹⁹⁶ ICCPR Art. 3.

¹⁹⁷ CEDAW Art. 1.

¹⁹⁸ CEDAW Art. 2(1).

¹⁹⁹ CEDAW Art. 2 (b).

²⁰⁰ CEDAW Art. 2 (d).

²⁰¹ CEDAW Art. 2 (e).

²⁰² CEDAW Art. 2 (f).

²⁰³ CEDAW Art. 5.

²⁰⁴ CRC Art 2.

respect, protect, promote and fulfill the rights contained in the Constitution. The South African Constitution states that “[the] Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” South Africa’s constitution also recognizes the importance of compliance with principles of international law by providing that any of the country’s domestic laws must be interpreted in a manner consistent with international law.²⁰⁵ Like the international human rights instruments, there are strong general prohibitions against discrimination enshrined in the South African Constitution.

Equality is the foundation of South Africa’s constitutional democracy and encompasses the full and equal enjoyment of all rights and freedoms. Everyone is equal before the law and has the right to equal protection and benefit of law.²⁰⁶ The constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on grounds of gender or sex.²⁰⁷ Further, no person may unfairly discriminate directly or indirectly.²⁰⁸ National legislation must be enacted to prevent or prohibit unfair discrimination²⁰⁹ whether perpetrated by the state or by a private actor.²¹⁰ Equality includes the full and equal enjoyment of all rights and freedoms. Because men and boys are for the most part not subjected to virginity testing and the testing burden falls predominantly on young unmarried women and girls, the existence of the practice constitutes discrimination.

2. *Sexual Autonomy and Bodily Integrity*

Issues of reproduction and sexual autonomy are at the center of strongly held ideological, religious, and cultural notions of female gender identity. While governments often are directly responsible for abuses in the course of implementing policies or projects that regulate women’s sexual and reproductive decision making and actions, social and cultural norms also enforce or reinforce limitations of women’s choices with respect to sexuality, reproduction and childbearing. Sometimes policies infringing women’s reproductive freedoms are justified by perceived state interests in economic development or population control and stability, as is the case with China’s one child policy.

In other instances, discriminatory social biases when combined with economic pressures constrain or influence women’s childbearing choices without any formal state action. For instance, in certain areas of India strong preferences for male infants over female infants influence sex-selective childbearing decisions and have resulted in an imbalanced sex ratio. These violations are perhaps more pronounced and prevalent where governments fail to promulgate policies that foster gender equality and ensure women’s rights related to reproduction and sexuality. Thus, state complicity is largely found in a government’s failure such that even where there is no direct state involvement, governments have

²⁰⁵ Constitution of the Republic of South Africa (1996) Chapter 14, Section 233.

²⁰⁶ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 9(1). The equality provision in South African Constitution states: “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.”

²⁰⁷ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 9(3); *see also*, Penelope Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women’s Rights in South Africa* 26 N.C. J. INT’L L & COM. REG. 693 (2001); Penelope Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307 (1998).

²⁰⁸ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 9(4).

²⁰⁹ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 9(4).

²¹⁰ Constitution of the Republic of South Africa (1996) Chapter 2, Section 9.

frequently been complicit in abuses against women and girls that are carried out in the name of tradition, culture or religion, by purposefully ignoring these violations.

Both international human rights law and South African Constitutional law can be understood not only to protect bodily integrity but also to protect sexual autonomy and the liberty to make choices concerning reproduction and childbirth.²¹¹ CEDAW provides that state parties must eliminate discriminate against women in all matters relating to marriage and family relations and ensure on a basis of equality with men right to enter into marriage, rights to decide freely and responsibly on the number and spacing of their children and to have access to the information education and means to enable them to exercise these rights.²¹² Similarly, CRC requires state parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence injury or abuse neglect or negligent treatment maltreatment or exploitation including sexual abuse while in the care of parents, legal guardians, or others.²¹³ State parties must also undertake to protect the child from all forms of sexual exploitation and sexual abuse.²¹⁴

Provisions of the South African Constitution recognize that everyone has the right to bodily and psychological integrity which has been expressly enshrined in the text of the Constitution to mean that everyone has the right to make decisions concerning reproduction as well as the right to security in and control over their body; and the right not to be subjected to medical or scientific experiments without their informed consent.²¹⁵ South Africa's constitution also guarantees the right of the child to be "protected from maltreatment, neglect, abuse or degradation"²¹⁶ and further provides that a child's best interests are to be given paramount importance in every matter concerning the child.²¹⁷

Virginity testing as presently practiced in South Africa impedes the free exercise of these rights. To the extent that the testing is physically invasive it interferes with a girl's right to security in her body and sexuality. To the extent that being marked as a virgin may place a child at greater risk of sexual abuse or exploitation the practice violates obligations to protect children from abuse. Finally, to the extent that testing is coercive, not accompanied by sex education, and presents abstinence as the only option available, a child may be placed at even greater risk of infection and transmission because her ignorance may undermine her ability to protect herself against the disease.

3. *Privacy*

Both international law and the South African Constitution provide privacy protections. The Declaration proclaims that everyone has right to life, liberty and security of person²¹⁸ such that, "[n]o one shall be subjected to arbitrary interference with his privacy, or to attacks upon his honor and reputation

²¹¹ The ICCPR states that no one shall be subjected to cruel, inhumane or degrading treatment or punishment. Art. 7 In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation. General Comment 20 which further develops the meaning of ICCPR Article 7, specifically states that the aim of Article 7 is to protect both the dignity and the physical and mental integrity of the individual.

²¹² CEDAW Art. 16.

²¹³ CRC Art. 19.

²¹⁴ CRC Art. 34.

²¹⁵ Chapter 2, Article 12 (2).

²¹⁶ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 28(1)(d).

²¹⁷ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 28 (2). A "child" means a person under the age of 18 years. Section 28 (3).

²¹⁸ UDHR Art. 3.

and all have right to the protection of the law against such interference or attacks.”²¹⁹ Similarly, the ICCPR also provides: “no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.”²²⁰ Article 16 of the CRC extends privacy rights protections to children under the age of eighteen and echoing the language of other human rights agreements states: “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor or reputation.” Similarly, provisions of the South African Constitution protect a right to privacy.²²¹

As presently practiced, virginity testing in purporting to determine who is chaste or not, and celebrating those girls and young women who have not been sexually active while condemning those who have, makes a public spectacle of private personal intimate matters. Virginity test results become common knowledge in communities and serve to undermine the honor and reputation of those who are deemed to have failed. Even if testing were not coercive, results are often arbitrary and once revealed can have negative consequences for a child whether she is said to “pass” or “fail.”

D. Virginity Testing as Self-Determination

*If I abandon the practice, it would mean that I am abandoning my culture as well, and I will not let that happen. I am a feminist too, who is fighting for women’s rights and the practice is definitely not an abuse.*²²²

Virginity tester and founder of the festival Nomagugu Ngubabne

Opponents of the legislative prohibition of virginity testing reject the discrimination arguments that women’s rights advocates advance emphasizing instead the virginity testing rite as a cultural right that must be accepted and accommodated without intervention from the state to end or alter the practice. Community organizations promoting virginity testing accuse the Commission for Gender Equality and others of suppressing their cultural rights and right to self-determination. Testers insist that virginity testing is not imposed on unwilling girls. Far from discrimination, they assert that the testing practice is part of a celebration in some communities and an expression of people’s cultural background.²²³ The prevailing sentiment among many virginity testers and others involved in the testing movement remains that the government should understand and “cooperate with us because we have valid grounds to conduct this.”²²⁴ Testing proponents could appeal to both international and constitutional law to defend the practice of virginity testing and win respect for their cultural rights.

1. Cultural Autonomy and Collective Rights to Associate and Assemble

²¹⁹ UDHR Art. 12.

²²⁰ ICCPR Art. 17.

²²¹ Chapter 2, Art. 14 everyone has the right to privacy which includes the right not to have their person searched.

²²² *Activists Challenge Girls’ Virginity Testing*, THE INDEPENDENT, July 17, 2003.

²²³ Kerry Cullinan, *Virginity Testers Say They Will Never Quit*, Health-e, Dec. 13, 2001 http://www.health-e.org.za/news/easy_print.php?uid=20010918 accessed April 28, 2004.

²²⁴ Zwelihle Memela, *Virginity Testers Fight for their ‘Cultural Rights*, NATAL WITNESS, Dec. 6, 2000.

Both international human rights law and South African Constitution provide protection for culture. The first basis of a right to culture can be found in a state's legal duty to guarantee the rights of minority populations, such as groups defined by common bonds of culture, language or religion, within its borders. States are obliged to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their territories and to create favorable conditions to enable persons belonging to minority groups to express their characteristics and develop their culture. Article 27 of the Declaration proclaims that everyone has the right to freely participate in the cultural life of their community. In states with ethnic, religious or linguistic minorities, the ICCPR commands that such persons not be denied "rights in community" with others, formulated as follows: "persons belonging to minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language."²²⁵

The ICESCR, which South Africa has signed but not yet ratified, provides a similar cultural rights protection, requiring state parties to recognize the right of everyone to take part in cultural life by taking steps necessary for conservation and development and diffusion of culture and science.²²⁶ Article 30 of the CRC also offers protection to cultural rights in community. Again, like the ICCPR, it provides that in states with ethnic, religious or linguistic minorities or persons of indigenous origin, a child who belongs to such a minority or who is an indigenous child shall not be denied the right in community with other members of his or her group to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language.²²⁷

Some commentators contest who is supposed to benefit from the minority cultural rights contained in international rights agreements. The treaty provisions speak of persons pursuing their rights and it is generally accepted that individuals are the principle right holders, but they may enjoy their culture only in community with the other members of their group. Some commentators have suggested that this might signify that the collectivity also has a legal interest in cultural association and expression as a given ethnic, religious, or linguistic group.²²⁸

For those who reject the idea that a group or collective can possess rights, a form of cultural rights expression can be located in an individual's right to associate and assemble with others.²²⁹ The Universal Declaration provides that everyone has right to freedom of peaceful assembly and association but no one shall be compelled to associate.²³⁰ Like the Declaration, the ICCPR in Article 21 provides that a right of peaceful assembly shall be recognized such that no restrictions may be placed on the exercise of this right other than those in conformity with national security, public safety, and public health. Similarly, the CRC in Article 15 calls upon state parties to recognize rights of the child to freedom of assembly and association.²³¹

²²⁵ ICCPR Art. 27.

²²⁶ ICESCR Art. 15. South Africa has signed, but not ratified the ICESCR.

²²⁷ CRC Art. 30.

²²⁸ T.W. Bennett, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION (1995) Unfortunately, the Declaration does not specify whether beneficiaries of the latter rights are groups or individuals.

²²⁹ Chandran Kukathas, Are There Any Cultural Rights? in THE RIGHTS OF MINORITY CULTURES 238 (Will Kymlicka ed., 1995).

²³⁰ UDHR Art. 20.

²³¹ CRC 15. For an analysis of how governments might interpret and apply universal human rights standards across diverse perceptions of childhood in a principled manner see Gerison Lansdown, The Evolving Capacities of

The South African Constitution is more explicit than international instruments on the question of culture, in that it recognizes and protects a right to culture guaranteeing that everyone has the right to use the language and to participate in the cultural life of their choice.²³² To that end, the Constitution provides: “persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practice their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”²³³ However, these cultural rights may not be exercised in a manner inconsistent with any other provisions of the Bill of Rights.²³⁴

2. *Self Determination*

As an incident of the historical period in which they were drafted, when much of the world’s population lived under colonial administration, the modern human rights instruments contain strong statements advancing the right of self-determination. For instance, the ICCPR acknowledges: “All peoples have the right of self-determination and may freely determine their political status and freely pursue their economic social and cultural development.”²³⁵ Similarly, the ICESCR acknowledges: “All Peoples have right of self-determination and as such may freely determine their political status and pursue their economic social and cultural development.”²³⁶

The CRC calls on state parties to respect the responsibilities, rights and duties of parents or where applicable the members of the extended family or community as provided for by the local custom. Legal guardians or other persons legally responsible for the child must provide, in a manner consistent with the evolving capacities of the child appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention.²³⁷

E. Virginty Testing Distinguished

Despite recent legislative prohibitions, the virginity testing issue in South Africa still remains locked in a “traditional” versus “modern” paradigm, where culture is equated with tradition while human and constitution rights are equated with modernity and foreign Western ideals.²³⁸ The ban has been met with condemnation by testers and traditionalists who have pledged to continue testing.²³⁹ In Pietermaritzburg and Durban, hundreds of women marched in opposition to the ban and Inkosi Mzimela, the chairperson of South Africa’s House of Traditional Leaders, an Assembly of tribal chiefs called the legislation an

the Child, UNICEF (2005) (observing that childhood is not an undifferentiated period. “A 17-year-old has profoundly different needs and capacities than a 6-month-old baby, while being entitled to the same rights.”)

²³² Chapter 2, Article 30.

²³³ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 31(1).

²³⁴ S. Afr. Const. (Act 108 of 1996) Ch. II (Bill of Rights) Section 31(2).

²³⁵ ICCPR Art. 1.

²³⁶ ICESCR Art. 1.

²³⁷ CRC Art. 5.

²³⁸ LeClerc-Madlala, *supra* note 48.

²³⁹ Sharon Lafraniere, *A Women’s Rights Movement in Africa Emerges*, TAIPEI TIMES, Jan. 1, 2006 (reporting South Africa’s former Deputy President Jacob Zuma personally attended a testing ceremony and endorsed the practice as a way to shield African values against the corrosive effects of Western influence).

“outrage” and warned that communities would defy it.²⁴⁰ These objections serve as another reminder that a given right, no matter how enshrined in public international law or constitutional charters, may not be universally accepted.²⁴¹ Accordingly, law makers must consider to what degree a liberal constitutional democracy, such as South Africa, must by virtue of its own commitments take cultural justifications for departures from gender equality seriously when articulated by those most affected.²⁴²

The virginity testing debate as it has been engaged in South Africa exposes the persistent theoretical and practical tensions between human rights universalism and cultural relativism. In this respect, the debate over virginity testing is not unlike women’s rights struggles elsewhere in the world; for example, it bears a strong resemblance to earlier controversies surrounding the attempted eradication of female circumcision in other parts of Africa.²⁴³ Although the two practices are different in nature, both customs are viewed by feminists as socially oppressive while others who are engaged in these practices understand themselves to be embracing self-constituting expressions of traditional culture. Virginity testing, like female circumcision, also departs from the classic rights violation paradigm in which governments constrain the liberty of individuals because it is private individuals, operating without express government approval, who are arguably violating the rights of girls and young women. Feminists and human rights scholars have generated a substantial body of literature on the potential role of human rights law in eradicating female genital cutting and other harmful traditional cultural and religious practices.²⁴⁴ Whether advancing abolition, accommodation, or cross-cultural conversations, the literature reflects deep conflicts about whether when confronted with cultural beliefs held by women inside a particular community, the international human rights system can as an “outsider” make ethical judgments about cultural practices and how these practices should be treated in national and international laws.²⁴⁵

²⁴⁰ Zwelihle Memela, *Virginity Testers Fight for their ‘Cultural Rights*, NATAL WITNESS, Dec. 6, 2000.

²⁴¹ Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1991).

²⁴² Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L. J. 89 (1996) (posing this question for feminists)

²⁴³ Female genital surgery is practiced in approximately 25 countries in Africa. Outside of Africa, a certain form of female circumcision exists in Indonesia, Malaysia, and Yemen. Hope Lewis, *Between Irua and “Female Genital Mutilation” Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, n.5 (citing Study on Traditional Practices Affecting the Health of Women and Children, U.N. EXCOR, Comm’n on Hum. Rts., Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, 43rd Sess., Provisional Agenda Item 4, paras. 9–10, U.N. Doc. E/CN.4/Sub.2/1991/6 (1991)).

²⁴⁴ See, e.g., ROSEMARIE SKAINE, *LEGAL, CULTURAL AND MEDICAL ISSUES: FEMALE GENITAL MUTILATION* (2005); Kay Boulware-Muller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN’S L. J. 155 (1985) (arguing that to challenge FGM on grounds of individual rights based approach is to ignore culture and be perceived by African women as imposing and judgmental rather the right to health approach, in which people are educated about health risks associated); Alison Slack, *Female Circumcision a Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988); Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQUALITY 367 (1989); NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* (1993); ALICE WALKER & PRATIBHA PARMAR, *WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN* (1993); Isabelle Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUMBIA HUMAN RIGHTS LAW REVIEW 189 (1992); HANNY LIGHTFOOT-KLEIN, *PRISONERS OF RITUAL: A ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA* (1989).

²⁴⁵ See, e.g., Lewis, *supra* note 243.

Virginity can be distinguished from female genital cutting and other harmful traditional and cultural practices women rights advocates struggle against in other parts of the world in that it is a cultural practice that has changed its character becoming uprooted from its origins in matrimonial preparation and established as a grass-roots public health movement. This change seems to have escaped some opponents of the practice who have discounted the new rationale accompanying the virginity testing resurgence. Thus, contemporary virginity testing adds a new dimension to the human rights discourse on the tension between rights universalism and cultural relativism. Here, advocates of the cultural practice at issue are changing (or supplementing) their rationale for performing the practice. Recasting the testing resurgence more as a matter of preventative public health strategy and less about culture potentially creates a new space for dialog among the stakeholders in the legislative debates over the practice.

IV. LIMITS OF THE LEGISLATIVE BATTLE LINES: FORBEARANCE VS. PERFORMANCE

What is clear is that the ban on virginity testing in South Africa's children's rights legislation, whenever it enters into effect, will not stop virginity testing,²⁴⁶ just as virginity testing will likely not stop AIDS or decrease the rate of HIV infection.²⁴⁷ To date, the way in which the issue has been framed in the political process illustrates the limitations of conceiving of rights as absolute and oppositional underscoring the theoretical and political vulnerabilities of the universality of human rights to claims from cultural relativism when conceptualized in this manner.

The debates on virginity testing have been simultaneously engaging and impoverished, highlighting the limitations of prevalent conceptions of rights as rigid, culture as static, and gender equality as conflicting with cultural autonomy. These tensions are by no means inevitable when rights are seen as complementary instead of conflicting. For example, realization of the right to education²⁴⁸ complements the right to political participation in public affairs²⁴⁹ and may in turn strengthen respect for human rights and fundamental freedoms overall. Moreover, there are conceptualizations of rights which are not entirely absolute, for example, some rights can be derogated in times of emergency under international law.²⁵⁰ Similarly, the South African Constitution incorporates a "limitations clause" which appreciates that only a limited number of rights are always absolute.²⁵¹

²⁴⁶ Sharon LaFraniere, *Women's Rights African Customs Clash*, N.Y. TIMES, Dec. 30, 2005 (quoting Patkile Holomisa, president of the Congress of Traditional Leaders, a political party in South Africa: "We will uphold our traditions and customs, There are laws that are passed that do not necessarily have any impact on the lives of people. I imagine this will be one of those.")

²⁴⁷ Cf. Kelly Haman, *Socioeconomic Disadvantage and Unsafe Sexual Behaviors Among Young Women and Men in South Africa* (2004).

²⁴⁸ Art. 13 ICESCR.

²⁴⁹ Art. 25, ICCPR.

²⁵⁰ See, e.g., Art. 4 ICCPR provides that in times of public emergency which threaten the life of the nation, states may take measure derogating from their rights obligations to the extent required by the exigencies of the situation provided that it does not derogate in a way that discriminate on the ground of race, color, sex, language, religion or social origin. There can be no derogation with respect to the rights to life and equal protection under law as well as prohibitions against torture, slavery, ex post facto criminal prosecutions, and religious freedom.

²⁵¹ S. Afr, Const. (Act 108 or 1996) Ch. II (Bill of Rights) Section 36. The limitations clause provides that the rights contained in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable taking into account all the relevant factors, including: the nature of the right;

Stakeholders in the virginity testing legislative battle have drawn the wrong battle lines. The arguments advanced by testing abolitionists are flawed for failing to appreciate the opportunities that culture may present for change. The arguments advanced by those who maintain that testing should be accepted and accommodated unchanged simply ignore the empirical fact that testing practices have indeed changed over time. The common and disappointing feature shared by both sides of the debate has been their tendency to see virginity testing itself as the problem and to frame the possible solutions as either abolition or accommodation.

Each side of the testing debate is in some measure demanding of the other side forbearance from interference with a favored basic right viewed as under threat from the other side's ideological positions or actions. For example, feminists with the Commission for Gender Equality did not want traditional communities interfering with the bodies and rights of young women and girls. Traditional leaders representing testers did not want the government and others perceived as outsiders to interfere with the community's right to express their culture through the practice of virginity testing. To testing opponents the children's rights legislation is not sufficient to protect gender equality. To testing proponents the children's rights legislation is a significant infringement on cultural freedoms.

It is suggested here that advocates on both sides of this debate and the young women and girls at the heart of it would be better served if there were calls for *intervention* at all levels from the community, to the South African government, to the international community, to realize a meaningful right to health and prevent premature death and disease from HIV/AIDS.

Indeed, it is the South African government's initial failure to adequately meet its obligations and duties owed to its citizens and those in its jurisdiction in the first instance that gave rise to the virginity testing resurgence. Virginity testing has become an adaptive self-help solution where there are limited options for women to successfully avoid infection and obtain treatment for infection. Stakeholder demands should be for *performance*, not forbearance and non-interference.

Classic rights discourse distinguishes "negative" rights imposing constitutional restraints on the state from "positive" rights implicating affirmative state duties.²⁵² So, while disappointing, it is perhaps not as surprising that the virginity testing debate became so polarized and misdirected as both the gender equality and cultural autonomy positions appear to be rooted in a human rights discourse built on normative foundations that invite conceptualizations of rights as requiring forbearance and non-interference. Had rights been conceptualized more expansively in the conversation over virginity testing, the dialog may more readily have reached the question of the substance and content of the right to health and the protection obligations owed to children by both the government and their communities under international and constitutional law in a pandemic infectious disease context.

the importance of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose. *See Larbi-Odam v. Member of the Executive Council for Education* (1996) (discussing what is reasonable and justifiable as dependent upon circumstances); *S. v. Makwanyane* (1995) (formulating the relevant factors to be assessed in evaluating a policy limiting certain rights); *see generally*, GEORGE DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN BILL OF RIGHTS (1999).

²⁵²Jeanne Woods, *Justiciable Social Rights as A Critique of the Liberal Paradigm*, 38 TEXAS INTERNATIONAL LAW JOURNAL 763,765 (2003) (noting that assumed dichotomy between positive and negative rights blurs the true dilemma social rights pose for the liberal paradigm which is that rights implicating the redistribution of social resources are collective in charter and rooted in the common needs of society).

A. *The Right to Health*

Both international human rights law and the South African Constitution recognize some form of a health right. The Declaration proclaims that everyone has a right to a standard of living adequate for health and well-being.²⁵³ Similarly, the ICESCR, which has been signed but not yet ratified by South Africa, recognizes a right “to the enjoyment of the highest attainable standard of physical and mental health.”²⁵⁴ To achieve the full realization of this right, governments must, among other things undertake measures to ensure the prevention, treatment and control of epidemic, endemic, occupational and other diseases²⁵⁵ and to facilitate the creation of conditions which would assure to all medical service and medical attention.²⁵⁶ South Africa has ratified the CRC which recognizes the right of the child to enjoy the highest attainable standard of health.²⁵⁷ In addition, pursuant to CEDAW, which South Africa has also ratified, the government must undertake “to ensure on a basis of equality of men and women, access to health care services.”²⁵⁸

While the “highest attainable standard of physical and mental health” formulation of the health right contained in many of the international human rights instruments does not expressly adopt the broad definition of health as contained in the Constitution of the World Health Organization (WHO),²⁵⁹ nor does it confine the discussion of the right to health as simply a right to timely and appropriate health care services. Rather, this formulation has been interpreted by international human rights monitoring bodies to encompass the underlying determinants of health as well, and involves a “range of socio-economic factors that promote conditions in which people can lead a healthy life . . . such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”²⁶⁰ Access to health related education and information, including information on sexual and reproductive health are also important aspects of the right to health.²⁶¹

The “highest attainable standard of health” norm does consider both the individual’s biological and socioeconomic preconditions and a State’s available resources.²⁶² Thus, the right to health is not to be

²⁵³ UDHR Art. 25.

²⁵⁴ ICESCR Art. 12.

²⁵⁵ ICESCR Art. 12(c).

²⁵⁶ ICESCR Art. 12(d).

²⁵⁷ CRC Art. 24 provides that governments must strive to ensure that no child is deprived of his or her right of access to health care services. Article 24 also outlines measures governments should pursue to attain full implementation of the health right. Among other things, governments are “to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition . . .”. Art. 24(2) (e). States are also encouraged “to develop preventive health care, guidance for parents and family planning education and services,” Art. 24(2) (f) and to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” Art. 24(4).

²⁵⁸ CEDAW Art. 12. The state obligation to eliminate discrimination against women in health care also extends to health care services related to family planning.

²⁵⁹ The Constitution of the WHO conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Constitution of the World Health Organization (1946).

²⁶⁰ Committee on Economic Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic Social and Cultural Rights (2000).

²⁶¹ *Id.* at Para. 11.

²⁶² *Id.* at Para 9.

understood as the “right to be healthy.”²⁶³ Indeed, observing that genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles play a significant role in an individual’s health, the monitoring body for the ICESCR has explained that: “there are a number of aspects which cannot be addressed . . . good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health.”²⁶⁴ Nevertheless, there are many aspects of health which a State can and should influence.

Under international law, the right to health contemplates both freedoms, such as the freedom to control one’s body and to be free from torture and non-consensual medical treatment and experimentation; *and* entitlements, such as the availability of and equal access to public health care facilities, goods and services.²⁶⁵ Acknowledging the resource constraints of many States, international law allows for “progressive realization over time” of the health right.²⁶⁶ However, States still have specific and continuing legal obligations “to move as expeditiously and effectively as possible toward full realization” of the health right and must take “deliberate, concrete and targeted” steps towards this end.²⁶⁷ State parties to international human rights treaties containing the health right are obligated to respect, protect and fulfill it.²⁶⁸

Under international law, with respect to the realization of socioeconomic rights, States have a core obligation to “ensure the satisfaction of, at the very least, minimum essential levels of the rights.”²⁶⁹ The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has determined that among the “minimum core” obligations associated with the health right are the obligations: to ensure the

²⁶³ *Id.* at Para. 8.

²⁶⁴ *Id.* at Para. 9.

²⁶⁵ *Id.* at Para. 8, 12. There are four essential elements to the right to health: availability, accessibility, acceptability and quality. A State must provide functioning public health-care facilities, goods, services and programs in sufficient quantity. The precise nature of these will vary depending a State’s level of development. A State must make such health facilities accessible to everyone without discrimination. The non-discrimination in accessibility element has three related features including: physical accessibility, economic accessibility and information accessibility. Health facilities should be within safe physical reach for all segments of the State’s population especially to vulnerable or marginalized groups, such as ethnic minorities, indigenous populations women, children and people with disabilities. Health facilities should be affordable for all. Information accessibility includes the right to seek, receive and impart information and ideas concerning health issues.

²⁶⁶ *Id.* at Para. 30.

²⁶⁷ *Id.* at Para. 30, 31.

²⁶⁸ *Id.* at Para. 33. The obligation to fulfill includes the obligation to facilitate, provide and promote health through sufficient recognition of the right in national political and legal systems and the adoption of a national health policy and public health infrastructure. *Id.* at Para. 36 Obligations to protect include the duties of the State to adopt legislative measures to control the marketing of medicines and medical equipment to ensure that medical practitioners and other health professionals meet appropriate standards of education and practice consistent with ethical codes of conduct. States are also obligated to ensure that harmful social or traditional practices do not interfere with access to health related information and services. *Id.* at Para. 35. Finally, the obligation to respect the right to health requires a State to refrain from denying or limiting equal access, to abstain from discriminatory practices in the delivery of health services relating to women’s health status and needs, to refrain from prohibiting or impeding “traditional preventive care, healing practices and medicines,” to refrain from applying coercive medical treatments, and to refrain from censoring or withholding or intentionally misrepresenting health-related information. *Id.* at Para. 34. States also should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, health-related information includes sexual education and information.

²⁶⁹ *Id.* at Para. 43. (restating the minimum core concept).

right of access to health facilities, goods and services on a non-discriminatory basis; to provide essential drugs, as from time to time defined under the WHO Action Program on Essential Drugs; to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; to take measures to prevent, treat and control epidemic and endemic diseases; to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.²⁷⁰

Violations of the health right can occur through the direct action of States where governments repeal or suspend legislation necessary for the continued enjoyment of the right to health or adopt legislation or policies which are manifestly incompatible with international or domestic legal obligations in relation to the right to health.²⁷¹ Alternatively, violations may also occur through the omission or failure of States to take necessary measures arising from legal obligations such as the failure to have a national policy and failure to enforce relevant laws related to health protection.²⁷²

The South African Constitution guarantees the right “to have access to—health care services, including reproductive health care²⁷³” The Constitution obligates the government to “take reasonable legislative and other measures within its available resources to achieve the progressive realization of these rights.”²⁷⁴ To date, the South African Constitutional Court has adjudicated two major health right cases, *Soobramoney v. Minister of Health*²⁷⁵ and *Minister of Health v. Treatment Action Campaign*.²⁷⁶ The Court has rejected the “minimum core” concept advanced under international human rights law²⁷⁷ and has

²⁷⁰ *Id.* at Para. 43–45. For a discussion of the UNCESCR’s understanding of the core of the right to health in the South African context see, G. Bekker, *Introduction to the Rights Concerning Health Care in THE SOUTH AFRICAN CONSTITUTION IN A COMPILATION OF ESSENTIAL DOCUMENTS ON THE RIGHTS TO HEALTH CARE* 1, 15–16 (G. Bekker ed., 2000).

²⁷¹ *Id.* at Para. 48. Violations of the health right may also occur when other private non-state entities that are insufficiently regulated by government impede the highest attainable standard of health. Examples of violations of the obligation to respect health include the denial of health care facilities to particular individuals or groups as a result of de jure or de facto discrimination, the deliberate withholding or misrepresentation of information vital to health protection or treatment. *Id.* at Para. 50. Examples of violations of the obligation to protect follow from the failure of the State to take all necessary measures to safeguard persons within the jurisdiction from infringements of the right to health by third parties, including the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others. *Id.* at Para. 51. Examples of violations of the obligation to fulfill include failure to adopt national health policy, insufficient expenditure or misallocation of public resources and failure to monitor realization of the health right through indicators and benchmarks failure to take measure to reduce inequitable distribution of health facilities goods and services.

²⁷² *Id.* at Para. 49.

²⁷³ S. Afr. Const. Ch. II Art. 27(1).

²⁷⁴ *Id.* Art. 27(2). The Constitution also provides that no one may be refused emergency medical treatment.

²⁷⁵ *Soobramoney v. Minister of Health, KwaZulu-Natal* (1997) CCT 32/97.

²⁷⁶ *Minister of Health v. Treatment Action Campaign* (2002) CCT8/02.

²⁷⁷ See UNCESCR General Comment 3 The Nature of State Parties Obligations (Art. 2, para. 1 of the Covenant (1990) Para. 10. See also Limburg Principles on the Implementation of the ICESCR (1987) (“Limburg Principles”); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (“Maastricht Guidelines”). The minimum core approach to socioeconomic rights enforcement envisions the identification of subsistent levels of a given right and attaches an immediate obligation to meet that basic level. The minimum core has been said to represent a “floor” of immediately enforceable entitlements from which progressive realization should proceed. See Arnold Chapman, *Core Obligations Related to the Right to Health and the Relevance for South Africa* in *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES*, 35–37 (D. Brand & S. Russell eds., 2002).

instead devised a “reasonableness approach” to the assessment and enforcement of socioeconomic rights.²⁷⁸

In *Soobramoney v. Minister of Health*²⁷⁹ (*Soobramoney*) the Court dismissed the case of a chronically-ill man, Soobramoney, who failed to establish that the state was in breach of its constitutional obligations. Soobramoney, an unemployed diabetic, with renal failure and in need of regular kidney dialysis, challenged a state hospital’s decision to limit dialysis care to patients eligible for a transplant. Because he suffered from a combination of different complications rendering his condition irreversible, the hospital determined that treatment would prolong his life but not cure him such that he was ineligible for a transplant or further dialysis treatment. The Court rejected arguments that the right to health required the state to make additional resources available for dialysis treatment. Applying a reasonableness test to the hospital treatment guidelines, the Court explained, “[t]he State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.”²⁸⁰

In *Minister of Health v. Treatment Action Campaign*²⁸¹ (*TAC*), AIDS advocacy groups sued the government claiming that the measures adopted by government in the area of health care services to HIV-positive pregnant women were constitutionally deficient in two respects: first, the government prohibited administration of the antiretroviral drug, Nevirapine, in the public health sector outside of pilot research and training sites; and second, the government failed to develop and implement a comprehensive national program for preventing mother-to-child transmission of HIV. These omissions, it was argued, violated the right to health.²⁸²

The Court rejected the argument that a minimum core obligation similar to that defined by the UNCESCR in relation to the right to health under international law would require the government to provide Nevirapine as an “essential drug.”²⁸³ The Court declined to find that the Constitution imposed any minimum core obligation: “[i]t is impossible to give everyone access to even a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to

²⁷⁸ Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 SOUTH AFRICAN J. OF HUMAN RIGHTS 472, 474 (2006) Broadly, the reasonableness approach is an assessment of the rationality, coherence, flexibility, fairness and inclusiveness of state policies aimed at the progressive realization of socioeconomic rights. See *Government of the Republic of South Africa v. Grootboom* (2000) (articulating reasonableness standard and factors to be considered in context of right to housing). For a discussion of the Constitutional Court’s treatment of socioeconomic rights, see generally, Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUMBIA HUMAN RIGHTS LAW REVIEW 321 (2007).

²⁷⁹ *Soobramoney v. Minister of Health, KwaZulu-Natal* (1997) CCT 32/97

²⁸⁰ *Soobramoney* at para. 31

²⁸¹ *Minister of Health v. Treatment Action Campaign* (2002) CCT8/02. The cost of Nevirapine was not an issue in the proceedings, *TAC* para 71.

²⁸² *TAC* paras. 3, 44–45. Nevirapine is a potent fast-acting antiretroviral drug used worldwide in the treatment of HIV/AIDS. In 2001, it was approved by the WHO for use by pregnant women to prevent mother-to-child transmission of HIV at birth. The drug had been approved for these uses in South Africa.

²⁸³ Nevirapine appears on the WHO’s list of essential drugs which should be provided as part of the minimum core of the right to health according to the UNCESCR. It was also available to the government free of charge. *TAC* at para. 4.

provide access to the socio-economic rights . . . on a progressive basis.”²⁸⁴ Next, applying a reasonableness inquiry, the Court found the government’s policy of restricting the availability of Nevirapine in the public health sector to be unreasonable. In addition, the Court decided that the government had not reasonably addressed the need to reduce the risk of HIV positive mothers transmitting the virus to their babies at birth. Still, the Court qualified that its finding of unreasonableness should not be taken to “mean that everyone can immediately claim access to such treatment.”²⁸⁵

Some commentators have been critical of the Court’s approach to socioeconomic rights arguing that it has in effect undermined meaningful enforcement of an individual entitlement to the right to health.²⁸⁶ Others maintain that “reasonableness” does not entirely foreclose enforcement of socioeconomic rights.²⁸⁷ Commenting on South Africa’s socioeconomic rights cases, Jeanne Woods has suggested that the jurisprudence is evolving from the rejection of individual rights claims for life-preserving medical treatments to the recognition of collective rights to comprehensive government programs to address urgent social needs.²⁸⁸ Further, Woods observes that the Court has more readily acknowledged rights and correlative state duties where there was a history of political struggle demanding their recognition, noting that AIDS case law is developing against the background of domestic and international civil society political movements.²⁸⁹ The gender equality and cultural autonomy political movements presently in conflict over virginity testing may find some common ground, if not consensus, by engaging the government on the nature of its obligation to realize the health right. Undoubtedly, the nature of the individual or collective entitlement to the health right in South Africa will be further articulated and developed in the years to come and deeply influenced by the AIDS crisis.

²⁸⁴ TAC at para. 34–35 (“the socio-economic rights of the Constitution should not be construed as entitling everyone that the minimum core be provided to them.”).

²⁸⁵ TAC para. 125.

²⁸⁶ See, e.g., David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 SOUTH AFRICA JOURNAL OF HUMAN RIGHTS 1, 8–9 (2003); Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Socio-economic Rights: Contemplating the South African Experience*, 26 HUMAN RIGHTS QUARTERLY 882, 898–99 (2004).

²⁸⁷ See, e.g., Jonathan Klaaren, *A Remedial Interpretation of the Treatment Action Campaign Decision*, 19 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 455 (2003); see also Pieterse, *Resuscitating Socio-economic Rights*, *supra* note 278, at 498 (arguing that it is possible to recast the TAC decision as finding an entitlement to receive safe and efficacious medical treatment where such treatment has been medically indicated, as long as the treatment is affordable and where capacity to administer it exists.); Mark Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617 (2004); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUMBIA HUMAN RIGHTS LAW REVIEW 321 (2007).

²⁸⁸ Jeanne Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEXAS INT’L L. J. 763, 790 (2003). Woods reconciles the results in the Soobramoney and TAC cases as follows:

Both kidney disease and AIDS are serious, life-threatening harms. However, the AIDS epidemic has all of the characteristics of a classic “public” health crises: a communicable disease that threatens the entire population. As such, AIDS more readily falls within the traditional scope of liberal state responsibility. In contrast, kidney disease no matter how widespread, is seen as a “private” misfortune; its victims, while generating sympathy may even be deemed “undeserving” of an urgent public response by having made bad lifestyle choices. Notably, in [TAC], the beneficiaries of constitutional relief were not the infected mothers, but the innocent—hence “deserving”—infants to whom the disease was transmitted in utero.

²⁸⁹ *Id.* at 791.

B. Reconsidering the Role of Culture

Abolitionist approaches to customary practices, by immediately identifying culture as the culprit, compromise the possibility of identifying avenues to adapt a particular practice in a way that does not offend human rights norms. Further, legal bans, criminalization and other forms of abolishing traditional practices do not encourage a holistic understanding of the context in which cultural practices are embedded and as a result prevent comprehensive solutions. Indeed, by “consigning culture to the role of violator,”²⁹⁰ human rights proponents risk missing openings presented within culture and fail to work collaboratively with community members committed to social change, thus precluding a positive role for culture in the pursuit of gender equality.²⁹¹

To some, the legislative ban on virginity testing has been taken as evidence that South Africa’s new constitutionalism means characterizing their culture as an obstacle to development and gender equality. Third World feminists have expressed concerns over similar calls to abolish traditions and customs in other areas. The concerns expressed by these African feminists stem in part from their experiences that abolitionist responses to traditional practices are based in mistaken impressions that women’s rights simply do not exist at all in custom or local practice, such that solutions may only be found by substituting custom and local practice with alternatives offered by medical science which are unfamiliar or not trusted.

The arguments advanced by traditionalists in defending virginity testing and demanding accommodation are not without their flaws. Despite their use of rights rhetoric, traditionalists have chosen to frame “culture” as integrated, holistic, and static. In contrast, the understandings emerging in contemporary anthropological literature is that “culture is fragmentary, contested, and shifting.” Far from being something to be preserved for its own sake, frozen in time and place, anthropology now sees culture as “connected to global systems of meaning and power, continually constituted and reconstituted through processes of interpretation, invention and imposition.”²⁹² Culture is dynamic, responds to social change, and undergoes transformation over time.²⁹³

Indeed, the revival of virginity testing seems to typify the constituted, reconstituted and transformed thesis offered by the insights of anthropologists. It is not seriously contested that, before the AIDS crisis, virginity testing had fallen out of favor and had all but ceased due to pressures that had changed social structures. Virginity testing has reemerged in its current form largely in response to HIV/AIDS. Testers

²⁹⁰ Celestine Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT’L L. J. 381 (2000). *see also* Abdullahi An-Na’im, *Promises We Should All Keep in Common Cause*, in IS MULTICULTURALISM BAD FOR WOMEN?, at 27–28 (Joshua Cohen et al. eds., 1999).

²⁹¹ *Id.*

²⁹² Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. J. L. & SOC. 247. 268-270 (1997) (explaining how “rights and legal remedies offer a narrow definition of social problems such as gender inequality and provide a restricted and individualistic set of remedies” rather than addressing “the broader cultural productions that foster violence against women); *see also* Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 HUMAN RIGHTS QUARTERLY 286 (1996) (discussing rights as cultural practice).

²⁹³ Nyamu (“People are not simply the naïve product of a rigid and static society,” except in the uninformed imagination of some people in Western societies who view Third World societies as “stable, timeless, ancient, lacking in internal conflict, and premodern”); *see also* Katha Pollitt, *Whose Culture?* in IS MULTICULTURALISM BAD FOR WOMEN?, at 27–28 (Joshua Cohen et al. eds., 1999).

who have promised to continue testing children despite the law say they do what they are doing to save the women and children of South Africa and ensure a future for the nation, not solely to preserve culture per se.

Bringing to bear this understanding of culture to the testing controversy, culture presents not just an obstacle but perhaps an opportunity to ensure that cultural changes incorporate and advance women's equality. The testing phenomenon itself illustrates how reactive and adaptive communities can be. It is possible, indeed more likely than not that without interventions that engage both gender equality *and* cultural autonomy, changes in cultural currents will remain harmful to girls and women even after other aspects of social life have evolved in a more progressive rights respecting manner. Thus, the question becomes how to promote a more progressive adaptation that improves the status of women.

C. *Efficacy of Legislative Efforts*

A legislative strategy for controlling virginity testing establishes, and limits, the domain of concern—to test or not to test.²⁹⁴ In South Africa, the domain of concern needs to be wider. Even if virginity testing is effectively abolished by the legislative prohibition, society will still need to address the HIV/AIDS epidemic and its disproportionate impact on women. What must be recognized is the need to expand the domain of concern beyond abolishing or accommodating virginity testing to alter the broader cultural norms that foster HIV infection and women's inequality in society which served to motivate the testing resurgence in the first instance.

Legal anthropologists have observed that legislation rarely has its intended effect because in the “social field” in which it must operate; ties of community and mutual obligation are frequently stronger than external law.²⁹⁵ The effectiveness of any human right will depend less on legislative action than on the extent to which that right is embraced or ignored by the community's leaders who dictate the non-state laws and norms of morality, custom and honor.²⁹⁶ Thus, “in communicating and devising laws and policies related to HIV/AIDS, law makers must consider the effect of their journey through social fields whose rules and obligations may rival those of the state.”²⁹⁷

V. MOVING BEYOND ABOLITION VS. ACCOMMODATION: ALTERING CULTURALLY REINFORCED INEQUALITY

²⁹⁴Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 *Can. J. L. & Soc.* 247 (1997).

²⁹⁵Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study in LAW AS PROCESS: AN ANTHROPOLOGICAL STUDY* (Sally Falk Moore ed. 1973); *see also* John Griffiths, *What is Legal Pluralism?* 24 *JOURNAL OF LEGAL PLURALISM* 1–26 (1986); E. Ehrlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1986) (“The social association is the source of the coercive power, the sanction of all social norms, of law no more than of morality, ethical, custom, religion, honor . . . the state is not the only association that exercises coercion; there is an untold number of associations in society that exercise [coercion] much more forcibly than the state.”)

²⁹⁶Kathryn Bromley Chan, *From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS*, 21 *SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS* 191 (2005).

²⁹⁷*Id.*

*Rights are cultural resources deployed in specific cultural contexts by local agents operating within legally and culturally plural frameworks.*²⁹⁸

Sally Engle Merry

*Rights purport to solve problems, but when stated abstractly—it is claimed they are at most the beginning of a discussion.*²⁹⁹

Cass Sunstein

*When gender biased social arrangements are defended in the name of culture, their purported cultural norms need to be challenged.*³⁰⁰

Celestine Nyamu

Just as the tensions between universalism and relativism will continue to preoccupy theorists, women's human rights activists will continue to struggle with how best to eradicate harmful traditional practices.³⁰¹ Conversations concerning virginity testing will also continue. As practical matter, stakeholders must move beyond the “abolish or accommodate” paradigm and seek *adaptation* through a pragmatic pluralist approach that accounts for the social context that creates and maintains inequalities rendering girls and women vulnerable to disease and premature death. Applying insights on pluralism from legal anthropology and analyzing the pragmatism of the South African Constitutional Court's emerging jurisprudence on the question of culture and customary law, it is observed that *both* rights and cultural practices in an open, democratic and plural society such as South Africa are not rigid but rather “social and collective in character.”³⁰² This means that both can allow for compromise, deliberation, and assessment of competing considerations. In the abstract, the rights to equality and culture do not tell us how to handle particular problems or how to decide between conflicting claims of rights, as evidenced by the virginity testing debate. In this context, resolution of conflicting claims will require (in addition to a discursive shift in the virginity testing debate towards a focus on health and other initiatives to combat HIV/AIDS), a pragmatic approach to cultural pluralism, and a constitutional interpretive mode which appreciates rights in context and allows for contemporary social and cultural change.

A. *Rights, Pluralism and Pragmatism*

A framework of pragmatic legal pluralism that appreciates how both rights and culture are mobilized locally can facilitate a move beyond the dichotomies of the universalism versus relativism debate and the limited options of abolition or accommodation that have consumed the virginity testing controversy. Historically, legal pluralists examined the overlapping normative systems created during the process of colonization where indigenous and European law operated simultaneously. Broadly, the study of legal pluralism today examines situations where more than one normative system occupies the same social field

²⁹⁸ Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. J. L. & SOC. 247 (1997).

²⁹⁹ Cass Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727 (1995).

³⁰⁰ Celestine Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L. J. 381 (2000).

³⁰¹ Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 Can. J. L. & Soc. 247 (1997).

³⁰² Cass Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727 (1995).

and attempts to understand a variety of forms of non-state normative ordering. The pluralist perspective, by recognizing that multiple norms interact and influence individuals and communities, renders the abolition versus accommodation paradigm irrelevant on some level because it can appreciate context and explain the disconnect between formal legal efforts to abolish a given practice and social change. Pluralism thus opens avenues for mediating between the different normative orders governing the lives of individuals and communities. Along the same lines, pragmatism holds that meaning is relative to the time, place and purpose of an inquiry. As such meanings may be modified as more knowledge is acquired.³⁰³ Pragmatism methodologically demands that we assess competing normative orders with a view towards practical consequences. The pragmatist perspective therefore calls for an active interrogation of the consequences which flow from cultural practices and also allows for adaptation.

Legal anthropologist Sally Merry, in her research on women's movements against domestic violence among Pacific Islander communities, has observed:

[s]ocial movements take shape within a legally plural world. Multiple legal orders are arrayed side by side in various geographical locations as well as up and down in local state national, regional and global systems. These orders are not autonomous but in constant interaction, the power of each is constrained by the power of others.³⁰⁴

Research on legal pluralism demonstrates the nature of these orders and their relationships are locally and historically variable. This multiplicity is not new, but the relative importance of each legal order and the nature of the interactions among them are constantly changing.³⁰⁵

In the pluralistic legal setting that characterizes South Africa and many developing countries, confronting the politics of culture will require understanding the flexibility and variation of custom in order to challenge the arguments that deploy culture as a justification for gender inequality.³⁰⁶ For instance, Celestine Nyamu, a Third World Feminist, advocates "critical pragmatic engagement" with culture instead of condemnation as a matter of course. She has observed that while the Convention on the Elimination of all forms of Discrimination against Women calls for change, it does not "dictate the process for achieving change leaving open the possibility of a flexible process for evaluating assertions of

³⁰³ See generally, WILLIAM JAMES, PRAGMATISM AND OTHER ESSAYS; A.J. AYER, THE ORIGINS OF PRAGMATISM (1968); H.S. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM (1968 repr. 1981); R. RORTY, CONSEQUENCES OF PRAGMATISM (1982); L. MENAND, PRAGMATISM: A READER (1997); THE REVIVAL OF PRAGMATISM (M. Dickstein, ed., 1999).

³⁰⁴ Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. J. L. & SOC. 247 (1997) (arguing that with introduction of global legal order offering resources, local actors face a richer and more diverse legal terrain than they did previously and may use law as a form of resistance noting: "[n]ational and global legal orders provide new forms of cultural and coercive capital to these movements but at the same time introduce categories of identity, conceptions of redress, and modes of defining problems which constrain and channel them. Legal orders are productive as well as repressive in their exercise of power, shaping meanings as well as imposing punishments. Legal orders define, name, and constitute identities and relationships, construct narratives of virtuous and criminal behavior and create new cultural meanings. These meanings exert power far beyond any capacity to impose sanctions.")

³⁰⁵ Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. J. L. & SOC. 247 (1997).

³⁰⁶ Celestine Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L. J. 381 (2000).

culture in context.”³⁰⁷ She maintains that this flexibility is particularly important in settings where overlap between formal legal institutions and policy and cultural norms may render laws purporting to abolish certain customs custom both meaningless and unrealistic.³⁰⁸ The “problem” of culture can be dealt with effectively if those engaged in driving changes are making choices and reacting to material and institutional conditions they confront in society. Changing these conditions, in this case promoting health, may change a culture’s response to disease. If material and institutional conditions are improved to better address the HIV/AIDS epidemic, the testing movement may be redirected.

As a practical matter, South Africa’s Commission for Gender Equality would do well to locate the space in local context that provides for the recognition of women’s rights while avoiding creating the impression that the only solution lies in substituting local custom with legislation banning cultural practices. It is important to utilize the openings present in local cultural or religious traditions while simultaneously working toward expanding conceptualization of rights and reforming the configuration of national legislation, constitutions, and administrative institutions.³⁰⁹ Arguing against virginity testing on the basis of its inconsistency with human rights standards and ideals of gender equity in development does not go far enough, and may even be counterproductive.

Where may such openings exist? Third World Feminists committed to the global women’s rights movement have called for a cross-cultural dialog which seeks the pursuit of a global consensus viewing the relationship between international human rights and local culture as a “genuinely reciprocal global collaborative effort.”³¹⁰ They advocate a two-way sharing of perspective drawing upon a given community’s respective internal discourses about cultural rites and women’s rights.³¹¹ South Africa’s Constitutional structure and human rights culture is well equipped for pragmatically fostering exactly the sort of internal and cross-cultural dialog that an open, democratic and heterogeneous society demands.

B. Contextual Constitutionalism

³⁰⁷ *Id.*

³⁰⁸ *Id.* (arguing proponents of gender equality must engage with the specific politics of culture and that assertions of the rigid notions of custom must be met with empirical evidence of the flexibility, variety, and richness of contemporary local practice.)

³⁰⁹ *Id.*; see also Nhlapo (warning against the estrangement caused by a rights based strategy that abstracts women from their cultural and religious contexts); Abdullahi An-Na’im, *Promises We Should All Keep in Common Cause*, in IS MULTICULTURALISM BAD FOR WOMEN? at 59; Martha Nussbaum, *A Plea for Difficulty*, in IS MULTICULTURALISM BAD FOR WOMEN? at 105; See also Jennifer Nedelsky, *Re-conceiving Rights as a Relationship*, 1 REV. CONST. STUD. 1 (1993); Jennifer Nedelsky, *Re-conceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989) (arguing for a reconceived notion of rights that emphasizes relationships and interdependence rather than estranging individualism).

³¹⁰ Celestine Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT’L L. J. 381 (2000).

³¹¹ *Id.* (“non-hegemonic human rights practice that incorporates the two simultaneous processes of internal discourse and cross-cultural dialog, in order to find legitimacy for human rights principles within all cultures” Scholars and practitioners must ask: Do the cultural norms reflect actual social practice? Are they representative of the community, or are they simply a generalization of the narrow interests of a few? Whose power is preserved through the use of cultural norms? Is the label of culture being deployed to stifle a desirable and necessary political debate?”)

South Africa's constitution has been described as 'a history bridge' leading from a past of prejudice and Apartheid to a future of democracy and *ubuntu*.³¹² Under the new democratic order, because fundamental rights were given priority due to South Africa's repressive past, some commentators have expressed concern that the decision to do so would not bode well for African customary law.³¹³

South Africa is characterized by a pluralistic legal setting. The Constitution explicitly allows for pluralism by recognizing validity of traditional authority as well as the right of persons belonging to a cultural, religious or linguistic community to engage in cultural practices. The exercise of cultural rights is subject to Constitutional law, however, in that cultural rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Accordingly, practices which may be legitimate under customary law are open to challenge under the Constitution. In sum, rather than a legal revolution, the Constitution was a compromise that set in motion a more moderate process of transformation.³¹⁴

1. *The Bhe Case: The Evolution of Customary Law*

South Africa's Constitutional Court recently confronted the challenge traditional cultural norms present to gender equality when it took up the question of the constitutional validity of the principle of male primogeniture as contained in the African customary law of succession and Apartheid era legislation in the combined cases of *Nonkululeko Bhe v. The Magistrate of Khayelitsha and Others (Bhe)* and *Charlotte Shibi v. Mantabeni Freddy Sithole and Others (Shibi)*.³¹⁵

³¹² Elsje Bonthuys, *Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity*, 18 SAJHR 41 (2002) (advising policy makers to measure the effectiveness of strategies for change against the changes brought about in the experiences of different women due to the different contexts in which women find themselves, explaining that middle class African women may organize many aspects of their life according to western structures and norms, but retain aspects of traditional identity which are advantageous in other contexts); V. Bronstein, *Reconceptualizing the Customary Law Debate in South Africa* 14 SAJHR 393 (1998) (South African constitution should not be interpreted to pit the right to equality against the right to participation in one's culture, reform must be thought instead of as the pursuit of a society in which all people, including girls, are able to realize their dignity and self-worth to their fullest potential); V. Van Der Meide, *Gender Equality v Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Martial Property Regime of the "Official Version" of Customary Law* 116 SALJ 100, 112 (1999) ("Africa women must no longer have to choose between culture and equality, for otherwise both rights will be rendered illusory").

³¹³ Elsje Bonthuys, *Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity*, 18 SAJHR 41 (2002).

³¹⁴ Cf. Makau Wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse* 10 HARV. HUM. RTS. J. 63 (1997) (offering a critical assessment of the constitution's gradualist approach to change: "Except for largely cosmetic effects, there is little possibility that the particular conceptualization of rights in the new South Africa will alter the patterns of power, wealth and privilege established under apartheid").

³¹⁵ Because the analysis in both cases was similar only the *Bhe* case will be discussed in depth. In *Shibi*, the applicant's brother died intestate. He was not married or in a customary union at the time of his death. He had no children and was not survived by a parent or grandparent. His nearest male relatives were two cousins. The Magistrate of Wonderboon appointed one of the deceased's male cousins as representative of his estate over the objections of his surviving sister. After some estate funds were misappropriated by one of the deceased's cousin, the Magistrate appointed an attorney to administer the estate and distribute the assets according to customary law. The remaining assets in the estate were awarded to the other male cousin determined to be the only heir to the estate. *Shibi* was precluded from being the heir to the estate of her deceased brother in terms of the legislation governing African intestate succession.

In the *Bhe* case, the applicant (Bhe) brought an action on behalf of her two minor daughters, the interest of all female descendants, descendants other than the eldest male descendants and extra-marital children who are descendants of people who die intestate subject to “Black law,” and the public interest.³¹⁶ Upon the death of Bhe’s spouse, the Magistrate of Khayelitsha appointed the father of the deceased as representative of his estate. A material factual dispute arose as to whether Bhe’s children were extra-marital, while both Bhe and the deceased’s father agreed that no formal marriage or customary union had taken place, the deceased’s father insisted that the deceased had paid *lobolo* which Bhe denied. From 1990 until the deceased’s death, Bhe and the deceased lived together and maintained a household, he was a carpenter and she worked as a domestic. They lived in a temporary informal settlement in the Khayelitsha township near Cape Town.

Prior to his death, the deceased secured a state housing subsidy which he used to purchase the property on which they lived as well as building materials for a house, but he died before the house was completed. His income had supported Bhe and their two dependent children. His disputed estate comprised the temporary informal shelter and the property on which it was situated, various items of movable property that he and Bhe had jointly acquired over the years, and the building materials for the home they intended to build. After the death of her spouse, Bhe’s relationship with his father “deteriorated to the point of acrimony.” Despite the fact that the deceased father lived on the other side of the country, he was appointed the sole heir to the estate by the magistrate pursuant to legislation governing intestate succession among Blacks and “Black law and custom.” When the deceased’s father indicated his intention to sell all the property to defray funeral expenses, Bhe challenged the appointment of the deceased’s father as heir and representative of the estate fearing homelessness for herself and her two minor children.

Bhe sought relief from the Constitutional Court, claiming that provisions of the statutes governing intestate succession in South Africa³¹⁷ should be declared unconstitutional and invalid because they conflict with the Constitution’s equality, dignity and children’s rights provisions. The Court agreed, finding customary laws governing succession incompatible with the Bill of Rights. It rejected the argument that such laws should nonetheless survive scrutiny because they give recognition and effect to custom.³¹⁸ The Court held that the customary rule of male primogeniture violated the rights of women to equal treatment and was an affront to their dignity, but not before explaining the importance of custom in law and society. The Court acknowledged that “the impact of the [challenged] provisions falls mainly on African women and children, regarded as arguably the most vulnerable groups in our society.”³¹⁹ Yet it also affirmed that “certain provisions of the Constitution put it beyond doubt that our basic law

³¹⁶ *Bhe* para 10. The women’s legal centre trust together with the Commission for Gender Equality submitted amicus briefs in the action.

³¹⁷ See Intestate Succession Act 81 of 1987 and the Black Administration Act 38 of 1927. Section 23 of the Intestate Succession Act provides in pertinent part: “All moveable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.” For a discussion of the legacy of discrimination against black women in South Africa see Adrien Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57 (1995).

³¹⁸ *Bhe* para 72(“the rights to equality and dignity are the most valuable of rights in any open and democratic state. They assume a special importance in South Africa because of our past history of inequality and hurtful discrimination.”)

³¹⁹ *Bhe* para 32.

specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law.”³²⁰

Writing for the Court, Justice Langa explained that customary law was not insulated from change, amendment or adjustment. Indeed, he opined that adjustments and development to bring customary law provisions in line with the Constitution or into accord with the spirit, purpose and objects of the Bill of Rights are required.³²¹ Affirming the role of customary law in South African society, he noted that constructive and positive aspects of customary law had too long been neglected:

The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes or disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*.³²²

Yet the Court rejected arguments that male primogeniture should be preserved out of respect for culture on the grounds that the dominant purpose of the rules did not give effect to the goals of respecting culture and pluralism. Rather, the court concluded that the effect of the succession rules had been to “ossify customary law” in furtherance of the purpose of a racist program of entrenching division and subordination. The Court deemed male primogeniture “a relic of a racist past,” because as codified it imposed a system on all Black Africans “irrespective of their circumstances and inclinations.”³²³

The Court offered guidance in assessing whether a rule of customary law should be upheld or invalidated: “a critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype which has become ossified in the official code, or whether it continues to enjoy social currency.”³²⁴ Accordingly, “it is important to examine the context in which the rules of customary law . . . operated and the kind of society served by them.”³²⁵ The Court explained that rules of customary law do not operate in isolation; rather they were part of a system which conformed to the community’s way of life and had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities.³²⁶

Examining the history and context of the male primogeniture practice, the Court found that customary succession rules functioned to preserve and perpetuate the family unit; the heir did not merely succeed to the assets of the deceased, nor was succession primarily concerned only with the distribution

³²⁰ *Bhe* para 41.

³²¹ In addition to the Constitution’s commitment to equality, the Court noted the nation’s obligations under international law to protect the rights of women and abolish all laws that discriminate against them pursuant to a number of international instruments to which South Africa is a party.

³²² *Id.* para. 45.

³²³ *Bhe* para 66 (“The legislation provides a scheme whereby the legal system that governs intestate succession is determined simply by reference to skin color. What it says to Africans is that if they wish to extricate themselves from the regime it creates, they must make a will. Only those with sufficient resources, knowledge, education or opportunity to make an informed choice will benefit from that provision.”)

³²⁴ *Id.* para. 86.

³²⁵ *Id.* para. 87.

³²⁶ *Bhe* para. 75-77.

of the estate of the deceased. Property was collectively owned and the head of the family administered it for the benefit of the family unit as a whole. To that end, customary rules provided that the heir served to step into the shoes of the family head and in so doing assumed not only all the rights of the deceased but also the obligations of the family head and acquired the duty to maintain and support all remaining members of the family who were assured his protection. An heir inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his obligations as head of the family unit. In short, “the rules of customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.”³²⁷

This context has over time changed, the Court observed: “[m]odern urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased’s estate without the accompanying social implications which they traditionally had.”³²⁸ The Court noted that nuclear families have largely replaced traditional extended families; the male heirs now often simply acquires the estate without assuming, or even being in a position to assume any of the deceased’s responsibilities. Accordingly, the Court found: “In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.”

Customary law, the Court concluded, had not kept pace with how people live: “indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life . . . it has evolved and developed to meet the changing needs of the community.”³²⁹ In this instance, rules of succession in customary law “have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.”³³⁰ For Justice Langa, it was clear that the application of customary law rules of succession in circumstances vastly different from their traditional setting causes much hardship. Trends reflect that a basic social need to sustain the surviving family unit rather than a general adherence to male primogeniture should be paramount.³³¹

Based on this understanding of the role of custom in the constitutional system as necessarily open to growth and adaptation, the Court concluded that the limitations primogeniture placed on the rights of those subject to it were not reasonable and justifiable in an open and democratic society founded on the

³²⁷ *Id.* para. 80

³²⁸ *Id.* para. 76.

³²⁹ *Bhe* para. 80.

³³⁰ *Id.* para. 83.

³³¹ *Bhe* paras. 43-46 Justice Langa opined: “Customary law has, in my view, been distorted in a manner that emphasizes its patriarchal features and minimizes its communitarian ones.” Thus, customary law as administered under Apartheid failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men and changing values concerning gender roles in society with the result being “formalization and fossilization of a system which by its nature should function in an active and dynamic manner.” He warned against falling into the interpretive mistakes of the previous legal regime which were “partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of common law or other systems of law.” This approach, he explained had “denied [customary law] of its opportunity to grow in its own right and adapt itself to changing circumstances” contributing to a situation where “[c]ustomary law was lamentably marginalized and allowed to degenerate into a vitrified set of norms alienated from its roots in the community”.

values of equality, human dignity and freedom. Because primogeniture precludes widows from inheriting from their late husbands; daughters from inheriting from their parents, younger sons from inheriting from their parents and extra-marital children from inheriting from their fathers; the Court concluded it was, “a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarch and male domination incompatible with the guarantee of equality under this constitutional order.”³³² Further, the court determined that the principle of primogeniture also violates the right of women to human dignity as guaranteed in the Constitution in the sense that implies that women are not fit or competent to own and administer property.

What is particularly noteworthy about *Bhe* is that the Court does not present customary and constitutional law as inherently necessarily in conflict—rather customary law is not what is written but what is lived. The Constitutional Court took a historical time honored tradition and examined it in the present context; for this Court, customary law is not ahistorical or abstract but experienced. In short, customary law is not treated as tantamount to the law of gravity.

Also worthy of note is the Court’s pragmatic approach to pluralism that examines the purpose of a given customary practice. The Court is pragmatic in its approach but still expresses appreciation for values of pluralism and diversity. In questions of custom and culture, the Court has now demonstrated its willingness to be pragmatic. As a normative matter, pragmatists take all truth to be experiential. This does not deny the existence of truth, as does the cultural relativist, but rather holds that truth is discovered by experience. Our experiences differ due to our differences which influence how we experience the world and how the world experiences us. The pragmatist position looks to real world consequences and empirical insights in proposing solutions. The pragmatist judge then employs empirical means to reach consequentialist ends and remains open to examining experiences to shed light on possible problems. The pragmatist judge wants to know what is at stake in a practical sense when deciding one way or another.³³³

At stake in the maintenance of the custom of male primogeniture was whether or not to render African women and children, among the most vulnerable in South African society, more vulnerable. The pragmatist judge is also anti-essentialist because the emphasis is on consequences not concepts, and results are justified contextually. Here, Justice Langa’s justifications in striking down male primogeniture were contextual and expressed concern for the new economic activity of women, different forms of household arrangements and changing values concerning gender roles.

In the pluralistic legal setting, normative orders, including international and constitutional rights as well as customary institutions, present both opportunities and challenges in the struggle for gender equality. Proponents of gender equality must appropriate positive openings presented by cultural and religious traditions, instead of dismissing culture as a negative influence.³³⁴ What may appear as “ad hoc,” the typical criticism leveled against pragmatism, is more properly seen as an opportunity for adaptation.

Both pluralism and pragmatism require contextualization, Justice Langa’s opinion in *Bhe* appreciates that context informs the meaning of cultural practice and customary law and meanings change over time adaptation occurs. Significantly, the *Bhe* case situates rights in the context of the associated corollary responsibilities that were customary. Because changes in society and in the status of women have served to disassociate responsibilities from rights, the claim of a customary right is less compelling. Yet, the Court would appear to find compelling the further development of norms of customary responsibility

³³² *Bhe* para. 91.

³³³ RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 59–60 (2003).

³³⁴ Celestine Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT’L L. J. 381 (2000).

given its emphasis on the communitarian features of customary law and its counsel to lower courts to consider the context in which rules operate and the kind of society rules serve when assessing whether or not to enforce them.

2. *The Fourie Case: The Evolution of Constitutional Rights*

The Constitutional Court has also determined that constitutional rights are flexible and adaptable. This is evidenced in its holdings concerning same-sex marriage. The combined cases of *Minister of Home Affairs v. Fourie* and *Lesbian and Gay Equality Project v. Minister of Home Affairs* (the *Fourie Case*) reflect the flexibility of rights.³³⁵

In *Fourie*, Marie Adriaana Fourie and Cecilia Bonthuys claimed that they were unconstitutionally prevented from getting married. The case was a facial challenge to the Marriage Act of 1961 claiming that the act unconstitutionally deprived gays and lesbian of the right to marry. The Court concluded that “the failure of the common law and Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements, and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1) and not to be discriminated against unfairly in terms of section 9(3) of the Constitution.”³³⁶

The State argued that under the U.N. Human Rights Committee existing interpretations of Article 23 of the International Covenant on Civil and Political Rights (ICCPR), which recognizes the right to marry and found a family, South Africa did not necessarily need to extend marriage to same-sex couples. The Court responded that the reference in Article 23 to “men and women” was “descriptive of an assumed reality, rather than prescriptive of a normative structure for all time.”³³⁷

The Court observed that while both the ICCPR and the Universal Declaration of Human Rights state that the “family is the natural and fundamental group unit in society,”³³⁸ neither attempts to define the family.³³⁹ The Court further stated:

Nor need it [the family] by its nature be restricted, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family . . . be constituted according to any particular model . . . Indeed, rights by their nature will atrophy if they are frozen. As conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today.³⁴⁰

³³⁵ *Minister of Home Affairs v. Fourie*, CCT 60/04, 2005.

³³⁶ *Id.* at para 72–73.

³³⁷ *Id.* at para 63. In the Court’s opinion, the real purpose of Article 23 “is to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriages are freely entered into and guarantee equal rights before, during and after marriage.”

³³⁸ ICCPR Art. 23; UDHR Art. 16.

³³⁹ The UN Office of the High Commissioner for Human Rights notes that “the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept of a standard definition.” Office of the United Nations High Commissioner for Human Rights, General Comment No. 19 Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23), July 7, 1990.

³⁴⁰ *Fourie*, at para 64.

As the *Bhe* and *Fourie* cases demonstrate, while the question of universalism in human rights defies easy resolution, South Africa's legal culture is one of compromise and negotiation. The South African legal system, with its incorporation of international human rights law is well equipped to construct a flexible position between the oppositional absolutes of universalism and relativism. Stakeholders in the debates that frames gender equality and cultural autonomy as oppositional and necessitating a choice between abolition and accommodation would gain from working pragmatically to identify possible avenues by which to adapt, adjust, and modify norms in ways that enhance the likelihood that both cultural practices and human rights advocacy will contribute to solutions to the HIV/AIDS pandemic.

*C. A Capabilities Approach to the Problems
Presented by Virginity Testing*

*Evading the task of finding the best grounding for human rights, in the face of philosophical skeptics and political opponents, demonstrates a lack of intellectual responsibility.*³⁴¹

Michael Freeman

As a case study, virginity testing highlights the need for a more comprehensive framework in human rights discourse for resolving competing gender equality and cultural autonomy rights claims and to ground socioeconomic rights. The "capabilities approach" offers an alternative conceptual framework that has great potential for strengthening the normative foundations of human rights theory and informing the practice of human rights advocacy. Because capabilities theory explicitly acknowledges the significance of context, it better accounts for cultural differences and therefore responds to one of the primary criticisms of a rigid universal rights approach. Accordingly, capabilities theory may provide a pragmatically productive way for mediating between gender equality and cultural autonomy when confronted by particular problems, such as virginity testing, which at first appears to present conflicts between and among particular rights. A capabilities approach would advance stakeholders towards finding new ways to address HIV/AIDS and its disproportionate impact on young women and girls in South Africa, Sub-Saharan Africa and beyond. The primary contribution of a capabilities approach is its potential to ground human rights discourse and advocacy in a way that addresses the issues associated with virginity testing by expands the domain of concern beyond formal legal entitlements to actual freedoms. In this way, a capabilities approach offers some promise for bridging the divides that have emerged in human rights theory and practice.

A. The Capabilities Approach

Nobel laureate economist Amartya Sen developed the capabilities approach because he perceived that mainstream development economics had failed to accurately assess the individual well-being that the development branch of economics purports to measure.³⁴² For Sen, the then existing literature on inequality in economics with its exclusive focus on certain factors, but not others tended to assume away ambiguities and complexities such that in his view "the most blatant forms of inequality and exploitation

³⁴¹ Freeman, *supra* note 174.

³⁴² Des Gasper, *Sen's Capability Approach and Nussbaum's Capabilities Ethic*, Vol. 9, No. 2 JOURNAL OF INTERNATIONAL DEVELOPMENT 283 (1997).

survive in the world” due to the limitations of utilitarianism which “overlooks everything other than total utility—aggregated over different types of utilities and different persons.”³⁴³

Sen argued that development economics should examine deprivation using a different metric than the then prevailing approaches which looked to utility or satisfaction. Instead of utility or satisfaction, Sen advanced “the metric of capabilities to function” as an alternative. This approach would involve “using information regarding who can in fact do what and not just the way people desire or react to their ability or disability to do these things”³⁴⁴ in order to measure the presence or absence of inequality.

Sen reformulated the framework traditionally used in microeconomics by suggesting that to truly understand how individuals obtain or fail to obtain well-being policy makers should focus on the true freedom people actually have for leading a valuable life. Under this view, in making or assessing various public policy choices or devising economic development policies, attention should be paid to people’s capabilities to do and to engage in certain activities and to enjoy positive states of being; policy makers must seek to assess an individual’s well-being and her freedom to pursue well-being. Accordingly, policy development is reoriented towards a “concentration on freedoms to achieve in general and the capabilities to function in particular.”³⁴⁵

The two basic elements of Sen’s capability approach are “functionings” and “capabilities.” Sen explains that *functionings* are the “beings and doings” of a person, while a person’s *capabilities* are “the various combinations of functions that a person can achieve . . . reflecting the person’s freedom to lead one type of life or another.”³⁴⁶ Put simply, “a functioning is an achievement, whereas a capability is the ability to achieve.” For Sen, functionings are, in a sense, more directly related to living conditions, since they are different aspects of living conditions. Capabilities, in contrast, are people’s potential functionings and may include such things as being well-nourished, being sheltered, being healthy, being able to participate in a community and working in the labor market. All capabilities together correspond to the overall freedom to lead the life that a person has reason to value.³⁴⁷

To illustrate this point, Sen offers a hypothetical, adapted here, which compares two individuals who are starving. Imagine individual A is an internally displaced victim of famine in North Korea, while individual B has decided to go on a hunger strike in front of the White House to protest the war in Iraq. Although both A and B lack the function of being well-nourished, the freedom of each of them to avoid starving to death is critically different. A capabilities inquiry captures this difference because it directs us to consider the positive freedom and real opportunity to create a particular lifestyle an individual would have reason to enjoy. From this vantage point, a capabilities approach enables us to make a meaningful distinction with respect to the difference between the functionings that each individual could have achieved. While both A and B may presently lack the achieved function of being well-nourished, the

³⁴³ AMARTYA SEN, *RESOURCES, VALUES AND DEVELOPMENT* (1997).

³⁴⁴ *Id.*

³⁴⁵ Amartya Sen, *Gender Inequality and Theories of Justice*, in *WOMEN, CULTURE AND DEVELOPMENT: A STUDY IN HUMAN CAPABILITIES* (Martha Nussbaum & Jonathan Glover eds., 1995).

³⁴⁶ Amartya Sen, *THE STANDARD OF LIVING* (1987).

³⁴⁷ Sen emphasizes the importance of the freedom to lead a life one would have “reason to value” because he argues that the motivations for valuing specific lifestyles should be scrutinized, a certain life cannot be valued without reflecting upon it. This insight is especially important from a gendered perspective because utility has a gendered dimension. Women who are worse off than men in objective terms might still have the same utility level because they have learned to expect less. A person may be in a desperate situation and still be contented with life if she has never known differently or has adjusted her expectations down.

political protester B easily has a capability to achieve such a functioning while the North Korean famine victim A does not.

As illustrated, the capabilities approach appreciates that the means to achieve are often dictated by personal, social and environmental factors which in turn influence an individual's freedom to achieve. As such, actual achievements are directly related to capabilities which will depend heavily on external choice constraints as well as different ideas of the good life. In Sen's view, people should have capabilities and freedoms to lead the kind of lives they want to lead, to do what they want to do and be or become the person they want to be in life. Once they have these basic freedoms they can choose to act on those freedoms in line with their own ideas of the kind of life they want to live. Thus, the capabilities approach respects different choices and conceptions of a good life. For example, "every person should have the opportunity to be part of a community and to practice religion, but if someone prefers to be a hermit or an atheist, they should also have this option."³⁴⁸

For Sen, the capability to function is the thing that comes closest to the notion of "positive freedom." A concentration on securing capabilities means eliminating vulnerabilities and enabling empowerment and liberty. According to Sen, "the issue of gender inequality is ultimately one of disparate freedoms." To be positively free is to be able to live as one chooses to have the effective power to achieve chosen results. Too often, this freedom is not available to women and girls in matters of equality, sexual autonomy and privacy.

A good society viewed from the perspective of Sen's capabilities approach would provide the material and institutional conditions for both well-being and agency freedom. It follows that good governments, through recognizing the rights to education and health should strive to facilitate the formation of good capabilities and remove impediments to their exercise and provide the means for their use. A broad well-being assessment measure of the kind Sen advocates in his Capabilities approach permits simultaneous appreciation of vital roles in process of economic development of many different institutions, including markets, governments, political parties, civic institutions, educational arrangements and opportunities of open dialog and debate.³⁴⁹

Finally, Sen maintains that there is an empirical connection that links freedoms of different kinds. For example, where political freedoms are present in the form of free expressions and democratic elections, economic security is promoted. Social opportunities in the form of education and health facilitates economic participation. Freedoms of different kinds can strengthen and reinforce one another. It would also follow that lack of certain freedoms diminishes other freedoms.

Virginity testing has reemerged because South Africans do not, as yet, enjoy the capability to be free from disease. The controversy surrounding the practice of testing became polarized, in part, because the theoretical foundation of human rights universalism has proved impoverished when confronted by the empirical realities of cultural difference in the disease context.

B. The Contributions of a Capabilities Conceptual Framework

How might capabilities theory assist policy makers and stakeholders better engage with the politics of pluralism in the context of HIV/AIDS? Capabilities theory may enhance human rights theory, advocacy and discourse by enabling a richer consideration of problems that the human rights conversation to date has not taken full account of for a variety of reasons. In addition to offering an alternative

³⁴⁸ Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93 (2005).

³⁴⁹ AMARTYA SEN, DEVELOPMENT AS FREEDOM 8-9 (1999).

conceptual framework for assessing inequality, Sen's capabilities approach offers a practical strategy for evaluating public policy. The capabilities approach evaluates policies according to their impact on people's capabilities: "[i]t asks whether people are being healthy *and* whether the resources necessary for this capability, such as clean water, access to medical doctors, protection from infections and diseases and basic knowledge on health issues are present. It asks whether people are well nourished *and* whether the conditions for this capability, such as sufficient food supply and food entitlements are met."³⁵⁰ The success of a society is to be evaluated by the substantive freedoms that the members of that society enjoy.

Feminist economists have embraced capabilities because of its enormous potential for addressing feminist concerns and questions such as reproductive health, voting rights, political power, domestic violence, education and women's social status which are not dependent solely on financial status.³⁵¹ Human rights theorists and advocates should also find reason to embrace capabilities theory. It would enrich the discourse on how human rights law can best address cultural diversity, legal pluralism, and socio-economic rights as they are presented in the instance of the virginity testing resurgence in the context of pandemic disease.

For both theorists and practitioners in human rights law, the capabilities approach offers two significant contributions to enable better engagement with the politics of cultural pluralism and socioeconomic rights. Indeed when human rights arguments are grounded in a capabilities perspective, the virginity testing problem is defined and resolved differently and more constructively.

The first contribution of the capability approach is that it explicitly acknowledges human diversity, such as race, age, ethnicity, gender, sexuality, and geographical location as well as whether people are handicapped, pregnant or have caring responsibilities. The capabilities approach does not proceed from some formal fiction of sameness, it actually attempts to account for difference. Sen criticized earlier inequality approaches in economics that assume that "all people have the same utility functions or are influenced in the same way and to the same extent by the same personal, social and environmental characteristics."³⁵² The social and environmental conversion factors appreciated by his capabilities approach allows policy makers to take into account a number of societal features, such as social norms and discriminatory practices which may impede an individual's capability to function.

Under this view, cultural practices are not immediately banned or condemned out of hand for being illiberal or unconstitutional, rather, one looks to whether capabilities are enhanced or diminished by a given practice. It follows that practices may be open to adaptation to enhance capabilities. Capabilities theory thus complements the pragmatic judicial analysis applied to the question of customary law by the Constitutional Court which privileged consideration of context and the actual effects a rule would have on the potential functionings of individuals.

Again, the capabilities approach would ameliorate concerns by Third World Feminists that too often culture is condemned as oppressive rather than as providing an opportunity for women's empowerment. Under a rights challenge to the practice of virginity testing informed by capabilities theory, the measure of inequality, repression of sexual autonomy and violation of privacy would be assessed in terms of how the practice enhances capabilities and functionings. Liberal universalism's normative commitments more

³⁵⁰ Ingrid Robeyns, *Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities*, 9 (2-3) FEMINIST ECONOMICS 61-92 (2003).

³⁵¹ *Id.* (investigating how Amartya Sen's capability approach can be applied to conceptualize and assess gender inequality in Western societies).

³⁵² *Id.*

readily call for abolition and condemnation and cannot as easily capitalize on the opportunities that may exist in a given customary normative framework for advancing women's empowerment.

Related to the potential of capabilities to acknowledge diversity is its "underspecified character" which allows the approach to accommodate heterogeneity or different ways of resolving issues surrounding cultural practices so long as the practice is capability enhancing. It is precisely because:

The capability[ies] approach is a framework of thought, a normative tool, but it is not a fully specified theory that gives us complete answers to all our normative questions. It is not a mathematical algorithm that prescribes how to measure inequality or poverty, nor is it a theory of justice. The capability approach, strictly speaking, only advocates that the evaluative space should be that of capabilities.³⁵³

Accordingly, a capabilities approach allows for flexibility and is not subject to being rigid and absolute in the sense that rights too often are. Rigid thinking about culture and rights shaped the debate over virginity testing and limited the domain of concern and in so doing also may have limited creativity over compromises and alternative solutions. When the problems associated with virginity testing were framed as gender equality rights and cultural autonomy rights in conflict, stakeholders were also rendered blind to the underlying motivation to resume testing which was the compromised ability of girls and women to be from disease and premature death. Because capabilities theory is flexible in its outlook it avoids this fate.

The second important aspect of Sen's capability approach is its appreciation of positive freedom and the interrelationship between and among freedoms as they influence the exercise of capabilities and functionings. Under this view, the focus of stakeholders in the virginity testing controversy is shifted to changing the material and institutional conditions that give rise to the practice in the first instance—disparate capabilities to be free from disease and death. Pragmatically, capabilities theory counsels that virginity testing could be eliminated by increasing the capabilities of women and girls to become more secure from HIV/AIDS infection.

Moreover, Sen's emphasis on positive freedom could help secure a theoretical foundation for a substantive and meaningful right to health as well as other underdeveloped social and economic rights enshrined in the ICESCR and the South African Constitution.³⁵⁴ Because the capabilities approach calls for the creation of the background material and institutional conditions necessary for developing the capabilities to function as a healthy individual, it might inform considerations of the reasonableness of a given policy course in realizing the right to health and promoting HIV/AIDS eradication.

Stakeholders in the virginity testing controversy could carry forward conversations about the content of the right to health and the affirmative obligations of government to create the material and institutional conditions to enable women greater freedom from disease in the course of discussions to develop regulatory guidelines to govern testing for those over 16 years of age. At minimum, such a right would include accurate education and information about HIV/AIDS transmission.

³⁵³ *Id.*

³⁵⁴ For explorations of how capabilities theory might enhance understanding of socioeconomic rights *See* Erika George, *Instructions in Inequality: Development, Human Rights, Capabilities and Gender Violence in Schools*, 26 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1139 (2005) (illustrating a capabilities approach to the right to education); and Jennifer Prah Ruger, *Health, Capability and Justice: Toward a New Paradigm of Health Ethics, Policy and Law*, 15 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 101 (2006) (advocating a capabilities approach to public health policy).

Stakeholders in the virginity testing debate share a common concern for girls' welfare but are distracted by their differences. Capabilities theory links their divergent normative commitments through its focus on positive freedoms. This perspective has the potential to strengthen conceptions of the substantive content of the minimum core of a right to health or could inform judicial evaluations of the reasonableness of a given government initiative or omission with respect to public health. Capabilities theory as an alternative normative grounding for human rights discourse can assist in moving the debate away from polarizing positions. Because capabilities theory is concerned with what girls can be and do, it creates more space for common ground between both parties to the testing debate and appreciates pluralism. Concerns about what the future generations of South African youth will be able to become and able to accomplish is at least one concern shared by traditionalists and feminists alike. A joint solution crafted with a view towards expanding the capabilities of South African youth will have more legitimacy than a legislative ban on a popular cultural practice. Reconciliation of stakeholder divisions may also be found in a greater focus on the further development of a substantive right to health. South Africa's legal culture is designed for mediation and adaptation as evidenced by the Constitutional Court's recent decisions on gender equality and cultural rights. A capabilities approach would be consistent with such emerging jurisprudence.

So, reconsidering the problems presented by the virginity testing controversy for human rights discourse from the perspective of a health right analysis informed by capabilities, the rights issues are not only equality, sexual autonomy, privacy and culture; it is also and primarily freedom to develop capabilities to function. The relevant inquiry is whether women are reasonably secure from disease and premature death and if not, why not? What are the impediments to their capabilities to avoid premature death from disease? What is virginity testing doing to further the capabilities and functionings of those engaged in it?

If instead of classical liberalism, the central foundation for human rights were capabilities, the distinction between universalism and relativism would collapse because the focus allows for choices and differences so long as capabilities are increased and freedom is enlarged. Similarly, the sharp distinctions drawn between civil and political rights versus socioeconomic rights would dissipate because a greater emphasis would be placed on the material and institutional conditions that may be the sources of impediments to freedoms to develop capabilities and choose different functionings. Where liberal rights to equality and autonomy in the abstract do not tell us how to resolve particular questions or decide between conflicting claims of rights, capabilities can mediate across pluralism and inform how best to balance conflicting rights by looking to capability enhancement. In considering challenges to human rights from culture based arguments, a capabilities approach encourages consideration of a more holistic understanding of the context in which cultural practices are embedded.

By their very nature, normative orders evolve as the people who live by them change their patterns of life. HIV/AIDS is changing the pattern of life in many places in the world. Law and culture must evolve and adapt to meet the changing needs of affected communities. In the disease context balances often are not struck in favor of rights. A human rights regime grounded in capabilities concerns would be better able to account for and cope with the coming changes. Current legislative approaches to the connections between culture, disease and gender inequality would be greatly enhanced by taking more seriously the community, social, material and institutional factors that the capabilities approach encompasses.

VI. CONCLUSION

*In the context of HIV/AIDS vulnerability to the epidemic has been associated with the extent of realization of human rights. For as the HIV epidemic matures and evolves within each community and country, it focuses inexorably on those groups who before HIV/AIDS arrived, were already discriminated against, marginalized, and stigmatized within each society.*³⁵⁵

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Human rights advocates need to understand the process of cultural legitimization and change within a particular political context and the disease context. Virginity testing is perhaps less a question of age-old tradition, than more one of current politics wrought in large part by the continued failure of the South African government and the international community to meet health obligations. Going forward all stakeholders in the virginity testing debate must be united in finding common cause in the social context of a disease that disproportionately impacts young women and girls. More likely than not stakeholders will find that the testing ban will not stop testing, and testing will likely not stop AIDS. While it will be next to impossible to rigorously enforce a testing ban, education is possible and a viable option. Stakeholders must mobilize and demand that the South African government and the international community meet obligations to realize the right to health and protect the health of the public.

The virginity testing controversy in South Africa highlights the way in which the contemporary human rights legal regime presents a paradox. On one hand it consists of a well established set of international standards, but on the other hand these standards have not been sufficiently theoretically grounded and so remain vulnerable to challenge by competing normative orders set by local cultures. Indeed, human rights law raises problems that are practical and urgent as well as theoretical and abstract. This article has offered a pragmatic approach to address the practical problems of cultural pluralism in diverse developing countries. It has also advanced capabilities theory as a way to address the theoretical difficulty socioeconomic rights present to human rights discourse. It is hoped that these strategies will assist those in South Africa and beyond who are concerned with gender equality and cultural preservation to identify areas of common interest and imagine a variety of ways of resolving conflicts between their positions by appreciating the richness of the resources rights and culture can provide in the AIDS crisis.

³⁵⁵ HEALTH AND HUMAN RIGHTS 124 (Jonathan Mann & Sofia Gruskin eds. 1999)