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**VIRGINITY TESTING AS WOMEN EMPOWERMENT: A CASE STUDY OF THE
UTHUKELA DISTRICT MUNICIPALITY'S VIRGIN BURSARY SCHEME**

BY

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DECLARATION

I declare that this dissertation is my own work. Citations, references and borrowed ideas have been duly acknowledged. It is being submitted for the degree of Masters in Child Care and Protection (Law and Social Work), School of Law, University of KwaZulu-Natal, Durban, South Africa. None of the present work has been submitted previously for any degree or examination in any other University.

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Date

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LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
ANCYL	African National Congress Youth League
ANCWL	African National Congress Women's League
AIDS	Acquired Immune Deficiency Syndrome
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CGE	Commission on Gender Equality
Children's Act	Children's Act 38 of 2005
CRC	United Nations, Convention on the Rights of the Child
HCP/s	Harmful Cultural Practise(s)
HIV	Human Immunodeficiency Virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
i.e.	That is to say or in other words
LHR	Lawyers for Human Rights
MBS	Maiden's Bursary Scheme
NHRI	National Human Rights Institution

PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SA	South Africa
SAHRC	South African Human Rights Commission
SALRC	South Africa Law Reform Commission
UDM	UThukela District Municipality
UN	United Nations
VT	Virginity Testing
WE	Women Empowerment
WHO	World Health Organisation

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

A body never belongs to an individual woman only -the female body serves as a symbol for society... Across time and place the female body stands in as a symbolic signifier for the father's, the brother's, the husband's, the family's, the collective's - the nation's honour (Schuhmann (2010) 97).

The private and public sectors' criteria for offering financial assistance such as bursaries and scholarships *inter alia* to further one's education is and has been based on excellency in academics and sports among other factors (Association for Dietetics in South Africa, 2008). This is for purposes of encouraging and empowering qualifying persons to achieve prospective qualifications. However, a new criterion for obtaining financial assistance for further education has sent shockwaves through KwaZulu-Natal: the Maiden's Bursary Scheme (hereafter referred as MBS) offered by the uThukela District Municipality (hereafter referred as UDM) early in 2016. MBS refers to the bursary offered to girls and/or young women who are virgins (Mojapelo, 2016).

The UDM's requirements for MBS are:

- a. young women who are virgins; and
- b. they have to undergo regular virginity testing (hereafter referred as VT); and
- c. remain virgins while they are in receipt of the bursary and throughout the duration of their studies in order to keep the bursary (Mojapelo, 2016; Mtshali, 2016; Merten, 2016).

This controversial scheme pitted human rights activists against traditionalists. Human rights activists (also known as antagonists) are people who, individually or collectively, act to promote or protect some variation of human rights (Moodley, 2008) whilst traditionalists are people who are adherent to certain traditional practices and beliefs, in

this case VT (Mhlongo, 2009). The former called for ban of the bursary and the latter advocated for it.

This research builds on the case study of the MBS to explore whether or not VT empowers young women. The key themes to occur throughout the study include arguments for and against VT of girls, parameters of VT as a means for women empowerment, the effectiveness of VT advocacy arguments in fulfilling their purposes and the Children's Act 38 of 2005's (hereafter referred as the Children's Act) regulations regarding VT.

1.2 Background of the study and problem statement

1.2.1 VT: a contested contemporary practice in South Africa

Virginity testing or inspection refers to an examination of the genitals of young women and/or girls to evaluate if they have engaged in sexual relationships or not and therefore still virgins (Kassan & Mahery, 2009:192; Mhlongo, 2009:1; de Robillard, 2011; Durojaye, 2016). It is practised in countries like South Africa (hereafter referred as SA) where it is an integral part of Zulu custom (Moodley, 2008). It involves the physical examination of a girl child by an older woman in the community known as *umhloli* to determine whether a girl is a virgin or not (Moodley, 2008; Mhlongo, 2009). The girl is considered a virgin if her hymen is still intact and a white clay dot is placed on her forehead as an outward symbol of her virginity (Bennet et al, 2010; Mhlongo, 2009).

In the Zulu Kingdom, 'VT is linked to the Zulu royal major ceremonies, *nomkhubulwane* (first fruits' festival) and *umkhosi womhlanga* (royal reed dance)' (Bennet et al, 2010). In the latter festival the king is free to choose a bride amongst the girls during the dance (Bennet et al, 2010). Candidates of tests are between the ages of 7 and 26 (Bennet et al, 2010; Durojaye, 2016; Mhlongo, 2009). This practice has brought forward the argument of whether girls give free consent to the practice because they may be too young to give informed consent. Hence, they submit to their parents' and society's pressure (Bennet et al, 2010). This practice has been argued as discriminatory to girls'

dignity and their personal security (South African Human Rights Commission, (hereafter referred as SAHRC) (SAHRC, 2003). Accordingly, the SAHRC has called for a total ban of the practice. The traditionalist advocates, however, raise the supporting reasons for the continuation of the practice (Bennet et al, 2010).

Consequently, the practice of VT of girls in SA has divided commentators into two camps, or schools of thought (Maluleke, 2012). Firstly, the traditionalists' point of view holds that VT is practised to educate girls about sexual matters with an emphasis on abstinence and non-penetrative sex and prevention of teenage pregnancy, *inter alia* (Maluleke, 2012; Swartbooi-Xabadiya & Nduna, 2014, Mhlongo 2009). Secondly, the institutions promoting democracy (also known colloquially as Chapter 9 institutions because they were established in terms of chapter 9 of the Constitution of the Republic of South Africa) such as the SAHRC and the Commission on Gender Equality (Hereafter referred as CGE), *inter alia*; hold that VT of girls should be banned on grounds that it violates the girls' right of bodily integrity, privacy and dignity, among others (SAHRC, 2003). These rights are all provided for in the Constitution. For over two decades arguments regarding VT practice have been based on these two thoughts (Mhlongo, 2009).

1.2.2 **Brief outline of international and regional law considerations**

The historical origins of VT can be traced back from the middle ages (Moodley, 2008). Increasingly, it is being considered a 'harmful' cultural/traditional practice. For example, the United Nations (hereafter referred as UN) Committee on the Rights of the Child, a treaty monitoring body for the United Nations Convention on the Rights of the Child (hereafter referred as the CRC) has condemned the practice of VT in South Africa and thus proposes the banning of VT in SA (SAHRC, 2003). The UN Committee on the Rights of Child raised concerns about the traditional practice of VT: that it has negative impact to women's dignity, health and privacy (SAHRC, 2003). The UN Committee on the Rights of Child recommended that the State party, SA, undertake a study of VT to assess its physical and psychological impact on girls and further recommended that it introduces sensitisation and awareness raising programmes for practitioners and the

general public to change traditional attitudes and discourage the practice of VT in light of articles 16 and 24(3) of the CRC (SAHRC, 2003).

The CRC, article 24(3), demands state parties to 'take all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of children.' The CRC does not specify cultures that are detrimental to children. In this regard, one may argue that it creates room for the state signatories to identify such practices and ensure their abolition. Some scholars and human rights activists *inter alia* have identified VT among other cultural practices which are harmful. Justifications provided in this regard are that VT is ineffective, unhygienic and a violation of human rights (Taylor, 2004 cited in Mhlongo, 2009) and that the physical examination of girls' sexual organs during the VT process can lead to health risks such as STDs and HIV (Kassan & Mahery, 2009) amongst others.

Correspondingly, Durojaye (2016:15) explains that, the Convention on the Elimination of all Forms of Discrimination Against Women (hereafter referred as CEDAW) committee has, in its concluding obligations on SA called on the government to:

amend the provision of the Children's Act' with the aim to prohibit VT for the girl-child irrespective of their age and to design and implement effective education campaigns to combat traditional and family pressures on girls and women in favour of this practice in order to comply with its international obligations' (CEDAW committee, 2011, para 23).

Such a call makes it clear that there are human rights implications in the practice that the state should consider.

In this vein, the International Covenant on Economic, Social and Cultural Rights (hereafter referred as ICESCR), article 1, makes a provision that the 'state parties to the covenant should ensure equal right of men and women to the enjoyment of all social and cultural rights set forth in the covenant.' To link this with the practice of VT, it can be argued that the practise does not adhere to this provision as the testing of virginity focuses only on a girl child. Therefore, it can be considered discriminatory in terms of gender and promoting patriarchy.

On the regional level, the Article 21 of the African Charter on Rights and Welfare on the Child (hereafter referred as ACRWC) demands for the abolition of cultural practices that has the following impacts on children. Firstly, 'cultural practices affecting the welfare, dignity, normal growth and development of the child in particular' (ACRWC, Article 21(1)). Secondly, those 'practices prejudicial to the health or life of the child' (ACRWC, Article 21(1)(a)). Thirdly, those 'practices discriminatory to the child on the grounds of sex or other status' (ACRWC, Article 21(1)(b)). In this regard, VT has been argued to be discriminatory between girls who are virgins and that are non-virgins and against the girl-child as it is performed only on a girl-child in a Zulu custom (Kassan & Mahery, 2009; Mhlongo, 2009).

1.2.3 **Outline of relevant South African law and policy on virginity testing**

Nationally, the Children's Act (section 12(1)) also prohibits cultural practices that are 'detrimental to a child's well-being'. The phrase 'child's well-being' can be argued to cover various aspects because well-being can involve health, emotional well-being and psychological well-being of a child. Also, with the drafting of the Children' Bill (eventually the Children's Act), effect has been given to many of the international human rights obligations. In relation to social and cultural practices, VT was originally included in the draft Bill as a specific cultural practice to be prohibited and criminalised (SALRC (2002) 28). The infringement of a girl's right to privacy was deemed to arise from VT as 'indecent assault', and as such, the SALRC had recommended that VT be criminalised, with a concomitant banning of cultural beliefs and practices as a defence against such a charge (SALRC (2002) 26). In the end a decision was made to regulate rather than ban VT outright, similar to the SALRC's stance on circumcision of boys as part of initiation.

The Sexual Offences Act 32 of 2007 criminalises all forms of forced sexual penetration. This includes digital penetration, such as a finger. This can be argued to include VT because it involves the inspection of a girl and/ or woman by an elderly woman. In relation to VT, the South African Constitution has a few other measures that make the practice illegal. Section (12) (a) and 12(b) of the South African constitution provides that 'everyone has the right to bodily and psychological integrity, which includes the rights to

make decisions concerning control over their body'. These measures can be argued to override the cultural right under sections 30 and 31 of the Constitution which is constantly used to justify the practice of VT.

Moreover, in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter referred as PEPUDA) the legislature view discrimination as any act which directly or indirectly imposes disadvantages from any person on one or more of the prohibited grounds such as sex and gender *inter alia*. This implies that PEPUDA also prohibits VT as it is performed only on a girl child.

At a political level, the future of VT has been uncertain in recent times. For example, the African National Congress Youth League (hereafter referred as ANCYL) in 2015 called for a ban of the practice after a process that started with a discussion paper in 2011 on a number of gender related issues (ANCYL, 2011: para 69). In 2013, the African National Congress Women's League (hereafter referred as ANCWL) called for abolition of the practice as well (ANCWL, 2015).

Early the year 2016, the uThukela District Municipality introduced the maidens' bursary programme which aims at providing funding to further education for young women on the condition that they undergo regular VT and remain virgins (Mtshali, 2016). This suggests a new concept in this practice, which is the objective of VT as a form of 'empowering women'. The question arises then whether VT empowers women? The purpose of this study is to look at the two views of VT mentioned earlier in this section in relation to the concept of women empowerment (hereafter referred as WE).

An important question to consider is the difference between 'forced' VT as the MBS has been called (Dlamini, 2016), and VT as regulated in South African law. Dlamini further asserts that 'constitutional protection for cultural rights does not provide a license for the continuation of practices of any kind that may seek to continue discrimination and violence against women and girls' (Dlamini, 2016). In this regard, Dlamini includes VT as one of the cultural practices in SA that needs to be looked at comprehensively in terms of gender discrimination against women.

The outcome of the MBS was a number of recommendations by the CGE on 24 June 2016 after it embarked on an investigation into the municipality's MBS. Among the CGE's findings, it is noted that the MBS amounts to gender discrimination because equivalent bursaries offered by the UDM for male recipients are not subjected to the condition that such recipients should remain virgins (CGE Investigatory Report, 2016). It was also found that the issuance of a bursary based on a female's virginity status is discriminatory, among other findings (CGE Investigatory Report, 2016). The CGE recommended that MBS be removed from the bursary category and its policies be amended. Thus, the councillors of the UDM were to receive training on gender equality including domestic legislation, international trainings and regional instruments to which SA is in signatory (CGE Investigatory Report, 2016).

When the CGE reported to parliament on its investigation, members of parliament were divided on the Chapter Nine institution's recommendations as the minutes of the meeting attests (Parliamentary Monitoring Group, 2016). The discussion of the meeting clearly showed the two camps taking position on the defensiveness of VT as a criteria for the MBS. For example, Ms D Robinson of the Democratic Alliance said that the UDM (the municipality) was clearly not aware that the constitution mandated that gender equality be respected. This statement acknowledges the lack of the civil society's awareness about the constitutional rights and culture. On the other hand, Ms T Mampuru of the ANC, argued that people should not focus on the colonial thinking but rather ensure that everyone is taught about their culture. This implies that, MBS is viewed by some as a way of cultural preservation.

1.3 Research Questions

The key question to facilitate the discussion throughout the study is whether virginity testing empowers young women? In answering this question, various sub-questions emerge as follows:

1. What are the arguments in favour of/advocating for and against virginity testing?

2. What are the parameters of the argument of virginity testing as a means for women empowerment?
3. Are any of these arguments shown to be effective in fulfilling their purposes?
4. How does the South African Children's Act and other relevant legislation deal with virginity testing and which arguments are favoured by the regulation of virginity testing in the Act?

1.4 Motivation of the Study

Virginity testing is performed in many communities in Africa, Europe and the Middle East (Swaartbooi-Xabadiya & Nduna, 2014); which makes it an international 'practice'. However, the means of testing virginity, reasons and purposes of practice differ from one community to another. In KwaZulu-Natal, SA, reasons such as cultural preservation for the purpose of sex education are given (Maluleke, 2012). In this vein, controversies arise related to the motives and purposes in a particular community in which VT is practised. In South Africa, on one hand; it is viewed as antithetical to human rights while on the other hand, it is viewed as an honour to the family and to the (prospective) husband (Ras-Work, 2006; Maluleke, 2012). On this basis this study contributes to international and national dialogues in relation to the practice of VT.

Additionally, arguments in relation to VT have been under the umbrella of the two schools of thought mentioned earlier. Literature has therefore considered issues such as whether VT of girls is constitutional (Behrens, 2014), whether VT educate girls about sex (Behrens, 2014) and perceptions of girls practising virginity testing (Swaartbooi-Xabadiya & Nduna, 2014). Virginity testing viewed as a 'tool' for women empowerment is a new concept emanating from the maidens' bursary offered by the UDM. Therefore, this study seeks to contribute to the literature by considering the aspect of VT as WE.

The practise of VT in South Africa affects children directly as they participate in the practice. Bennet et al, (2010) emphasises this by asserting that candidates of virginity tests are between the ages of 7 and 26. A child refers to 'a person under the age of 18 years' (section 28(3) of the Constitution; article 2 of the ACRWC, 1990).

Winter et al (2002) explain the involvement of children in VT as part of socialisation. Hence, the authors state that children are socialised in a manner that they will accept the culture even when they grow up (Winter et al, 2002). However, the Children's Act regulates VT of children older than the age of 16 (section 12(5)) subject to specific conditions *inter alia* consent being obtained and the practice being conducted in the prescribed manner. The monitoring system at the local level as to whether these are practiced as articulated in the Children's Act can be questioned. The lack of monitoring suggests the need to protect children who participate in the practice, both those under the age of 16 and those who are 16 years of age and above. On this basis then this study will contribute to the improvement of the implementation of regulations regarding VT in the societies that practise it.

Limitations in answering some of the probed questions in this subject area lies in the controversies in relation to the human rights' and traditionalists' views mentioned earlier. Behrens (2014) argues that different views regarding VT contributed in the decision taken by the legislatures in finalising the regulation of VT found in section 13 of the Children's Act. On this basis, the Children's Act, "...represents a compromise between those who want a complete ban on virginity testing and the traditionalists who sought freedom to practice this custom..." (Behrens, 2014:178). In this regard, there are completely different views regarding this practice with no common factor between the two schools of thoughts to agree upon.

1.5 Aims and Objectives of the study

The objectives of this study are as follows:

- To understand the arguments in favour of/advocating for and against virginity testing
- To identify the parameters of the argument of virginity testing as a means for women empowerment

- To assess whether the arguments in favour of virginity testing are effective in fulfilling their purposes
- To review the regulations of virginity testing in the South African Children's Act and other relevant legislation in order to identify which arguments are favoured by the legislation

1.6 Methodology

This dissertation involves an analysis and review of relevant materials on the practise of VT. This study is desk-top based, a secondary data collection method in which data is collected without fieldwork. It includes searching relevant information from the libraries, internet, and newspapers *etcetera*. Primary literature utilised will be international and regional law instruments, the Constitution, legislation and regulations, and case law. Secondary literature utilised will be journal articles, books and newspaper articles. One chapter relies predominantly on the views of commentators, as well as stakeholders such as the UDM, quoted in newspaper articles, based on thematic analysis identified from the literature review.

1.7 Theoretical framework

This study tries to link the cultural practice of VT with WE. From the theory I aim to understand the manner in which WE is viewed by feminist' theory (generally) in literature and theoretical explanations that elaborates on the reasons why people adopt a certain worldview. 'Cultural practice(s) refers to the manifestation of a culture in regard to the traditional and customary practices of a particular ethnic group' (Mhlongo, 2009); while empowerment means authority or power given to someone to do something (Chamberlin, 1997). In this regard, this study merges the relationship between cultural practice of VT and human rights, especially women's rights.

The emancipatory theory and the feminist theory have been used as theoretical frameworks.

1.7.1 Emancipatory Theory

The emancipatory theory deals with a critical reflection on past events in order to understand the current situation. This study refers to the emancipatory theories of Freire, Gramsci and Giroux as explained by Sewpaul (2003; 2013). In explaining human behaviour, the emancipatory pedagogy positions individuals as a product of the historical process (Giroux, cited in Sewpaul, 2013). This implies that the manner in which individuals behaves and thinks relates to their childhood upbringing environment. The emancipatory pedagogy raises important issues regarding the way we construct our identities (*Ibid*). It embraces that the environment in which one grew up has a major role in forming his/her identity.

The emancipatory theory also emphasises that based on their historical processes, individuals produce power or powerlessness in their everyday life experiences (Sewpaul, 2013). This according to the emancipatory framework is where the sources of oppression and/or of privilege come in (Sewpaul 2013:117). Emancipatory pedagogy also points out that social groups have their own conceptions of the world; such groups for reasons of submission and intellectual subordination have adopted a conception that is not its own (Sewpaul, 2013). When such groups are not acting autonomously, it is the conception of the dominant group that prevails (Gramsci, cited in Sewpaul, 2013). The impact of oppression is such that oppressed people eventually turn societal and political oppression into self-oppression.

Gramsci (cited in Sewpaul, 2003) Distinguishes the common sense from the good sense according to which common sense consists of the incoherent set of generally held assumptions and beliefs common to any given society whilst good sense refers to practical, empirical common sense (Sewpaul 2003; 2013). Based on these ideas, the emancipatory pedagogy embraces the need for individuals to challenge their thinking and to transform common sense into good sense. This can be achieved through opting for redefining of their identities by evaluating societal power structures that oppress

them and/or working on their advantage (Sewpaul, 2013). Freire (cited in Sewpaul, 2013) argues that critical understanding would lead to critical action.

Therefore, the emancipatory pedagogy has been used in this study to understand the reasons that influenced the human behaviour of the parties involved in relation to MBS. This includes the young women in receipt of the Maidens Bursary in terms of what influenced their decisions to participate in it. It has also been used to understand the traditionalists, human rights activists' and the mayor's point of views and motives for decision-making in this regard from a theoretical point of view.

1.7.2 Feminist Theory

Feminist theory broadly speaking is also used as a framework for this study in relation to women empowerment. Feminist theory deals with the set societal norms in terms of the expected behaviour from different genders. It is based on the belief that the inferior status of women is due to social inequality and that 'women should have equal access to all forms of power' (Turner & Masch, 2014). Feminist analysis helps women to understand how they are oppressed and dominated and often implores them to engage in efforts to bring about broader social change (Turner & Masch, 2014). The aspect of feminist theory that this research is based on is African feminism. The African feminism aims at transforming gender relationships and conceptions in African societies and improving the situation of African women (Arnt, 2002). This means that African feminism weighs which traditional institutions are positive for women, and which disadvantage women so severely that their abolition seems imperative.

1.8 Overview of Subsequent Chapters

This chapter provides a brief background and problem statement of the study. It also covers key questions that the study seeks to answer, motivation of the study, aims and objectives of the study, research methodology and theoretical framework.

CHAPTER TWO: Arguments for and against virginity testing - This chapter will present the traditionalists and the human rights advocates points of views in relation to virginity testing.

CHAPTER THREE: Virginity testing as empowerment of women – This chapter will discuss the newspapers’ reports about Maidens’ Bursary Scheme. This will be linked to the way in which women empowerment has been viewed in literature.

CHAPTER FOUR: The Regulation of virginity testing in the Children’s Act and other relevant legislation. This chapter will review the regulations of virginity testing in the SA Children’s Act and consider other relevant legislation. The regulation of the practice will be analysed to determine which argument of VT is favoured.

CHAPTER FIVE: Conclusion and Recommendations – This chapter will present an overall conclusion and offer recommendations

CHAPTER TWO

ARGUMENTS FOR AND AGAINST VIRGINITY TESTING

2.1 Introduction

The practice of virginity testing (VT) in South Africa has been controversial, particularly since its revival and regulation in the Children's Act (section 12(4)-(7)). Notable from the chapter above is that the arguments with regard to the practice of VT can be classified into two camps, which includes those in favour of the practice and those against the practice – both generally being mutually exclusive. During the breaking of the story of the maidens' bursary scheme (MBS) offered by the UThukela District Municipality (UDM) in January 2016, similar arguments as those during the regulation of the VT in the Children's Act were put forward. On this basis, this chapter seeks to answer the question: what are the arguments in favour or advocating for and against virginity testing? In exploring this question, this chapter discusses the arguments about VT that existed before the MBS was offered in conjunction with the arguments that arose when the UDM offered MBS. It commences by defining fundamental terms for the purpose of the chapter. It then moves to discuss views advocating for VT. The chapter will then proceed to discuss views against VT. Finally, the chapter summarises the arguments while noting their implication regarding the practice of VT.

2.2 Conceptualisation

The fundamental concepts for the purpose of this chapter are 'virginity testing' and 'virginity testing as a cultural practice'. As briefly explained in the chapter *supra*, VT (also known as *ukuhlolwa kwezintombi*) refers to an examination of the genitals of young women and girls to determine if they are sexually chaste and therefore still virgins (Kassan & Mahery, 2009:192; Mhlongo, 2009:1; de Robillard, 2011; Durojaye, 2016). Maluleke (2012) asserts that cultural practice refers to the values and beliefs

developed within a specific ethnic group especially those that have been practised since ancient times. Hence, VT as a cultural practice is predominantly practiced in a Zulu community in KwaZulu-Natal, South Africa (Moodley, 2008). Virginity in this practice is determined by different factors, such as if the vagina of a girl and/or a young woman has never been penetrated, firm breasts and body muscles and innocence in the eyes (Mhlongo, 2009; Moodley, 2008). The cultural practice of VT has been and is almost equally supported and criticised by some. Next, I discuss some of the arguments raised in support of VT as a cultural practice.

2.3 Views advocating for virginity testing

Drawing from the two schools of thought outlined in this paper, chapter one, it can be noted that arguments in favour of VT are strongly connected to the traditionalists' point of views. Such arguments are discussed by different authors in literature. These arguments supporting VT include that:

- VT is a protected constitutional right (cultural);
- VT has health benefits for the girl/woman concerned;
- VT prevents social ills from arising;
- VT accords social status to the girl/woman and her family/community;
- VT promotes and protects moral values;
- VT secures girls/women's futures (educationally and economically); and
- VT is an African practice worthy of protection from western ideology.

2.3.1 Constitutional right

First and foremost, the Constitution is applied and quoted to support the practice of VT. In this vein, the practice of VT is justified as a constitutional right to practice the culture of choice. The Constitution provides for the right to culture (section 15(3), 30 & 31) and recognises traditional leadership (section 211 & 212). This implies that participants view their constitutional right to practice VT. Similar arguments were raised in support of the MBS. In this regard, the Mayor of the UDM, Dudu Mazibuko (hereafter referred as the

'Mayor'), was reported stating that 'the Constitution itself refers to the right of cultural, religious and linguistic communities' (Khoza, 2016). The offering of MBS through the cultural practice of VT in this argument then is viewed as a constitutionally accepted action.

Moreover, the as discussed in chapter one, the Commission for Gender Equality (CGE) conducted an investigation into the MBS. The CGE Investigatory report faced defensive arguments from the advocates of the MBS as it was calling for a ban of the bursary. In this sense, the UDM's Mayor, as stated that the CGE Investigatory report, failed to prove that the cultural practice of VT violates any of the provisions of the Bill of Rights (Khoza, 2016). She further stated that the CGE report failed to quote any part of the Constitution that prevents the UDM from utilising the state's resources to support the cultural association of the maidens (Khoza, 2016). This arguments shows that the advocates of VT view the practice as a girl's constitutional right – culturally and in terms of association.

2.3.2 Health benefits

The supporters of VT also note health benefits attached to practising VT. The argument often used in this regard is that VT of girls is practised in order to curb the further spread of HIV infection (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016; Wickström, 2010) and for teenage pregnancy prevention (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011). In this regard, VT is argued to encourage abstinence from sexual intercourse as part of the ABC (Abstain, Be faithful and Condomise) strategy to prevent the spread of HIV/AIDS (Mhlongo, 2009). This can be interpreted to mean that if girls and/or young women undergo regular VT, there are fewer chances of them engaging in sexual intercourse in fear of being discovered as non-virgins during the next test. This is because in Zulu culture, if a girl and/or a young woman is discovered to be a non-virgin, is associated with negative labelling such as promiscuity (Mhlongo, 2009). Therefore, a girl would abstain from engaging in sexual activities, thus the spread of HIV would be prevented.

Additionally, with the prevalence of HIV/AIDS in SA, with 5,700,000 people infected (UNAIDS, 2007), VT is seen as a response of the Zulu community to the HIV/AIDS epidemic (Mhlongo, 2009). This implies that VT is also viewed as a strategy for curbing the spread of HIV/AIDS. In relation to the health benefit and VT, Durojaye (2016) asserts that VT emphasises the importance of sex education. This is supported by Mhlongo (2009) when stating that VT is also used as a strategy to educate girls and/or young women about sexual relationships.

Correspondingly, in advocating for the MBS, similar arguments were also cited. In this regard, the Mayor stated that the main reason for introducing MBS was that there is 'a very high rate of teenage pregnancies' - there is around 25% of girls who become pregnant by the age of 19 in SA (AFP, 2016). She further cited that there are a lot of young people who are infected by HIV and AIDS in UDM, with up to half of the population between the ages of 15 and 49 infected with HIV and AIDS as per the municipal statistics (AFP, 2016). This is in line with the arguments that has been raised prior to the MBS to justify the practice of VT. This is to say that one of the objectives of VT is to decrease the spread of HIV and prevent teenage pregnancy. Awarding virgin girls with a bursary in order to achieve these objectives is seen as a strategy to encourage them to maintain their virginity and attaining health benefits too.

2.3.3 Social Ills

In addition, VT activists also view VT as an answer to some social ills in South Africa. In this regard, Moodley (2008) asserts that VT has been revived to combat certain social pandemics and to promote and maintain cultural identity. This implies that the advocates of VT view it as a useful tool for curbing social issues. This includes prevention of unplanned pregnancies and a tool for detection of children who are sexually abused (Mhlongo, 2009; de Robillard, 2011; Moodley, 2008; Mswela, 2009). Therefore, the testing of virginity would prevent girls and/or young women from engaging in sexual activities, thus prevent unplanned pregnancies. Virginity testing has also been viewed as a tool for identifying children who have been sexually assaulted so that they can be referred to social services and health services (Moodley, 2008).

This argument has been criticised by human rights activists during the media attention given to the MBS. Some of the arguments in this regard is that sexually assaulted girls may undergo secondary victimisation when tested for virginity (de Robillard, 2011). However, the Mayor of the UDM argued that on the matter of girls or young women who lose their virginity after being raped, they are culturally cleansed and are still viewed as virgins (Khoza, 2016). In this regard, it is notable that the understanding of VT goes beyond checking whether or not a girl or young woman has been penetrated in order to accommodate sexually assaulted girls.

Leclerc-Madlala (2001) explains that there is a process of labelling occurring during the VT process, dividing 'virgins' into two groups: A, B and a C type of virgins. Accordingly, a girl or a young woman who achieve an 'A' status of virginity is the one whom the colour of the labia is very light pink, the size of the vaginal opening is very small, and the hymen is clearly evident and intact *inter alia* (Leclerc-Madlala, 2001). Whilst, the 'B' type of a virgin have labia that is a deeper shade of pink than those of the 'A' grade virgin, the vaginal opening slightly bigger and the vagina not so tight. In this regard, it can be argued that sexually assaulted girls and/or young women falls under a 'B' category as they may have been penetrated once or twice.

Seen in this light, the supporters of VT attempts to accommodate sexually assaulted girls who are discovered as non-virgins. This implies that should a recipient of the MBS be sexually assaulted the testers of virginity would still regard her as a 'virgin' and she may still maintain her bursary.

2.3.4 Social Status

Another dimension that is used to advocate for the practice of VT is the 'social status' attached to a girl who passes the virginity test. It is argued that being announced as a virgin grants girls and/or young women respect from peers, the family, the community and boys who see them as potential wives (Mhlongo, 2009). If a girl or a young woman is tested as a virgin she is viewed to possess moral values of self-respect, modesty, and purity (de Robillard, 2011; Mhlongo, 2009). It is also associated with trustworthiness (Leclerc-Madlala, 2001). In this regard, it is believed that a girl who maintains her

virginity until marriage will gain the trust of her husband who would feel that she has shown that she does not give away to sexual temptation (Mhlongo, 2009). This implies that, she will be able to be faithful to her husband and/or in a monogamous relationship.

Furthermore, Mhlongo (2009) asserts that *Lobola* (bride price) is high for a virgin. *Lobola* refers to an African custom in which a bridegroom's family makes a payment in cash and/or cattle to the bride's family before marriage (Mhlongo, 2009). If the girl or young woman being paid *lobola* for is a virgin, there is an additional cow to be given to the mother during the payment of the *lobola* (Mhlongo, 2009; Moodley, 2008; Mswela, 2009). On the basis of such reasons, girls and/or young women may partake in the custom of VT with the motivation from parents wanting her to attain such status. Hence, one may argue that being awarded MBS can be viewed as an incentive that encourages girls to participate in VT and also maintain their virginity.

This argument was not expressly stated when advocating for MBS. However, it can be argued that adding the proof of virginity as criteria for a bursary can be viewed as prestigious to qualifying persons by those who do not qualify. It can also make the parents or caregivers of the recipient of MBS proud of their daughter for keeping her virginity.

2.3.5 Moral Values

The advocates of VT also views testing of virginity as a way to instil moral values to girls and/or young women. Such values include self-control and respect (Mhlongo, 2009). Girls are given an 'exception' to the ban of engaging to sexual activities at the age of 21, as it is believed that at this age they are able to handle sexual relationships and make decisions related to sexual matters (Mhlongo, 2009). Moodley (2008) emphasises this by stating that VT is viewed as a tool for re-instilling ideals of morality in the young women and/or girls. On this note, VT representatives ascertain that if girls are tested, they are fearful of engaging to sexual activities because of fear to be discovered to be non-virgins (Mhlongo, 2009; Kassan & Mahery, 2009). This is argued to be for the purpose of preventing young girls from being sexually active (Mhlongo, 2009; de

Robillard, 2011), to delay the age of first sex (Mhlongo, 2009; Wickström (2010) and to safeguard fertility (Mhlongo, 2009).

Similarly, Wickström (2010) argues that the supporters of VT see it as the best possible catalyst for change of behaviour in the context of limited financial means. This implies that the VT supporters view it as a financially affordable strategy in order to prevent HIV, teenage pregnancy and unplanned pregnancy. Similarly, Mr M Khawula (IFP, KZN), a member of parliament, argued that the bursary was a motivating factor to promote good behaviour (Parliamentary Monitoring Group, 2016).

These arguments are also in line with the arguments raised in justifying the MBS. Adding virginity as a requirement for the bursary and requiring beneficiaries to continuously provide evidence of virginity to maintain the bursary can be argued to act as surveillance of their sexual life. In this regard, the Mayor asserts that when girls maintain their virginity while studying will enable them to focus on their studies and avoid sexual activities (Khoza, 2016).

2.3.6 Securing Future

Virginity testing is also viewed as a practice that 'secures girls' future'. In this regard, it is associated with a peaceful marriage (Mhlongo, 2009). There is a belief that the in-laws will be happy that the bride is a virgin and they will treat her with respect (Mhlongo, 2009). According to the CGE Investigatory report (2016:4), the Mayor asserts that the MBS's objective was to encourage 'girls to keep themselves pure and inactive from sexual activities and focus on their studies'. This can be interpreted to mean that if girls delay sex they would focus on their studies, obtaining their qualifications and have a bright future.

2.3.7 Cultural diversity

Traditionalists argue that the universalisation of human rights is a Western ideology which fails to accommodate the diversities in cultures of the people around the world (Durojaye, 2016; Behrens, 2014). They also argue that the human rights activists criticise customary procedures as anti-modern (Wickström, 2010). This implies that the

VT's objectives can be strictly understood from the African point of view. Hence, the testing of only a girl child in the culture of VT can be understood more from the customary perspective rather than the rights' perspective. In discourses against VT, it has been argued to be discriminatory in terms of gender as it is performed only on a girl child (Mhlongo, 2009). This has been argued to imply that if males get tested for their virginity, the females must also attend initiation schools for circumcision (UDM Mayor cited in Khoza, 2016).

In summary, it is clear that there is a difficulty in balancing human rights with culture, thus, it is difficult to give meaning to cultural practices and their objectives in a rights-based perspective. In this vein, the Mayor states that there was a friction between the cultural rights of the association of maidens and the responsibility of the municipality to promote these rights (Khoza, 2016). This may mean that since traditionalists see it as a constitutional right to practice VT then the state's resources can be utilised to promote this right.

2.4 Views against virginity testing

Virginity testing contradictors highlight a number of flaws and concerns associated with the practice of VT. Numerous scholars have identified these issues, thus I next discuss some of the arguments used to oppose the cultural practice of VT. Similar arguments were also raised against the MBS.

2.4.1 Constitutional rights.

First and foremost, the opposition to the practise of VT is based on the argument that it violates a number of constitutional rights provided for in the Bill of Rights (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016). In this regard, human rights activists argue that supporters of VT tends to ignore the part which states that 'however, the rights in section 31(1); i.e. right to enjoy culture; may not be practiced in a manner inconsistent with the Bill of Rights' (Mhlongo, 2009). One may argue that this implies that the fact that VT of girls is regulated in the Children's Rights does not

mean that it is constitutional. This is in line with the provision that the Constitution declares its supremacy (section 1(c) & 2) and provides that any law or conduct inconsistent with it is invalid. Therefore, this argument connotes that VT is unconstitutional and violates the rights of girls and/young women.

Consequently, there are a number of rights quoted by the human rights activists from the Constitution to support the argument of human rights violated when the cultural practice of VT is observed (CGE Investigatory report, 2016).

2.4.1.1 Equality

Firstly, is the right to equality (Section 9(1)). In Section 9(1), the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In this regard, the contradictors of VT view it as discriminatory that VT is practised only on a girl child (Kassan & Mahery, 2009; Mhlongo, 2009). Thus, the MBS is argued to discriminate against other races that do not practice VT. In this regard, The CGE (cited in Memela, 2016) found that the MBS excluded girls who did not want to take part in this particular cultural practice, and also people of other cultures are excluded from the bursary. Maluleke (2012) asserts that a cultural practice that is beneficial only to some members of the society may be regarded as a harmful cultural practice. The Constitution further provides that the state may not unfairly discriminate directly or indirectly against anyone on grounds of *inter alia* gender and sex (section 9(3)). Hence, the MBS was argued to violate the right to equality and utilising the state's resources to promote inequality (CGE Investigatory report, 2016).

2.4.1.2 Dignity

Secondly, is the right to dignity (section 10) which refers to the acknowledgement of the intrinsic worth of human beings. Hence, VT is argued to violate this right, particularly with regards to the manner in which VT is conducted. Kassan & Mahery (2009) states that VT is seen as a form of violence being perpetrated and discrimination against women, an invasion of privacy and infringement of the right to dignity.

In *S v Makwanyane and Another*, the Constitutional Court found the penalty given to the accused persons unconstitutional in honour of the right to respect and protect their dignity as provided for in section 10 of the Constitution. In this case, the accused were to receive the heaviest sentence permissible in law which was death penalty for four counts of murder, one attempted murder and one count of robbery (*S v Makwanyane*). However, this sentence was aborted. This shows the extent in which the law can extend when protecting human rights, in this case the right to dignity. Hence, VT is seen as encroaching on young women's lives and as humiliating (Wickström, 2010). VT is, in this view, degrading and not affirming.

2.4.1.3 Freedom and security of the person

Thirdly, is the right to freedom and security of persons (section 12(2)). This includes the right to bodily integrity, psychological integrity and rights to make decisions concerning reproduction and to security in control over their body. In this regard, it is noted in the earlier discussion that VT is ostensibly practised to instil moral values. The moral value could be said to conflict with the right to freedom and security of the person. This may be because in certain instances girls do not consent to VT but submit to their parents' decision do so (Maluleke, 2012).

2.4.1.4 Inhuman treatment

Related to the right to freedom and security of the person is the right against torture and degrading punishment – effectively inhuman treatment - particularly where virginity testing occurs in a prison setting. In the European Court of Human Rights case of *Yazgül Yılmaz v. Turkey* (2011), the Court found that coercive virginity testing of a minor after a sexual assault complaint, was not medically justifiable and amounted to violating the prohibition of inhuman treatment.

Broadly speaking (not only in prisons), the United Nations Human Rights Council (2015) considers VT to be a forced medical practice, of the ilk of forced sterilisation and forced gender reassignment surgery. As such, VT is thought to constitute a form of violence against the person. This is similar to the violence argument raised by Kassan and Mahery (2009), earlier.

2.4.1.5 Privacy

The fourth is the right to privacy (section 31(1)). In this regard, VT is argued to violate children's rights because it is not always conducted in private and because of the public communication of the results of the screening (Kassan & Mahery, 2009). Similarly, Moodley (2008) asserts that the testing of girls in an open environment is an affront to their rights to privacy, bodily integrity and human dignity. Hence, the marking of a girl and/young woman after a virginity test is also argued to violate the right to privacy (Mhlongo, 2009). The marking occurs if the girl passed the virginity test - a white clay dot is placed on her forehead whilst a red clay dot is placed on her forehead if she failed the test (Moodley, 2008). This explains that the results of the test can be known by other people who are present in the testing area without the girl disclosing the results. The marking of the body of the girl is contrary to the regulation of the practice in the Children's Act which provides that the body of a child who has undergone virginity testing may not be marked (section (12)(7)).

2.4.1.6 Harmful cultural practice

Moreover, VT is regarded as a harmful cultural practice according to different provisions of the international law which were briefly discussed in Chapter one of this study. In this regard, CEDAW provides for discrimination against women (article 1) and ensuring equal rights for women with men in the field of education to ensure equality (article, 10). CEDAW also calls for state parties to take appropriate measures to modify the social and cultural patterns of men and women with a view of eliminating prejudices and customary practices that are based on the idea of stereotyped roles for men and women (article, 5). This implies that the practice of cultures that display the inequality between men and women be discouraged. This suggest that the practice of VT be discouraged since it is practiced only on a girl child and the MBS be discouraged since it is gender biased. The CGE Investigatory report (2016) reported that the MBS violates regional and international commitments to promote gender equality and eradicate harmful traditional practices.

Furthermore, the CGE had some concerns after conducting its investigation into the MBS. The CGE reported that VT is discriminatory, invasive of privacy, unfair, impinging

on the dignity of young girls, and unconstitutional (CGE Investigatory report, 2016). It further reported that the MBS's objectives are discriminatory and goes against the ethos of the constitutional provisions regarding dignity, equality and discrimination. This is in line with the CGE's comments that VT is discriminatory in a sense that it excludes people from other cultures from participating in the MBS.

Durojaye (2016) argues that VT can potentially reinforce the subordination of women. This may be because the UDM's criteria for other bursaries which included males did not include the requirement of virginity.

2.4.2 Health Benefits

To counter the health benefits argument, human rights activists opposes VT as being ineffective, unhygienic and a violation of health rights (Taylor, 2004 cited in Mhlongo, 2009). The ineffective part may mean that VT does not meet its objectives of teenage pregnancy prevention and does not curb the spread of HIV/AIDS. In relation to VT, the spread of HIV/AIDS may be due to societal expectation that women (especially a virgin) should be sexually clueless and/or inexperienced making it difficult for her to negotiate the practice of safe sex (Mhlongo, 2009). Virginity testing fails to understand that girls also have sexual feelings just like boys (Mhlongo, 2009).

It is argued to be an unhygienic practice because the testing process of VT involves physical examination of girls' sexual organs which can lead to health risks such as sexually transmitted diseases and HIV (Kassan & Mahery, cited in Boezaart, 2009). Therefore, it can be harmful in a sense that testers do not wear gloves or wash their hands and should gloves be worn, the same gloves are used to examine more than one girl. Such manner of conducting the test is contrary to the regulations under the Children's Act (regulation 4) discussed later in chapter 4 below.

Virginity Testing have been argued ineffective for curbing the spread of HIV/AIDS. This can be linked to the number of identified factors as some of the reasons for the spread of HIV/AIDS amongst the youths. Some of these include female sexual submissiveness, male dominance, high levels of sexual dominance and social acceptance of 'sugar

daddies' (Leclerc-Madlala, 2002). Notably, some of these factors are modern and/or recent phenomenon i.e. sugar daddies (also known as blessers). Considering that VT is a revived practice means that it was practised in ancient times. There is therefore a possibility that applying an ancient strategy to handle modern issues can be ineffective. In this regard, Leclerc-Madlala (2002: 35) asserts that:

There is a need to set a research agenda that takes a much wider-angle view - one that analyses the normative social, cultural and economic influences that are shaping young people's sexual desires and experiences in rapidly changing communities situated in rapidly changing societies. The need now is to engage with the dis-enabling context that gives sustenance to the dis-enabling attitudinal and behavioural codes that continue to drive the HIV/AIDS epidemic.

Leclerc-Madlala proposes a need for the implementation of innovative new strategies to curb social issues that evolve as society, behaviour and communities change.

In terms of the procedure and outcome of testing for virginity, health professionals oppose the argument that virginity can be identified by the presence of the hymen. In this regard, health professionals claim that the hymen is not a good indicator of sexual virginity because some women are born without a hymen; the hymen can be easily ruptured during physical activities and can be stretched open by the use of tampons (Le Roux, 2006 cited in Mhlongo, 2009; Mojapelo, 2016; Moaddab *et al*, 2016; Behrens, 2016).

Kassan & Mahery, (cited in Boezaart, 2009) argue that the breaking of a hymen is not necessarily an indicator of the loss of virginity. Wickström (2010) points out that the hymen heals rapidly which means that sexual intercourse does not necessarily break the hymen. This implies that girls and/or young women who have had sexual intercourse can also have a hymen which does not mean that they are virgins: 'It is clear, therefore, that a not insignificant percentage of those undergoing a virginity test will be incorrectly labelled virgins or non-virgins' (Behrens, 2014:181).

Medically, VT has been viewed as an unethical practice (Moaddab *et al*, 2016). The authors adds that VT is ethically unacceptable because it violates the model of ethics of

respect for autonomy, justice and beneficence as ethics held by the obstetricians and gynaecologists:

- The autonomy ethic holds that clinical interventions must be informed and based on voluntary decisions.
- The justice ethic discourages professionals from engaging in interventions that discriminates in terms of sex.
- The beneficence ethic hold that a clinical intervention must be effective i.e. likely to produce the intended outcome (Moaddab *et al*, 2016).

Hence, in the case of MBS it can be argued that girls are indirectly coerced to engage in VT since they need to apply for the bursary which breaches the ethic of autonomy; and further that VT also breaches the ethic of justice because in some instance the doctors or cultural virginity testers are paid to 'prove' the virginity of a candidate (Mhlongo, 2009; Moaddab *et al*, 2016).

2.4.3 **Social Ills**

VT contradictors protest that VT curbs some social ills. In support of this, it is argued that VT contradicts the strategy that is taught to children which is to report touching of genitals and confuses them (Kassan & Mahery, cited in Boezaart, 2009). This implies that through VT, a girl-child is socialised to accept the touching of her genitals and would or may not report it in case of abuse. Accordingly, VT may perpetuate social ills rather than curb them.

Furthermore, human rights activists argue that some girls who fail VT may commit suicide (Kassan & Mahery, cited in Boezaart, 2009; Mhlongo, 2009; Behrens, 2014). It is also argued that sexually abused girls may experience secondary victimisation if they have to undergo VT. Similarly, in a case of MBS, the CGE report (2016:21) found the issuance of a bursary based on a female's virginity fails to consider that certain factors such as rape may be the cause of loss of virginity. Hence, if such may occur a victim may face secondary victimisation as she would be dealing with a trauma of rape and

further losing a bursary (Memela, 2016). Therefore, this may lead her to commit suicide due to the feeling of being social excluded.

De Robillard (2011) emphasises this by stating that VT can potentially cause psychological harm through rebellion against culture and society's expectations. In this regard, the author makes the example of a girl who takes her virginity with the stick of a broom.

Another social ill argued to be perpetuated through the practice of VT is that, girls become targets to sexual predators who believe in the myth that having sexual intercourse with a virgin cures HIV/AIDS (Kassan & Mahery, cited in Boezaart, 2009; Durojaye, 2016; Leclerc-Madlala, 2002; Behrens, 2014). This is supported with an argument that public identification as a virgin increases the risk of sexual abuse and HIV infection (Durojaye, 2016; Mswela, 2009). In case of the MBS, one may argue that girls and/or young women may be similarly identified as virgins when awarded the MBS and thus open to sexual abuse. Moreover, Durojaye (2016) argue that the publicising of VT is intended 'to confirm and display to others the evidence of a girls (im)purity and (im)morality' (Durojaye, 2016). This may put those who are non-virgins at risk of social exclusion and stigma of labelled as promiscuous while give social status to those who are virgins. This may lead girls to be less keen to report sexual abuse for fear of disclosing that they are no longer virgins (Mswela, 2009).

Moreover, the human rights activists argue that VT promotes gender equality (Dlamini, 2016; Wickström, 2010). Dlamini (2016) asserts that VT as an MBS criteria perpetuates patriarchy and inequality in SA. She further states that the Mayor's justifications such as curbing HIV and teenage pregnancy prevention does not justify the differentiation of only females being subjected to VT.

In summary, then, while VT supporters justify the practice as curbing social ills, VT contradictors points out that more damage is done through the process than curing of social ills.

2.4.4 Social Status

Human rights activists argue against the beneficial social status attached to a girl who is tested as a virgin. In this regard, Kassan & Mahery argue that VT draws the attention away from the role of men to prevent the spread of HIV (cited in Boezaart, 2009). VT places the responsibility of abstaining from sex on girls alone as VT is viewed as placing the accountability for safe sex, prevention of STDs and abstinence from sex on girls and/young women (Mhlongo, 2009; Behrens, 2014).

This argument was also raised with regard to the MBS when the CGE (2016) reported that the bursary places all responsibility to reduce teenage pregnancy and the spread of HIV on girls and/or young women (Dlamini, 2016; Mpofu, 2016).

Additionally, human rights activists view the social status attached to a girl who is identified as a virgin as discriminatory. To amplify this point, Kassan & Mahery (cited in Boezaart, 2009) states that the practice of VT is discriminatory against non-virgin girls. A similar argued was raised regarding the MBS that it discriminates against other girls (non-virgins and from other cultures) who may qualify for the bursary based on other criteria except virginity (Dlamini, 2016).

It is noted in the earlier discussion (para 3.4) that *lobola* paid for a virgin girl is higher compared to that paid for a non-virgin. Human rights activists assert that this practice commoditises girls and promotes the view of women as objects which can be bought (Moodley 2008; Mhlongo, 2009). This also leads to disputes in families. In this regard, a non-virgin girl during *lobolo* contracts is viewed as a disgrace to her family because she could not secure the required head of cattle as *lobolo* (Moodley, 2008). In this regard, the MBS can be argued to perpetuate the commodification of women as they are awarded bursaries based on their virginity.

Furthermore, non-virginity is associated with certain social stigma. For instance, a girl who becomes pregnant before marriage is detested and stigmatised by peers because she is thought to have brought shame onto herself, her family, peers and community at large (Mhlongo, 2009; Kassan & Mahery, 2009). Another stigma implies that a non-virgin girl is associated with bad luck. For instance, if a non-virgin attends the ceremony

meant for virgins, something bad will happen, such as rolling over of the bus and the bending of the reed (Mhlongo, 2009).

In summary, it can be noted that what the traditionalists view as adding value and social status to a girl child who observes VT is viewed differently by human rights activists. Notable are the arguments by human rights activists against the notion that girls are responsible for prevention of teenage pregnancy and spread of HIV, exclusion of non-virgin girls and negative labelling of non-virgin girls.

The CGE Investigatory Report (2016) recommended that the criteria of the requirement of virginity be removed from the MBS criteria. This can be argued to be for the purposes of creating a balance between genders, virgin and non-virgin girls and other cultures.

2.4.5 Moral Values

Instilling moral values is also one of the factors that is argued to justify the practice of VT. Human rights activists contend this argument is flawed by stating that VT is practiced to exert control over women and their sexuality (Mhlongo, 2009; Leclerc-Madlala, 2001). Ndlovu, 2005 cited in Mhlongo, 2009 explain that '[g]irls are encouraged to maintain their virginity while boys are expected to act as real men, the features of a real man are the one who has many sexual partners'. This implies that VT is discriminatory against young women because there is no expectations for boys to remain virgins until marriage, boys who are not virgins are expected to marry virgin girls (Mhlongo, 2009). Hence, the UDM offered equivalent bursaries for male recipients without a criterion of virginity. In this regard, the CGE in its Investigatory report (2016) highlighted that virginity is not intrinsic to the task of studying. This means that girls can focus on their studies and attain their qualifications even if they are not virgins.

Similarly, de Robillard (2011) asserts that sexuality can be managed and negotiated not controlled. This can be interpreted to mean that should it should be girls' and/or young women's decision to maintain their virginity rather than forced to maintain it in fear of losing their bursary. There are arguments which portray that girls and/or young women may maintain their virginity out of their own free will (Moaddab *et al*, 2016). Bower

(2005) avers that young girls who are at risk of failing the virginity test endanger their health in order to convince the testers that they are virgins (cited in Mhlongo, 2009). This includes inserting meat in their vagina (*ibid*) in order to fake virginity (Dlamini, 2016). Anal sex and non-penetrative sex are also some of the alternatives that girls tend to opt for in order to protect their 'virginity' (de Robillard, 2011). This can prove that in some instances VT is based on social pressure to participate.

2.4.6 Cultural Diversity

Some opposes VT on the basis that the manner in which it is practised recently and/or since its revival is different or has changed from how it was practised originally. The cultural practice of VT was revived with the aim of curbing the spread of HIV/AIDS, whilst before then it was practised in order to ensure that a young woman was a virgin before marriage (Mhlongo, 2009). In this regard, VT as practiced in contemporary times is opposed by some on the basis that it does not reflect the 'true' origins on how VT was observed. Maluleke (2012) emphasises this by stating that local African culture was oppressed by white South Africans and it is now a mixture of traditional elements and alien features. Some commentators thus oppose VT on the basis that it has diverted from its original objectives.

Additionally, Behrens (2014) is in support of cultural rights as provided for in the Constitution (section, 15(3)). However, he states that 'no act can be morally justified solely on the grounds that it is a part of culture, as this would give moral legitimacy to culturally sanctioned acts' (Behrens, 2014:180). Behrens (2014) opines that it was a mistake to legally sanction VT in girls over the age of 16. The author states reasons for rejecting VT as morally unjustified. These include that VT is inherently unjust, meaning that:

[I]t is possible that a woman who has not experienced penetrative sexual intercourse might not have a visibly discernible intact hymen, and that a woman who has engaged in it may still have what could appear to be an intact hymen (Behrens, 2014).

Thus, the author opposes VT on ground that the 'right to culture' does not necessarily 'establish a group right to culture, but affirms cultural identity as an important social good worthy of some protection' (Behrens, 2014:179).

2.5 Summary

This chapter has discussed the arguments raised in support of and against the cultural practice of VT. There are divergent views on the cultural practice of VT. Critically, arguments against VT and the MBS outweigh the arguments supporting it. Crucially this is clear from the fact that the UDM accepted the recommendation of the CGE (2016) to remove virginity as a category for bursary allocation (Memela, 2016). One may argue that the days of VT may seem numbered is that it's objective results are not measurable, which means the arguments of the outcomes of the benefits used to justify the practice are not realised.

CHAPTER THREE

VIRGINITY TESTING AS WOMEN EMPOWERMENT

3.1 Introduction

Socio-economically, women (in this case young women) are behind their male counterparts in the labour market. Ostensibly to address this gap, an organ of state, UThukela District Municipality (UDM) introduced the Maidens Bursary Scheme (MBS) for reasons such as empowering women educationally, encouraging moral values and curbing social issues like HIV, teenage pregnancy etcetera (these are discussed in detail in chapter two). This bursary was awarded to sixteen (16) female students to tertiary institutions who would have to undergo virginity testing twice a year to prove their 'purity'. This chapter answers the sub-questions: what are the parameters of the argument of virginity testing (VT) as a means for women empowerment (hereafter referred as WE)? I consider whether or not any of the arguments are shown to be effective in fulfilling their purposes? To answer these questions, the discussion will consider the meaning of WE, newspaper reports on MBS illustrating the different arguments raised in defence or against VT as a criteria, the link between WE and VT and the effectiveness of arguments advocating for VT.

3.2 Women empowerment

It is necessary to briefly define 'women empowerment' as an underlying concept for the purpose of this chapter before the discussion proceeds further. The concept of WE is mainly advocated by feminists to advocate for gender equality (Moyo et al, 2012). Feminists are advocates of women's (and other non-binary persons) rights who are governed by the objective of creating a balance between men and women in society (Convention on the Elimination of All forms of Discrimination against Women (CEDAW), 2014: para 9).

Women empowerment relates to the existence of the patriarchal system in the society and creating strategies to eradicate it (Moyo et al, 2012; Akpotor, 2009). The patriarchal system is a system that places men superior to women in society (Moyo et al, 2012; Akpotor, 2009). Women empowerment is based on eradicating the myths about women's sexuality, reproduction and culture (Akpotor, 2009). Striking the balance between men and women in society has focused on the areas such as labour market, employment opportunities, occupying leadership roles and equal access to recourses etcetera (Moyo et al, 2012; Akpotor, 2009).

The objectives of this bursary are to 'encourage girls to keep themselves pure and inactive from sexual activity and focus on their studies' (Dudu Mazibuko (the Mayor) cited in CGE Investigatory report, 2016:4). Accordingly, the MBS' conceptualisation of women empowerment can be understood differently from the one stated in the above paragraph. In this regard, WE purposes to empower women to be educated (Mayor, cited in Khoza, 2016). The MBS utilises the cultural practice of virginity testing (VT) as a tool to empower women, which means that identification as a virgin is one of the requirements for women to be awarded the bursary. 'Virginity was to be ascertained by them successfully undergoing VT procedures and had to be maintained throughout the duration of their studies' (CGE Investigatory report, 2016:4). In this sense, empowerment can be achieved when women receive bursaries to further their studies and achieve their prospective qualifications.

This approach to WE was criticised by the human rights activists such as the Commission on Gender Equality (CGE) whereby the emphasis was against VT as the key criteria to the MBS (these controversies are discussed in detail in chapter two). For the CGE, the awarding of bursaries was not the issue of concern but rather the inclusion of virginity as one of the requirements for women to obtain the bursary. Such arguments as against the MBS and in support of it received extensive media attention both locally and globally early in year 2016. This discussion is taken further in the next section with the validations from the newspaper's reports on MBS to highlight the intersection between VT, WE and MBS.

3.3 Newspapers' reports on Maidens' Bursary Scheme

It can be said that encouraging strategies for young women and/or girls to maintain their virginity in the Zulu cultural practice of VT has been 'within' the boundaries of a Zulu culture. These include the *lobola* being high for a virgin compared to non-virgin (Scorgie, 2015; Leclerc-Madlala, 2001; Mhlongo, 2009; de Robillard, 2011), certificates awarded to young women and/or girls tested as virgins (Scorgie, 2015) and the possibility to be the Zulu king's bride – the king can choose the bride from the girls and/or young women participating in the annual royal reed dance (Scorgie, 2015) etcetera (the methods to encourage women to maintain their virginity are discussed further in the next section – para 3.3.1).

However, a new strategy to encourage women to maintain their virginity in the Zulu culture is seen in the introduction of the MBS in terms of which 16 young women were awarded the MBS for remaining virgins (Khoza, 2016). The UDM's MBS seem to extend the already discovered forms of encouraging young women and/or girls to maintain their virginity to include the financial support in order for them to achieve their tertiary qualification. On the one hand, MBS is seen to be empowering young women and with good intentions (the Mayor in Khoza, 2016), while on the other hand, it is argued to perpetuate social imbalance, gender discrimination and is inappropriate (CGE report, 2016; Dlamini, 2016). This section discusses the parameters of the argument of VT as a means for WE in the present times while noting its controversies.

3.3.1 VirginitY Testing as Women Empowerment from a Contemporary Cultural Perspective

VirginitY testing as WE during contemporary times is hardly distinguishable from the way it was defined during its revival in the early 1990s (Mojapelo, 2016). The current conceptualisation of VT as means for WE is evident with the introduction of MBS by the UDM. VirginitY testing is viewed as means for WE when a young woman and/or girl who cannot afford to pay tertiary fees is awarded with monetary assistance to do so (Mojapelo, 2016; Khoza, 2016; Dlamini, 2016; CGE Investigatory report 2016). This is

supported by the testimonials of some of the young women who were awarded the MBS. In this regard, AFP (2016) reports that 'Thubelihle Dlodlo would not have made it to university in South Africa (SA) this year [2016] as her family could not afford the fees, but virginity brought her a lifeline'. Also, 'Bongiwe Sithole, would also have dropped out of university due to poverty, but now will continue her studies' (AFP, 2016). This can be interpreted to mean that through VT, young women are empowered to further their tertiary education.

Similarly, VT can be seen as WE when through maintaining their virginity, women can achieve their prospective qualifications. The Mayor argued that awarding bursaries to women on the condition that they remain virgins was 'to emancipate them through education' (cited in AFP, 2016). This may mean that the Mayor realised the significance of WE through education, however, just as generally bursaries are 'earned', young women had to earn the bursary through being virgins and remaining virgins in order to be empowered educationally.

Noteworthy from MBS is that, VT can be means for WE when women contribute to bringing solutions and/or being the solutions to existing social ills which makes them actively contributing to a healthy society. In this regard, the Mayor asserts that the main reason behind introducing the bursary was that the UDM has 'a very high rate of teenage pregnancies and a lot of young people are infected by HIV and AIDS' (cited in AFP, 2016). This implies that the Mayor recognised the need to resolve the existing social issues, thus, granting bursaries was a form of encouraging young women to be involved in bringing solutions to social issues. In defence of the contradictors of MBS, the Mayor states that 'we want to fight HIV and AIDS; we want to stop teenage pregnancy. This is what we thought will work for us' (cited in AFP, 2016).The Mayor further states that the CGE is not coming with suggestions; instead it is ridiculing what is being done (cited in Khoza, 2016). This may mean that the UDM innovated MBS as a possible solution to social ills; hence, empowering women to being solutions would help to address the mentioned social issues. It is concerning that the Mayor of the UDM misapprehended the role of the CGE, which is a constitutionally mandated watchdog on gender equality.

Moreover, VT as means for WE is argued to mean that women and the community are actively involved in suggesting and implementing possible solutions to the existing social problems. In this regard, the Mayor states that the idea was mooted by the 'maidens' themselves (cited in AFP, 2016). The Mayor further alleges that 'what we are doing is the mandate from the people of the district. We did not just wake up one day and decide to issue bursaries' (cited in Khoza, 2016). This implies that the Mayor recognised the importance of letting civil society be the active agents for the betterment of their livelihood.

According to this argument, the 'maidens' realising the role they play in contributing to the curbing of social ills, thus, requested an award for it. In this regard, the Mayor was adamant that the maidens 'complained that they were not recognised, while their peers who fall pregnant get "rewarded" by the government with child support grants' (cited in AFP, 2016). Therefore, the 'reward' was the introduction of the MBS for young girls who are able to abstain from sexual activities to encourage them to continue doing so (AFP, 2016). The fallacy of teen and youth pregnancy being encouraged by the CSG is being perpetuated here.

Another view argued for by King Zwelithini (Man, 2016) is that VT is a way of dealing with the social ill of young women who date older man for money, called 'blessers' and to avoid pregnancy. He called pregnancy of 'girls' aged 22 years by older men as 'disgusting and a disgrace (Man, 2016). In his speech during the royal reed dance in 2016, King Zwelithini asked the young women whether they had been forced to attend the reed dance (and consequent virginity testing) against their will. His view is contrasted with the issue of consent argued for by the human rights activists. In relation to the opposition of the MBS by the CGE, King Zwelithini argued that the CGE had several attempts to divide the Zulu nation and urged it to guard its culture and customs, especially the reed dance. He also views VT as an answer to social ills generally. In this regard, he said South Africans need to decide who kept their children safe from diseases and temptations in the world (Man, 2016).

King Zwelithini views the CGE's intervention in the MBS as imposing its ideas. He asserts that he could not understand why other cultures wanted to impose their standards on the Zulu culture (Man, 2016).

The phenomenon of 'blessers' is demonised even by young people, who in a KwaZulu-Natal study are said to advocate that their peers should 'stay away from blessers' and link the phenomenon to the 'contextual risks of sexual violence and transactional sex as problems' (Varjavandi, 2017: 95). Varjavandi explains that this internalised attitude by young people towards the choices of young women vulnerable to material deprivation and inequality is harmful. King Zwelithini has similarly internalised values attached to women's purity and demonises women who 'choose' blesser encounters, without considering the root of the inequalities underlying the phenomenon. The empowerment described by the bursary recipients therefore refers to their ability to access educational opportunities and thus work opportunities.

Women empowerment understood by feminists generally, has been seen as a tool to access a number of work and educational opportunities, but on the basis the women are 'equal' to men or that affirmative measures are required to equalise the playing field between men and women. The idea that VT is one way in which women can be empowered to access employment or work opportunities identifies women as possible sexual 'deviants' that are likely to abstain from sex only if they are provided with an incentive to do so. Further, it presumes that women are the 'agents' that control their own sexuality when there is a 'reward' to be received from it.

3.3.2 Virginty Testing as Women Empowerment from a Contemporary Rights Perspective

The classification of VT as WE discussed above can be noted from the objectives, arguments and execution of the MBS by the UDM. Yet, the practice of VT has always been contentious, with human rights activists calling to ban it over the years whilst the traditionalists are and has been in support of the practice. Similarly, there are notable contradictions regarding the cultural view of VT as WE.

First and foremost, on the argument that VT can be viewed as WE when young women who cannot afford the tertiary education fees are provided with monetary assistance to do so; VT contradictors view this as discriminatory and violating the constitutions (CGE in AFP, 2016). The issue of consent by the young women and/or girls to undergo VT is questioned. Dlamini (2016) argues that 'is it consent or coercion when women and girls can only access bursaries based on them doing virginity tests and passing those tests'. In the same vein, Thorpe (2016) states that 'bursaries are a lifeline for many students' who would not be able to afford to further their education. These can be interpreted to mean that when young women are in need of financial assistance to further their studies and there is an option such as the MBS. They would undergo through VT in order to obtain the bursary not necessarily because they want to be tested. Correspondingly, Mojapelo (2016) argues that 'in theory girls are free to choose to participate in a test, but in practice coercion is often the order of the day.'

The awarding of MBS has been argued as a coercive method for young women to undergo VT (Dlamini, 2016; Thorpe, 2016). Dlamini (2016) notes that though the Children's Act 38 of 2005 (Children's Act) provides for girls over the age 16 to give informed consent in order to test for virginity in a prescribed manner (section (12(5))). However, she asserts that 'this does not include coercion through making access to resources to study' (Dlamini, 2016). Dlamini (2016) describes this as 'discrimination and not consent'. In this vein, Lawyers for Human Rights (hereafter referred as LHR) (2016) is of the view that the MBS entrenches gender inequality by holding girls to a different sexual responsibility and standard than boys. Thorpe (2016) supports this by stating that 'it is possible that many women underwent VT not out of a commitment to stay "pure" but because they wanted to study'.

The issue of consent has been questioned in relation to the practice of VT for the purpose of cultural practices such as the annual royal reed dance. This has been linked with the reports of girls who fake virginity. Dlamini (2016) argues that girls put their health in danger through engaging in practices known as 'virginity saving'. 'This includes inserting objects such as meat and even pieces of nets to try and give the illusion of an intact hymen when tested' (Dlamini, 2016). This implies that if young women and/or girls

give informed consent to the testing of virginity, then why do some engage in measures of 'faking' it? In relation to MBS, Dlamini (2016) asserts that the MBS 'may, also, distort the manner in which VT is practiced in other contexts through providing an incentive for parents and bursary seekers to bribe *abahloli*' (those who are tasked to perform virginity inspection).

In relation to the argument of young women empowered through VT to bring and/or being solutions to social ills; rights activists argued that VT cannot curb AIDS. In this regard, Dlamini (2016) contends that 'the prevention of HIV is best done through proven measures such as comprehensive sexuality education and access to dual barrier forms of contraception such as the female and male condoms...' *inter alia*. Dlamini (2016) further states that such methods are the best way to empower women and girls in order to combat HIV and AIDS and 'not through practices that are tantamount to being a sexual offense'.

It can be noted from this argument that through coercion some young women end up 'faking' virginity in order to escape the stigma of being discovered as non-virgins. Such stigma includes *lobola* being low for a non-virgin compared to a virgin, a risk of social exclusion and being labelled as promiscuous (Mswela, 2009). Dlamini (2016) categorises virginity faking methods such as inserting objects like meat and pieces of nets in a vagina with hymen reconstruction surgery. In this regard, she asserts that 'Middle class women and girls in places like Egypt have the opportunity to go for rather expensive hymen reconstructive surgery such is the stigma associated with not being a female virgin in patriarchal countries' (Dlamini, 2016).

Hymen reconstruction surgery or 're-virginisation', also, called hymenoplasty refers to 'a surgical procedure that aims to restore hymen tissue to simulate the ritualistic bleeding after first intercourse' (Kaivanara, 2015:72). It is commonly practised in countries like China, Iran and Turkey *inter alia* (Steinmüller & Tan, 2015; Kaivanara, 2015). It is seen as a solution for engaging in premarital sexual relationships while escaping the possible consequences (Steinmüller & Tan, 2015; Kaivanara, 2015). For instance, Kaivanara (2015) articulates a story of Aida, a 24-year-old Master's student from a rich and non-

religious family who had freely had intercourse with several boyfriends but later, when her present husband came along as a suitor, she undertook the surgery.

Noted reasons for women to opt for the hymenoplasty in Iraq and China are similar to the reasons of 'faking' virginity which are noted in a Zulu cultural practice of VT. In Iran, it is believed that a woman's sexual urges are weaker and more controllable than a man's (Kaivanara, 2015). This implies that a woman is in a greater position to control engaging in sexual intercourse, thus, maintaining her virginity. In this regard, Steinmüller & Tan (2015) connote that compared to boys; girls are expected to be always unavailable, which is seen as a sign of worthiness and purity.

However, it can be said that such theories are proven to be unrealistic. MacEntee (2016) alleges that representations of girls voluntarily participating in sexual activity are sometimes overshadowed in the media and in sexual health curricula. This is illustrated in a digital story by MacEntee (2016) that the boy is initiating the sexual encounter, and the girl is agreeing to the terms. Hence, the girl's sexual desire is indicated through her smiles and embraces, which show how she participates in the increasing intimacy. Leclerc-Madlala (2002:23) connotes that 'South African youth become sexually active on average between the ages of 13 to 15 years'. Therefore, this explains that women have sexual urges which they tend to act upon, but, due to societal expectations some may opt for measures like hymenoplasty to be socially accepted. According to Steinmüller & Tan (2015) hymen repair surgeries offer the possibility to fulfil the traditionalist requirements that some men seem to have for marriage partners.

On the basis of this argument, it can be grasped that the bottom line for one to be classified as a virgin in a cultural practice of VT is an intact hymen. According to Naidu (2008:86) 'the condition of a women's hymen [is] used to determine the virginity status'. This may mean that, if a woman who underwent hymen reconstruction was to undergo through VT in a Zulu cultural practice of VT; she may be classified as a virgin due to the presence of a hymen. In this concern, Thorpe (2016) argues that VT cultural practice considers sex to describe the act of penis-vagina intercourse and ignores the range of sexual practices that take place.

Steinmüller & Tan (2015) reveals that feminists are divided on the merits of hymenoplasty. Some believe that it reinforces the existing power relations and affirms the patriarchal order, whilst others suggest that the increasing number of women who choose such operations may eventually diminish the significance of virginity (Steinmüller & Tan, 2015). In the same vein, (Kaivanara, 2015) argues that ‘as the number of ‘fake’ virgins grows through operations and tactics, it becomes impossible to distinguish between the real virgin and the re-made virgin’. This implies that in the presence of such measures, the cultural practice of VT loses its value.

This sub-section of the dissertation presents a discussion about the factors of the argument of VT as means for WE noting its controversies. The underlying point is that while traditionalists presents the arguments that VT can be a means for WE, the rights activists opposes such views. Again, as noted in Chapter two that the practice of VT seems to be outnumbered by the arguments against it. The critical point in Chapter two is that the UDM accepted the CGE’s recommendations to remove the virginity requirement for the awarding of the MBS. Critically, since it is possible to surgically or through faking ‘recreate’ virginity, the core justifications for VT that abstaining and/or delaying sexual activities may encourage women to focus on their studies, prevent teenage pregnancy and curb HIV/AIDS amongst other factors, are undermined.

3.4 Link between virginity testing and women empowerment

The recognisable connection between VT and WE as discussed in the sub-section above presents a contemporary perspective. The next section discusses the identifiable factors of VT as WE from ‘ancient’ cultural, rights’ and theoretical perspectives. An ancient cultural and rights perspective can be traced from the discourses since the revival of VT and during the precolonial period, whilst the theoretical perspective explains how emancipatory and feminists theories conceptualises the formation of the idea of VT as WE.

3.4.1 'Ancient' Cultural Perspective

It is briefly noted in the section above that VT as WE can be said to have been 'within' the boundaries of the Zulu cultural practice. The *lobola* is high for girls who are classified as virgins compared to non-virgins (Mhlongo, 2009). In this sense, VT as WE can be defined in terms of strategies used to encourage women to maintain their virginity. In this regard, the societal values are aligned in a way as to 'reward' and/or praise females who can maintain virginity for the cultural purposes to be fulfilled.

Consequently, in a cultural perspective; VT as WE may mean encouraging women to comply with the traditional values through 'awarding' rituals and/or ceremonies. Firstly, one of the 'awarding' rituals for women who complied with the tradition of maintaining their virginity is that the *lobola* is high for them compared to a non-virgin (Mhlongo, 2009; Moodley, 2008; Mswela, 2009; Scorgie, 2002). 'Traditional bride wealth practices reflected the importance placed on a girl's virginity' (Leclerc-Madlala, 2001:418). In this regard, Thornberry (2015) argues that 'it was considered a disgrace when a young woman had illicit intercourse with a young man because the same number of cattle was not paid for her as otherwise would have been'. Thus, it was considered a disgrace if the *lobola* is small (Thornberry, 2015; Mhlongo, 2009; Moodley, 2008). This implies that women were empowered to bring solutions to social ills through being of 'high value' when they maintained their virginity.

Another ceremony for women who maintain their virginity is *umemulo*. *Umemulo* is a female coming-of-age ritual whereby parents of a girl or a young woman slaughter a cow and invite community members to celebrate her for keeping herself 'pure' (Thornberry, 2015). This ritual is called a 'coming-of-age' ritual because the means of it performed is to announce that the girl or a young woman has come on age of marriage (Thornberry, 2015; Mnguni 2006). In this sense, it can be argued that WE occurs when an unmarried young woman finds a suitor as a result of a ritual.

Moreover, VT is associated with respect, purity, self-control, honour, pride, modesty and chastity before marriage (de Robillard, 2011; Mhlongo, 2009). These attributes culturally make a young woman marriageable, respected and honoured by her family, society and

men who view her as a potential wife (Mhlongo, 2009). Therefore, VT as WE in this sense may mean respect that a woman receives through undergoing VT. Also, through undergoing VT, a woman has the possibility of being the Zulu King's bride (Scorgie, 2002). One may argue that, for the family of a woman to be related to a 'royal' family is considered an honour and a privilege. In this vein, VT as WE may mean creating a platform for a young woman to be a member of a royal house as a queen. The awarding of certificates of proof of virginity can also be classified as one of the means for WE. *Abahloli* inspects women and issue certificates (Scorgie, 2015).

Virginity testing as WE can also be defined as providing 'protection' for women from men who may sexually assault them (Thornberry, 2015). This means that women were empowered through VT to voice out incidents of sexual intrusion. Thornberry (2015: 134) explains how, historically, VT during precolonial and early colonial periods had two roles: protection of women from 'sexual coercion' and affirmation of 'the status of older women as experts on female sexuality'. He elaborates:

In the old time, girls were carefully looked after, and were examined frequently by older women, and if anything wrong was observed it was reported to the father, and, in consequence of this supervision, when any attempt was made by a man on a girl she at once reported it' (Cape of Good Hope, cited in Thornberry, 2015: 153).

The common grounds for VT as WE in contemporary and ancient times is that virginity can be proven through vaginal inspection (Scorgie, 2015). Hence, what seem to be the measures of WE in both perspectives are actually forms of encouraging women to remain virgins for cultural reasons. Virginity testing activists seem to be updating its objectives to match the present time. Hence, what can be learnt from this is that in order to address social ills, strategies need to be reassessed as the society progress.

3.4.2 **Rights' perspective**

The rights' perspective presents a divergent view to the cultural perspective on VT. Equally, the conceptualisation of WE from the rights' viewpoint does not incorporate the argument that VT can be the means for WE. This may be because 'many gender activists identify culture as an obstacle to the realisation of women's rights' (Thornberry,

2015). This section of the chapter then presents a discussion on how WE is explained from rights' perspective while noting how it clashes with the cultural perspective.

The activists of a rights-based definition of WE holds to a similar meaning to the feminist definition of WE provided in sub-section 2 above. In this view, WE involve the recognition of the existence of the patriarchal system in society and creating strategies to eradicate it (CEDAW, 2014: para 9). Hence, the rights' perspective views the concept of WE in terms of 'gender equality' and 'women's rights'. According to the Constitution (section 9(2)), 'equality includes the full and equal enjoyment of all rights and freedoms.' This implies that the rights' view WE as an achievement of a situation whereby everyone, in this case men and women, in the society enjoy equal opportunities, rights, obligations and treatment in all spheres of life (Akpotor, 2009).

According to the rights' view, culture is a cause for the imbalances that exist between men and women in the society (Dlamini, 2016). According to Akpotor (2009), the existing 'gender inequality in the African societies that place the male folks at advantage over the women folks is exacerbated by culture'. A number of international law instruments, that South Africa (SA) is a signatory, categorises some of the cultural practices that are practised around the world as harmful cultural practices (hereafter referred as HCP/s) which needs to be gotten rid of (African Charter on the Rights and Welfare of the Child (ACRWC), United Nations Convention on the Rights of the Child (CRC), Convention on the Elimination of All forms of Discrimination against Women (CEDAW)).

Dlamini (2016) submits that VT is a 'patently harmful practice steeped in patriarchal practices that serve to oppress women' (AFP, 2016). Similarly, LHR (2016) argues against MBS and view it as based on an arbitrary, dubious physical characteristic which is discriminatory. In this regard, WE would mean '...achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (CEDAW, article 5).

Additionally, the CRC outlines HCPs as those practices prejudicial to the health of children (article 24(3)). This implies that if a cultural practice causes diseases to a child is considered as a HCP. Kassan & Mahery (2009) assert that the physical examination of girls' sexual organs during the VT process can lead to health risks such as STDs and HIV amongst others.

Moreover, Article 21 of the ACRWC terms a HCP in three ways. Firstly, it refers to cultural practices affecting the welfare, dignity, normal growth and development of the child in particular (article 21(1)). Secondly, those practices prejudicial to the health or life of the child (ACRWC, Article 21(1)(a)). Thirdly, those practices discriminatory to the child on the grounds of sex or other status (ACRWC, Article 21(1)(b)). In this regard, one may assert that the definition by the ACRWC provides broad protection and care of children as it covers various aspects of a child's life.

Subsequently, VT has been argued to be discriminatory in terms of gender as it is performed only on a girl child (CGE report, 2016). The Children's Act (section 12(1)) explains a HCP as a cultural practice that is detrimental to a child's well-being. This definition can also be argued to cover various aspects because well-being can involve health, emotional being and psychological being of a child. In this regard, it is asserted in the CRC, article 24(3) that states parties shall take all effective and appropriate measures with a view to abolishing harmful traditional practices. The CRC does not specify cultural practices that are detrimental to children. I would argue that this lack of specificity creates room for the signatory states to identify such practices in their own context and ensure their abolition.

Furthermore, the ACRWC, article 21 make a demand for state parties to take all appropriate measures to eliminate harmful cultural practices. In relation to MBS similar views from rights' activists ascended. In this regard, Dlamini (2016) states that her objection to the MBS is situated within a discussion that it perpetuates harmful practices against women and girls which is not uniquely SA or African, but are features of patriarchal practices across the globe. This is in contradistinction with the explanation of Maluleke's (2012) that the African culture contains colonial and apartheid influences

which made it diverge from its original objectives and standards. Dlamini (2016) is of the view that:

If we are committed to dismantling patriarchy in all its forms, and the discrimination and violence that accompanies it we must be committed to stopping all harmful practices against women and girls. She further asserts that 'legislation is not enough to do this and we must have discussions with all the relevant stakeholders concerned to change society' (Dlamini, 2016).

Another view from a right's perspective is that MBS violates the human rights provided for in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) (LHR, 2016; De Vos, 2016; Smuts, 2016). This is related to a number of human rights provided in the PEPUDA which include non-discrimination. Hence, MBS objectives are to be in breach of section 1 of the PEPUDA ((LHR, 2016; De Vos, 2016; Smuts, 2016). This is because PEPUDA defines discrimination as:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

In this vein, the MBS constitutes discrimination because men are not required to adhere to a virginity standard in any of the other 100 bursaries offered by the UDM (Smuts, 2016). This implies that the UDM denotes that men can be sexually active and successfully study to complete their qualifications whilst women cannot. Relatively, Smuts (2016) states that 'it is entirely possible for women to be sexually active and pursue university studies'. The provisions of the PEPUDA and its link with the VT and MBS will be further discussed in Chapter 4 of this dissertation.

In summary, the rights' perspective views WE as achievable through creating balance between genders in the society. While, cultural perspective holds that WE is possible within the boundaries of culture; the rights' perspective view culture as the main obstacle and/or cause of gender imbalances. The underlying point from the rights'

viewpoint in this argument classifies VT as one of the HCP which need to be eradicated for WE to be achieved.

3.5 Theoretical perspective

3.5.1 Emancipatory Pedagogy

The theoretical perspective in this dissertation is used to give meaning to the reasons for the creation of certain ideologies that individuals think and act upon. In this case, it is used to make sense of the possible reasons why young women and/or girls and VT advocates accept the cultural practice of VT and also, possible reasons for UDM to suggest MBS. It is correspondingly used to explain the influence behind the views of the rights activists against the cultural practice of VT.

Emancipatory education is briefly defined in chapter one of this dissertation, as a theory that positions individuals as products of the historical process in explaining human behaviour (Giroux, cited in Sewpaul, 2013). This means that people tend to act and think the way in which they were normalised to during their upbringing.

The practice of VT presents young women and/or girls who claim to participate in it voluntarily. Scorgie (2010:55) articulates a report of a crowd of teenage girls marching through streets of central Pietermaritzburg, 'singing, chanting slogans and holding placards written "we are not being forced"'. This can be one of the cultural systems which present constructions of 'reality' as they were natural or given as underlined by feminists (Naidu, 2008).

Emancipatory education explains the participation of girls in the cultural practice of VT and them accepting it as 'normal', 'natural' and/or 'the way things are' as because of the socialisation process. Candidates of tests are between the ages of 7 and 26 (Bennet et al, 2010; Durojaye, 2016; Mhlongo, 2009). As some are young to consent submit to their parents' and society's pressure (Bennet et al, 2010). In this vein, Giroux (cited in Sewpaul 2003) argues that 'Our identities are produced in social contexts in which we live, but we are often not fully aware of these contexts'.

Correspondingly, Giroux also argues about 'thinking about thinking', similarly, Freire argues about 'reflection in and on action' (cited in Sewpaul, 2013). This means, the emancipatory pedagogy explains the acceptance of young women of the cultural practice of VT as they have received the message that it is 'normal' practice for young women to undergo. In this vein, Gramsci argues that when societal groups are not acting autonomously, it is the conception of the dominant group that prevails (Gramsci, cited in Sewpaul, 2013). Hence, this can explain the participation of girls in VT as that they act unconsciously based on what they have been taught as the way it is without reflecting on it.

Giroux (cited in Sewpaul 2013) argues that emancipation takes place when one refers to strategies of critically looking at society and not simply taking-in and accepting everything that one sees. Gramsci (cited in Sewpaul 2003) views this as a process of transforming common sense into good sense, whereby the former refers to a set of generally held assumptions and beliefs common to any given society, whilst the latter refers to practical, empirical common sense (Sewpaul, 2003; Sewpaul, 2013). This means that emancipatory pedagogy theory facilitates intellectual freedom and results when people learn to be critically aware of the world, themselves, and those around them.

Culture and its values seem to be passed from one generation to the other. Hence, in VT, according to Leclerc-Madlala (2001) girls as young as six years of age partake in this practice. According to law, the age of consent in VT is 16 (Children's Act, section (12)(5)). Ras-Work (2006) argues that the socialisation process for children are designed and applied to instil a feeling of dominance of boys while girls are groomed to accept subjugation and inferiority. Hence, this may be classified as what Freire (cited in Sewpaul, 2003) called 'the banking system of education' which occurs when the teacher deposits information into learners and expect to withdraw it in the form of tests or exams. Similarly, the elders normalises the cultural practice of VT for girls so that as they grow it would be 'inscribed in their blood'. For instance, in her study, Naidu (2008:85) finds that 'none of the students seemed to be interrogating how they might well be the stage on which cultural beliefs were being performed as natural'.

The similar theoretical explanation can be used to understand the Mayor's decision of introducing MBS. This means that the Mayor might have been socialised into a social context whereby VT was an accepted practice for girls, thus, encouraging strategies for to maintain their virginity. Sewpaul (2003) argues that critical multiculturalism challenges individuals to examine how culture gets reproduced historically and institutionally.

The rights' activists views against the cultural practice of VT can also be given meaning according to the emancipatory pedagogy. Since, the traditionalist and rights activists views are divergent in relation to VT; it can be said that while traditionalists and VT participants present ideas of 'normalised' culture, the rights activists presents ideas of critical thinking. In this regard, Freire (cited in Sewpaul 2003) argues for 'critical understanding'. This notion encourages individuals to look at every day experiences and reflecting on or questioning then take action. In this sense, it can be argued that the rights' activists look at the practice of VT in a critical way, which means that they weigh its pros and cons and came up with arguments that oppose it. In this regard, Gramsci states that good sense - contradictory consciousness does not only point to domination and confusion, but also provides us with possibilities for radical change (cited in Sewpaul, 2003).

In explaining the formation of ideas of human behaviour, emancipatory pedagogy involves recommended strategies for how individuals can overcome internalised sources of privilege and of oppression. Sources of privilege refers to the historical social contexts that make one a better person currently, whilst, sources of oppression refers to the historical social contexts that oppresses individuals (Sewpaul, 2003; Sewpaul, 2013). In this regard, Giroux (cited in Sewpaul, 2003) argues that 'an examination of ourselves from historical, social, cultural, political and economic perspectives 'helps to rewrite the complex narratives that make up [our] lives'. This implies that the emancipatory education helps individuals to understand how they construct their identities within particular historical, cultural and socio-political contexts, with the intention of contributing to a more democratic life. It involves giving voices to the disadvantaged to empower them to confront injustice or discomfort.

The underlying point from emancipatory education is the encouragement for individuals to understand the reasons behind the way they think; act and express themselves. In this regard, Coetzee (2001:137) asserts that 'engaging about our thinking and actions helps us realise that we are not "passive victims of society' control elements"'. Emancipatory pedagogy holds that all persons have the ability to think about their thinking. Gramsci (1971) claims that 'all men (sic) are philosophers' (cited in Sewpaul, 2003). Hence, from this theoretical perspective VT activists and participants need to engage in questioning the source of reasoning behind their justifications of VT. In this way, their emancipation can be achieved. Van de Merwe (1996:26) supports this by stating that the term empowerment cannot take place unless the person or group is aware of their own powerlessness, is unhappy about it, and is willing to become engaged with change. The voice of the young women beneficiaries of the MBS (and those who did not make the 'grade') is not heard in the newspaper reports on the matter. Their perspectives would have greatly added to the richness of the debate (and should not be confused with the Mayor stating that she speaks *for* these young women).

3.5.2 **Feminists Theory**

The emancipatory pedagogy's perception of achieving WE such as dealing with internalised oppression, changing the mind-set of the 'oppressed' and the ability for the oppressed to understand oppressive structures around them, *inter alia*, is correlated with the perception of the feminist theory. As briefly defined in Chapter one of this dissertation (section 7.2), feminist theory seeks to empower women to understand how they are oppressed and dominated and often implores them to engage in efforts to bring about broader social change (Turner & Masch, 2014).

Distinct from the emancipatory pedagogy, the feminist theory deals specifically with matters affecting women. It is based on the belief that the inferior status of women is due to social inequality and that women should have equal access to all forms of power (Turner & Masch, 2014). Feminists believe that gender is a socially constructed notion of masculinity and femininity which is not necessarily a direct product of an individual's biological sex (Akpotor, 2009).

African feminism is based on transforming gender relationships and conceptions in African societies (Arnt, 2002). Its underlying premise includes determining which traditional institutions are positive for women, and which disadvantage women so severely that their abolition seems imperative (Arnt, 2002).

Therefore, in a feminist' viewpoint WE is achieved when men and women (and all genders) share equal access to opportunities and enjoy equal treatment and social experiences *inter alia*. As discussed in section 2 in this chapter, the feminist movements of achieving WE include creating equality between men and women in different spheres of life which comprise employment opportunities, occupying leadership roles and equal access to recourses etcetera (Moyo et al, 2012; Akpotor, 2009). The social and economic forms of WE are discussed in this section as these are some of the objectives the MBS sought to achieve.

The economic and education empowerment of women in a feminist viewpoint has been advocated for based on closing the gap between the number of men and women who are educated and in labour market. Akpotor (2009) asserts that women seem predominant in low-paid jobs. Women constitute two-thirds of the world's illiterate population (Akpotor, 2009). Hence, women in the labour market are in more 'feminine' jobs such as teaching and nursing *inter alia* (Akpotor, 2009). In such functions women are the lowest paid with the limited or no opportunity for advancement (Moyo et al, 2012; Akpotor, 2009). Therefore, educating girls is the suggested way which can raise overall economic productivity (Akpotor, 2009; Moyo et al, 2012).

Consequently, such factors noted in the above paragraph have been the entrance point for feminists to strive for WE. Economically, feminists fight women to engage in a productive activity that will allow them some degree of autonomy (Kruger et al, 2015). Hence, education is considered one of the most important means to empower women with the knowledge, skills and self-confidence necessary to participate fully in development processes and engage in economic empowerment (Akpotor, 2009). Therefore, feminists view WE possible by putting them on par with the social status that enabled men to be able to be economically and educationally empowered. This means that if women can be viewed in a similar way as men in the society, their empowerment

can be guaranteed. Therefore, this view does not incorporate VT as a tool for empowering women.

3.6 Women's Perspectives

The concept of WE seems to be open to interpretation. This implies that what can be seen as WE to one may not be WE to another. Skafté & Silberschmidt (2014:2) argue that ‘...analyses of women’s position should be based on the realities of their lives, rather than on generalised (Western) assumptions of their oppression’. This can be noted from a discussion in above section 4, whereby, the cultural perspective views WE as possible within the cultural practices such as VT, *umemulo* and *lobola* etcetera; whilst the rights’ view connote that WE is possible with the elimination of prejudices and practices which are based on the idea of inferiority or the superiority of either sexes.

However, the commonality in these views is that WE is possible when women have a certain form of ‘agency’. Agency refers to the “capacity to define their own life-choices and to pursue their own goals, even in the face of opposition from others” (Kabeer, 1999 cited in Kruger et al 2015:31). In relation to MBS, women’s agency is when they have goals of future employment and attaining qualifications and uses their virginity to achieve those goals. Thus, agency can take numerous forms: ‘bargaining and negotiation, deception and manipulation, subversion and resistance’ (Kabeer 1999, cited in Skafté & Silberschmidt, 2014). Similarly, the views of women regarding their agency portray different versions. This section, therefore, discusses forms of women’s agency.

Women’s forms of agency can be associated with the different meanings of WE discussed above. Hence, the above section portrays two divergent ways in which women’s agency can be viewed. The first view is noted from the MBS, according to which women engage in VT to obtain educational and employment opportunities. This form of agency holds that:

women are not merely the receptors of patriarchal rules and customs, but also often use their gender positions and sexuality – even those that might be perceived as oppressive – to gain certain positions and benefits in society, such as security, financial benefits, social status, and, as will be proposed in what follows, education (Stander, 2016:440).

This means that women's form of agency towards their empowerment can be found within the boundaries of the 'oppressive' structures (Kruger et al, 2015). In this regard, Stander (2016:440) asserts that 'class and ethnicity also have an influence on the strategies that women choose to gain benefits and security within a patriarchal and unequal society and culture'.

The similar view is noteworthy in a Rwandan study conducted by Skafte & Silberschmidt (2014). This study reveals sex as a crucial domain in which women felt that they could exercise their state of power - agency. In this study, women reveal that during sex they managed to get access to decisions that are typically male domains (Skafte & Silberschmidt, 2014). They were particularly aware of their sexual power and that men can be controlled and manipulated through sex. In a South African study, Kruger et al (2015) finds that young women have the power to make reproductive decisions that will keep them safe and that are morally right.

However, the study also reveals that women are aware of the limitation of their agency and that men had more agency than them. For instance, women agreed in non-protective sex in their efforts to make their partner happy because insisting on safer sex was not helpful in fear of the partner leaving for another woman who would agree to non-protective sex. However, several women were able to successfully negotiate condom use through 'taking advantage of the partner's state of arousal' (Skafte & Silberschmidt, 2014:8).

The forms of women agency in above paragraph can be viewed as differently to the rights' and feminists' viewpoints. Women agency's is seen to be achievable when they do not see themselves in an inferior position to men in all spheres of life. On this view Akpotor (2009) explains that WE can be achieved with a focus on identifying and redressing power imbalances and giving women more autonomy to manage their own lives.

According to Stander (2014: 437) there has been a 'backlash against virginity testing and the patriarchal, oppressive overtones identified by various feminists'. This backlash sees women advocating for the MBS and VT as mere victims of patriarchal cultural practices with no agency. This implies that women's agency cannot be achieved within oppressive structures.

3.7 Effectiveness of arguments advocating for virginity testing

The success of VT should be measured against its objectives. This dissertation has discussed the intentions of VT as a means for *inter alia* curbing HIV/AIDS, preventing teenage pregnancy and detecting girls who are sexually assaulted (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011). Therefore, this section of the chapter discusses the objectives of VT against the 'realities' of the matters it is argued to resolve.

First and foremost, the supporters of VT argue that it is a means for HIV and AIDS prevention ((Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016; Wickström, 2010; Leclerc-Madlala, 2001). The argument in this regard is that if girls are regularly inspected for virginity, they will not engage in sexual activities due to fear of being discovered non-virgins during the next test (Mhlongo, 2009). According to statistics from 2016 an estimated 12.7% of the total population (55.91 million) is HIV positive (Avert, 2016). Mhlongo, (2009) asserts that in KwaZulu-Natal province, home to the large Zulu-speaking group, HIV infection rates have consistently led the country. HIV prevalence is almost 40% in Kwazulu-Natal compared with 18% in Northern Cape and Western Cape (Avert, 2016). Supporters of VT also argue that it is a method for prevention of teenage pregnancy (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011).

Detention of sexually assaulted girls is also one of the objectives of VT. The objectives of VT present the social issues that SA aims to address. There has in increase on the number of reported rapes since the practice of virginity testing was revived (Mhlongo, 2009).

There is a critical need to address the reasons why women under the age of twenty in South African contexts are eight times more likely than their male counterparts to contract HIV (MacEntee, 2016). In this regard, Thorpe (2016) argues that:

This campaign contributes to stigma around HIV. It does not encourage safe sex, or the use of protection. Instead, it encourages a climate of silence around sexual activity, for fear of being “caught” or labelled as impure. It effectively silences conversation around safe sex, consent, and importantly around HIV medication and treatment. Silence around HIV is the opposite of what we need in terms of healthcare policy, particularly in a municipality with such high HIV prevalence.

The belief that virgins are free from HIV discourages the use of condoms during the sexual intercourse (Mhlongo, 2009). In response against these factors, VT advocates argue that VT prevents pregnancy and curb HIV for only those who participate in the practice (Mhlongo, 2009).

3.8 Summary

The advocates of the cultural practice of VT seem to be updating its objectives to fit and/or answer current social issues. In ancient times, its objective was to ensure chastity before marriage (Thornberry, 2015). During its revival the objectives were updated to include a strategy to curb teenage pregnancy, reduce the HIV/AIDS rates and a tool for detecting sexually assaulted girls (Mhlongo, 2009; Kassin & Mahery, 2009; de Robillard, 2011). Contemporarily, it is viewed as a strategy for WE (Khoza, 2016).

Notwithstanding such attempts, VT continuously faces opposition from the rights’ and feminists’ viewpoints. It can be said that the cultural practice of VT presents a dichotomous viewpoint in its objectives. This may be because some of the culturally accepted habits perpetuate the very social ills that culture claims to address. For instance, VT’s views against condom use. Igugu Lama Africa’s (cited Leclerc-Madlala (2001:411) letter records that ‘I don’t believe in Western civilization and culture as they say we must use condoms and contraceptives, which promotes adultery’. Moreover, it

can be noted that the cultural practice of VT is silent on the issue of girls who are born with HIV. Many children in South Africa were born with HIV following poor public health policy around the provision of anti-retroviral to pregnant women in the past (Thorpe, 2016). Virginity testing assumes that HIV is contracted only through sexual intercourse, thus, can be prevented through abstaining from sexual activities.

It must be noted that the South African state has attempted to regulate the sexual behaviour of female students on other occasions. For example, female students with state bursaries to study pharmacy and ultrasonography in India were required to have a contraceptive implant (Ngubane, 2014; Mlambo, 2014, Abbas, 2014). In this regard, the Health Member of the Executive Council, Dhlomo suggested that the young women who were granted the bursary were to be given a contraceptive implant that will prevent them from falling pregnant for up to three years (Ngubane, 2014; Mlambo, 2014, Abbas, 2014).

A media outcry also followed the so-called 'pregnancy scandal' caused by South African medical students falling pregnant whilst studying in Cuba, with resultant pressure from the health department for these students to use contraception. Therefore, the reason behind the implant was to avoid a repeat of the Cuban pregnancy scandal where four students who were sent to Cuba for medical training had returned pregnant (Mlambo, 2014). Similarly to MBS, this was also opposed as infringing on the human rights of the female students (Haysom cited in Abbas, 2014).

These attempts by government to control the sexuality and fertility of female students through bursaries was ostensibly based on 'financial' implications of falling pregnant for the state. The UDM bursaries on the other hand were related to promoting culturally 'appropriate' ways to maintain virginity. All these attempts by government to subject female students to means of sexuality or fertility regulation could be considered unwarranted interference with the privacy and sexual reproductive rights and agency of women.

The virginity testing debate in SA has not considered the impact that virginity testing has on 'outing' intersex and transsexual persons. Virginity testing of intersex and

transsexual persons risks their shaming and abuse, (Boynton (2015)) and in SA, a country with high levels of hate crimes against LGBTIQ persons, also violence and death. Their agency is not considered.

CHAPTER FOUR

THE REGULATION OF THE CHILDREN'S ACT ON VIRGINITY TESTING

4.1 Introduction

The cultural practice of virginity testing (VT) is presented with divergent views in literature and media. This includes the human rights' views against the practice as well as the traditionalists' views that support it. The former presents reasons that VT is discriminatory, unhygienic and violating human rights of privacy and dignity *inter alia* (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016), whilst the latter advocates for it on the bases that VT curbs teenage pregnancy, detect sexually assaulted girls and prevents HIV/AIDS among other factors (Mhlongo, 2009; Leclerc-Madlala, 2002; Kassan & Mahery, cited in Boezaart, 2009). The traditionalists' value for VT has been shown through 'awarding' ceremonies such as *umemulo* and annual reed dance for girls and/or young women who can maintain their virginity. The Maidens Bursary Scheme (MBS) can be noted as one of the 'rewards' to young women for keeping themselves 'pure' while empowering them educationally.

On the whole, the continued legitimacy of this practice is questionable on the basis of the possibility of surgical restoration of virginity (hymenoplasty) and the capitulation of the UThukela District Municipality (UDM) to the demand of the CGE that it remove virginity proof as a requirement for MBS.

What has not yet been considered is the impact of the regulation of the Children's Act 38 of 2005 (Children's Act) - 'do's and don'ts' - in relation to practising VT (section 12). Whilst this legislation relates only to children (girls under 18 years of age) and not adult women, it is nonetheless instructive. On this basis, this chapter answers the sub-question: How does the South African Children's Act deal with VT and which arguments are favoured by the regulation of VT in the Act? This will be answered by engaging in the discussion under the following headings: VT's regulation in the Children's Act, the

link between the regulation and the arguments against VT and link between the regulation and the arguments for VT.

4.2 Virginitly Testing's regulations in the Children's Act

South Africa (SA) is in signatory with a number of international and regional legal frameworks which require state parties to take measures to ensure the abolishment of harmful cultural practices (HCPs) (art 21 of the ACRWC; art 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; art 24(3) of the CRC; arts 2(f) and 5(a) of CEDAW). In a similar articulation, these legal frameworks demand states parties to take all effective and appropriate measures, including legislation, with a view to abolishing harmful traditional practices.

The South African Constitution (the Constitution) makes provisions in relation to traditional practices. As stated in Chapter 2, section 3.1 of this dissertation, the Constitution provides for the right to culture (section 15(3), 30 & 31) and recognises traditional leadership (section 211 & 212). The Constitution further provides that the rights in section 31(1); i.e. right to enjoy culture; may not be practiced in a manner inconsistent with the Bill of Rights. However, it is silent on harmful social, cultural and religious practices in the context of children's rights, specifically. Accordingly, reference to 'everyone' in the Constitution's framing of the right to culture would include children too.

The Children's Act is one of the responses to international law demands. During the enactment of the Children's Act, arguments that categorises VT as one of the HCPs were put forward. According to Mswela (2009:186/360) 'parliamentary and public hearings responding to the draft of the Children's Bill were extremely critical of VT as an example of a HCP'. However, the arguments for or against VT were both presented. In this regard, the South African Law Reform Commission (SALRC) (2002) and CGE Consultative Conference on Virginitly Testing (2000) *inter alia* presented arguments that were put forward during the review of the Child Care Act 74 of 1983 (hereafter referred

as 'Child Care Act'). Similar arguments for and against VT has been discussed in this dissertation are also notable from the discussions by the SALRC and CGE.

By and large, as noted in chapter two of this dissertation, it seems that more harm is done in the process of VT than good but the practice persists in SA. In this regard, the CGE's recommendations during the review of Child Care Act favoured a ban of VT in SA. However, 'several respondents cautioned that religious and customary practices deserve sensitive treatment and said that these practices and laws should be acknowledged' (SALRC, 2002:28). Therefore, in regulating section 12 of the Children's Act the legislature accommodated both these views in relation to VT. In this regard, Moodley (2008:73) asserts that section 12 of the Children's Act seeks to compromise between two competing rights, i.e. the rights of the child and cultural rights. Hence, this suggest a deliberate choice to regulate VT in the Children's Act despite arguments against it.

Similarly, the MBS also faced critique and support from diverging perspectives as discussed in previous chapters of this dissertation – chapter 2 and chapter 3. The Children's Act, section 12 regulates the acceptable manner of practising VT as an underlying tool for MBS. However, it can be noted that the Children's Act permits the practice of VT for children over the age of 16 on certain conditions. This implies that VT for young women who participated in MBS may beis regulated on a similar basis as those under the Children's Act (certain conditions) which are discussed in details below.

4.3 Conditions for Conducting Virginity Testing on a Child

The first provision that the Children's Act makes in relation to cultural practises is that 'every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being' (section 12(1)). In this regard, it can be said that the term 'well-being' involves the holistic wellness of a child. Maluleke (2012) defines well-being as a term that describes the condition of an individual which encompasses economic, psychological, emotional, social, spiritual or medical state inter alia. In this regard, it can be said that this provision is open to any interpretation. Thus

any culture that threatens the well-being of a child may not be performed. This may mean that if the practice is not harmful then the child can be subjected to it. The first step that the Children's Act therefore takes is acknowledging the child's right not to be subjected to social, cultural and religious practices (section 12(1)).

The Children's Act discusses specific cultural practices. This include child marriages (Section 12(2)(a) and (b)), circumcision of female children (female genital mutilation) (section 12(3)), VT (section 12(4) to (7) and male circumcision (section 12(8) to (9)). However, this portion of the dissertation analyses the provision of VT in the Children's Act for the purpose of the discussion and objectives of this study.

In relation to VT, the Children's Act firstly prohibits VT of children under the age of 16 (section 12(4)) and then makes provisions to allow the cultural practice of VT for children older than 16 (section 12(5)). This implies that the legislature views children below the age of 16 as unable to make an informed decision as to whether she wants to participate in VT. It also means that, children of the age of 16 and above can make a decision as to whether or not to undergo VT. However, there are conditions that the legislature presents in allowing the cultural practice of VT.

4.3.1 **Consent**

The first condition for a child to undergo VT under the Children's Act is that the child has given consent to the testing in a prescribed manner (section 12(5)(a)). This applies to children who are 16 years of age and older. The underlying concepts in this regard, are 'consent' and the 'prescribed manner'.

Consent refers to giving permission for something to happen. This means that the child must give permission for a VT to be performed on him or her. In interpreting this provision, Davel and Skelton (2013) stress the regulation that 'no VT may be performed on a child unless, the consent and required proof of age have been submitted to the person conducting the test' (regulation (3)(a)(i)). Also, that the child's consent must be in writing and on the prescribed form (Davel and Skelton, 2013). In this regard, it can be argued that this provision does not take into account that developmental stages of

children differs from child to child. For instance, the legislature realised this with the provision on consent for male circumcision. In this regard, the Children's Act provides that the child may refuse to undergo male circumcision 'taking into consideration the child's age, maturity and stage of development' (section 12(10)).

To elaborate, the Children's Act provides for the right of refusal for male circumcision, but not for VT. The Children's Act provides for the prohibition of male circumcision of male children under the age of 16 except if circumcision is for medical and religious purposes (section 12(8)(a) and (b)). The consent in this regard must be issued by both parents or guardians of the male child (Davel and Skelton, 2013, regulation 6(3)(a)). In this vein, VT is totally prohibited under the age of 16 with no exceptions for religious or medical reasons. A noteworthy aspect is that male children who are under 16 years of age may refuse circumcision, for example for religious or medical purposes (Davel and Skelton, 2013). This poses a dichotomised view because the consent of children is not required when they are below the age of 16.

In comparison of right to refuse to participate in a cultural practice for male circumcision versus VT, the right of refusal is not provided for openly in relation to VT. However, on this issue, one may argue that the provision of the right to refuse in relation to VT is incorporated within the requirement of 'consent' for the child to undergo VT. This implies that the right to refuse can be realised if the child (16 years of age and above) does not give consent to undergo VT. Hence, this right to refuse is extended to boy children in line with their age, maturity and development as also provided for in section 12(10) of the Children's Act (Davel and Skelton, 2013). Thus, ethical implications for circumcision of boy children are built into the regulation of circumcision even under the age of 16. Therefore, there seems to be an unequal considerations for male circumcision and VT in relation to the right to consent and refusing participation in cultural practice in the Children's Act. This may be because male circumcision may have a medical utility, while VT does not.

4.3.2 Prescribed manner

Moreover, another condition for the practice of VT for children above the age of 16 is the prescribed manner (section 12(5)(c)). The term 'prescribed manner' is described by Davel and Skelton to include healthy and safety precautions to be taken into consideration when one conducts a virginity test to a child. These includes privacy, hygiene and safety measures. In describing VT's Children's Act provision in relation to the prescribed manner, Davel and Skelton (2013) assert that each child should be tested individually and in private (regulation 1(a)). This can be argued to ensure the protection of the child's right to privacy (section 31(1)) and dignity (section 10) as provided for by the Constitution. The right to dignity is the acknowledgement of the intrinsic worth of human beings (Kassan & Mahery, 2009).

Prescribed manner is interpreted to include the cleanliness measures to be taken into account when conducting a virginity test on a child. Davel and Skelton (2013) stress that the VT is to be conducted in a hygienic manner (regulation 1(b)). Hygienic manner means using a separate pair of sterile surgical gloves for each test (regulation 1(b)(i)) and disposal of such gloves after each test in accordance with medical standards for the disposal of the surgical gloves (regulation 1(b)(ii), Davel and Skelton, 2013).

Another perspective for prescribed manner is ensuring health precautions by someone who conducts a virginity test on a child. In this regard, Davel and Skelton (2013) explain that the person conducting the test on child must avoid direct blood contact with any bodily fluid between her or him and the child undergoing VT (regulation 1 (b)(iv)).

Prescribed manner is hence explained in terms of protecting the children's human rights. In this regard, Davel and Skelton (2013) assert that a person conducting a test must ensure the least invasive means of testing for virginity in order to give regard to the child's right to bodily integrity (regulation 1(c)). Thus, VT may be performed on a girl child only by a female person and a male person only on a boy child (regulation 3(2)).

4.3.3 **Proper Counselling**

The second condition is that the child needs to undergo proper counselling prior to undergoing VT (section 12(5)(b)). The legislature specifies in the regulations that a parent, guardian, caregiver or social service professional should take the responsibility of counselling the child (regulation 4(3(a)(ii))). Hence, a parent who sees no harm in the practice of a certain cultural practice may only present what the community labels as the positive aspects of a certain culture. This is emphasised by Winter et al (2002) when stating that children are socialised in a manner that they will accept the culture even when they grow up.

4.3.4 **Disclosure of Virginity Testing Results**

Another condition is that the results of a virginity test may not be disclosed without the consent of the child (Children's Act, section 6). As discussed in section 4.3.1 of this chapter, consent means giving permission for something to happen. The condition of consent also applies with the release of the child's results after VT was conducted on him or her. Therefore, in this regard, written consent is required for the disclosure of the results of VT of a child.

4.3.5 **Marking of the body of the Child**

The last condition is that the body of a child who has undergone VT may not be marked (Children's Act, section 7). In this regard, one may argue that the marking of the body of the child who has undergone VT is the only part of the cultural practice of VT that the legislature forbids. However, the use of the term 'may' can be said to mean that the body of the child can be permitted on certain conditions which the legislature does not state openly. In this concern, one may state that if the body of the child is marked after the VT, the consent from the child is required. This may be because the mark placed on the child's forehead corresponds with disclosing his or her VT results. In this regard, Moodley, (2008) argues that if the girl passed the virginity test - a white clay dot is placed on her forehead whilst a red clay dot is placed on her forehead if she failed the test.

In order to safeguard the practice of these regulations in the communities where VT is practised, the Children’s Act makes a provision of form 1 (see figure 1 below).

FORM 1

**CONSENT TO A VIRGINITY TEST BY A CHILD
(Regulation 3(1))**

[SECTION 12(5) OF THE CHILDREN’S ACT 38 OF 2005]

Part 1: Particulars of child and of person performing virginity test

[Child to be aged 16 years or older]

Full name of child	
Date of Birth/ID number	
Residential address of child	
Telephone contact details:	
Cell phone number	
Age of child (16 or older)*	

* Proof of age to be attached

Particulars of person administering virginity test

Name	
ID No (where applicable)	
Residential Address	
Telephone contact details	
Cell phone number	

Part 2: Pre-test counseling, and acquisition of voluntary and informed consent

I confirm that the child to undergo the virginity test has received proper counseling about the risks, benefits and social implications of a virginity test.

I confirm that I have received sufficient proof that the child to undergo virginity test is 16 years or older.

I have explained to the child consenting to treatment the following in a language that is understandable to the child: -

- The nature of the virginity test and method to be followed
- Any risks associated with a virginity test
- The social implications of virginity test
- Any other implications or possible consequences of a virginity test
- The confidential nature of the results of a virginity test,
- The voluntary nature of the test

I have given the child an opportunity to ask questions relating to the above.

----- Signature

of person performing the virginity test

Date:

Place:

REVERSE SIDE OF FORM 1

Part 3. Consent by child

I, (Insert child's name)

- understand that a virginity test is going to be performed on me, and that I am voluntarily undergoing this test

- understand the risks and possible consequences of a virginity test that have been explained to me

- confirm that I have been given an opportunity to ask questions about a virginity test and the results of such a test

- consent to a virginity test but understand that I may at any time before the procedure withdraw my consent

I understand that the results of the virginity test will be confidential unless I give my consent for the results to be disclosed.

I believe that I have sufficient information to give this informed consent.

Signature of child

Date _____

Place _____

Signature of witness

Date _____

Place _____

Figure 1: Source – Children's Act, Annexure A

This section of the chapter has discussed the conditions required for one to perform a virginity test to a child. Such conditions include the consent, the prescribed manner, and proper counselling, among others. The Children's Act, annexure A's form 1 outlines the requirements for conducting VT on a child in a formulaic way. The first part of the figure above is the requirements of the particulars of the child and a person conducting the test. This is in line with the provision that VT can be performed on children who are 16 years of age and older. This implies that the first part of form 1 is to ensure that the child whom VT is conducted on is of age to undergo it.

The second part of form 1 is about the agreement to have provided proper counselling to the child by the person conducting the test. The third part of form 1 is the consent by the child to undergo VT and agreeing that proper counselling was given to him or her.

This also makes a provision of a signature by a witness. Therefore, the consent to undergo VT by a child who is older than 16 must be in a form identical to Figure 1 above. The signed consent of the child and assent of a parent or guardian must be made on Form 1. A child who is older than 16 of age and who has a disability which renders her or him incapable of making a decision regarding VT cannot be subjected to VT (Davel and Skelton, 2013).

Therefore, the conditions discussed in this section are significant during the process of VT of children. In addition to these conditions, the Children's Act makes provisions for the consequences of not adhering to some of the conditions discussed in this section. In this regard, the Children's Act (section 305 (1)) provides that 'a person is guilty of an offence if that person (a) commits an act in contravention of the prohibition set out in section 12(2), (3), (4), (6), (7), or (8)'. The applicable sections in relation to VT in this case are sections 4, 6 and 7. Section 4 prohibits VT of children under the age of 16, section 6 prohibits the disclosing of the results of a VT without the child's consent and section 7 forbids the marking of the body of the child who has undergone VT. Hence, a person found guilty is '...liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment' (Children's Act, section 305(8)).

4.4 Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002(PEPUDA) and its relevance in Virginitiy Testing

The Children's Act as discussed in the section above provides a methodical understanding of how South African law regulates terms for the practice of VT. The underlying factor from the Children's Act is that it provides legislative permission for the practice of VT for children who are 16 years of age and older. It can be noted that the preceding discussion of this dissertation is centred around the MBS which was offered by the UDM for girls and/or young women who can prove that they are virgins and maintain their virginities for the duration of the study at a tertiary level (Lawyers for Human Rights, 2016; de Vos, 2016; CGE Investigatory report, 2016). Clearly, young women who had to provide proof of VT as 'virgins' to access MBS cannot be

categorised as children. This is because in South Africa a child, whether male or female, becomes a major upon reaching the age of 18 years (Children's Act). Thus, as briefly discussed in chapter 3, the legislative provision which can be applied in this regard is PEPUDA. Therefore, this section of the chapter discusses the provisions of PEPUDA in relation to the practice of VT by the young women who have reached the age of majority.

A child's consent is a decisive factor for her to undergo VT. In relation to women who had to provide proof as 'virgins' in application for MBS, it can be argued that the age to consent for VT is not an issue since the minimum age of consent is 16. However, it is discussed in chapter 3 of this dissertation that the issue of concern with regards to consent for VT when there is financial benefit attached, VT is argued as coercion and not by consent (Dlamini, 2016). In addition to this argument the international law experts have indicated that VT (in particular VT for the MBS) is coercive. In this regard, the United Nations Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa (2016) agrees with the concerns raised by CEDAW in relation to MBS on whether it is consent or coercion when women access the bursary based on them passing virginity tests (para 25). The Concluding observations of the CEDAW (2011: para 22) criticises the provision of VT in the Children's Act.

Another concern by CEDAW is that there are reports that the practice of VT of girls as young as 3 years old is practised in SA. This is argued to expose girls to risks of sexual violence and undermining physical and mental integrity of girls (CEDAW, 2011). This suggests that VT of adult women (above 18 years) for the purpose of obtaining financial benefit may not be conducted regardless of whether she they give consent or not.

Another factor that discourages the issue of consent in relation to the practice of VT is that VT is argued as inauthentic from a medical point of view. This is discussed in chapter 2, para 4.2 of this dissertation that while the traditionalists claim that the presence of a hymen is an identifying factor for one to be classified as a virgin; health professionals claim that the hymen is not a good indicator of sexual virginity because some women are born without a hymen; the hymen can be easily ruptured during

physical activities and can be stretched open by the use of tampons (Le Roux, 2006 cited in Mhlongo, 2009; Mojapelo, 2016; Moaddab et al, 2016; Behrens, 2016).

The World Health Organisation's (hereafter referred as WHO) (2014) view is that VT is not a scientifically valid test. The WHO (2014) also argues that 'any physical exam should be conducted only with informed consent and focused on determining the nature of medical care required'. This view is supported by a review of research on the lack of medical utility of VT conducted by Olson & García-Moreno (2017) and the argument that virginity is not scientifically proven. Accordingly, consenting to a procedure that has no scientific validity, whether as a young adult (16 to 18 years of age); or an adult is fraught. This may mean that women may not consent to VT. However, this poses an ethical dilemma because VT is lawful for children over 16 whilst there is no regulation for adults required and/or provided.

An aspect that bears mentioning is the right of women (and all person) to information. In relation to sexuality (and the claims of virginity testing), everyone should have

access to scientifically accurate and understandable information related to sexuality, sexual health, and sexual rights through diverse sources. Such information should not be arbitrarily censored, withheld, or intentionally misrepresented (clause 9 of the World Association for Sexual Health Declaration of Sexual Rights cited in Kismödi et al (2017) 3).

Virginity testing is not scientifically defensible and women are entitled to this information. Further, misrepresenting virginity testing as accurate violates the right of women to information.

PEPUDA makes provisions that deal with doing away with all forms of discrimination, which include race, gender, sex, colour, sexual orientation, age, and disability inter alia (section 1(a)). Section 1 of PEPUDA defines discrimination as:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

The prohibited grounds in this regard include any aspect where discrimination can occur. This includes sex, gender, race, sexual orientation and pregnancy inter alia. This implies that in relation to VT and MBS, discrimination occurs when the virginity proof requirement is not required for males to access the bursary. It also occurs when people from races that do not practice VT and non-virgins are excluded from applying for the bursary. This implies that on the basis of this definition VT as performed on young women alone may not be executed.

Moreover, PEPUDA (section, 1(a)) includes 'pregnancy' as one of the factors that individuals are not to be discriminated against. Hence, MBS's objective is that the recipients must maintain their virginity for the duration of their study. This means that the UDM prohibits women from benefiting from a bursary after falling pregnant. Falling pregnant while on receipt of MBS would mean losing the bursary. This constitutes discrimination according to PEPUDA. Thus, this provision discourages the idea of MBS and the practice of VT.

PEPUDA makes a provision that links the traditional and customary practices with unfair discrimination. In this regard, section 8 of PEPUDA terms unfair discrimination as:

any practice, including traditional, customary or religious practice which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl child;

This may mean that PEPUDA classifies VT as an unfair discrimination. This is because VT is practiced only on women and girls. Hence, the MBS also constitute unfair discrimination according to PEPUDA as the requirement of virginity proof is required only on young women in order to access the bursary.

In summary, the Children's Act, section 12, ostensibly seeks a compromise between the rights of the child and cultural rights (Moodley, 2008). This is because the Children's Act prohibits the practice of VT for children under the age of 16 and permits it for children older than 16 years of age under certain conditions. The conditions of the Children's Act, form 1's criteria and the regulations are significant factors for the protection of the children's human rights during the practice of VT. The transition embedded in the

regulation of VT from the acceptable age for children (16 years up to 18 years) and then young women who have reached the age of majority (18 years and above) is problematic. This is because the Children's Act provides clear guidelines for the practice of VT while in PEPUDA the practice of VT can be argued to be incorporated among other traditional practices. This implies that PEPUDA is open to interpretation and hence, justifications that VT does not constitute discrimination.

4.5 Link between the regulations and arguments against virginity testing

It is argued in the above section that the Children's Act presents a compromise between the two divergent views on VT i.e. the rights of children and cultural rights. This section therefore discusses the provision of the Children's Act that is linked with the argument that calls for ban of the practice.

The arguments opposing the practice of VT in SA has been discussed in detail in chapter 2 of this dissertation. Briefly, some of these arguments oppose VT on the bases that it is the violation of constitutional rights provided for in the Bill of Rights i.e. equality, dignity, freedom and security and privacy (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016); ineffective, unhygienic and violation of human rights (Taylor, 2004 cited in Mhlongo, 2009) and exert control over women and their sexuality (Mhlongo, 2009; Leclerc-Madlala, 2001). Such arguments are raised by the human rights activists such as the Commission on Gender Equality (CGE) and South African Human Rights Commission (SAHRC) to motivate for the banning of VT in SA.

On this basis, it can be noted that the Children's Act presents two views of VT. On one hand it prohibits the practice of VT for children under the age of 16 (section 12(4)) and on the other hand provides that VT of children who are 16 and older can be practiced under certain conditions (section 12(5) to (7)) discussed in section 2.1 of this chapter. One may argue that the argument that rejects the practice of VT for children under the age of 16 is in line with the human rights activists who argue against VT. Also, the sanctions of individuals who violate some conditions for practising VT can be argued to favour the human rights view (section 305(8)).

4.6 Link between the regulations and arguments in favour of virginity testing

The Children's Act also ascribes to the perspective that favours the practice of VT (of girl children over 16 years of age). Some of the arguments support VT on justifications that it is a constitutional right to practice the culture of choice (section 15(3), 30 & 31); curbs the further spread of HIV infection (Mhlongo, 2009; Kassan & Mahery, 2009; de Robillard, 2011; Durojaye, 2016; Wickstaw, 2010); combats certain social pandemics and maintains cultural identity (Moodley, 2008) *inter alia*. Such arguments suggest the need for the practice of VT in South Africa.

On this basis, it can be argued that the argument that favours this view in the Children's Act is section 12(5) to (7). In this regard, section 12(5) provides that VT of children who are 16 years of age and older may be performed. This is accompanied by subsections and sections that present conditions in which VT may be performed. These conditions are consent (section 12(5)(a)), counselling (section 12(5)(b)), hygiene and safety (section 12(5)(c)) and privacy (section 12 (6) and (7)).

4.7 Summary

This chapter's main objective was to discuss the Children's Act regulations on VT and to discuss if any of these regulations favour the arguments for and against VT. The fundamental point in this chapter is that the Children's Act presents a compromise between the arguments in favour of VT and arguments against it. Hence, VT of children under the age of 16 is prohibited whilst VT for children who are 16 years of age and older may be performed. This suggests that a 16-year-old child has the capacity to consent to the process of VT. The regulations and form 1 form an integral part of the Children's Act's section 12 as it gives guidelines and details on the concepts that may not be clear in the statute. A challenge lies in ensuring that those who practice VT follow the procedure as discussed in this chapter. Also that section 305's provision about punishing non-adherent individuals is enforced. Another vital point in this chapter is that young women who participated in MBS were of age to consent for VT since the

minimum age of consent is 16. However, the PEPUDA's definition for discrimination and unfair discrimination suggests that VT of women and MBS should not occur.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.1 Recommendations

Different spheres of intervention are involved in relation to traditional and/ or cultural practices: the international, national, provincial, community (local), family and personal levels. For instance, the international instruments such as the ACRWC, CRC & CEDAW, makes provisions concerning cultural practices and calls for prohibition of harmful ones. National legislation such as the Children's Act and PEPUA has been ratified nationally as a response to international frameworks' demands. These make provisions regarding cultural practices to regulate safe measures in practising culture and abolishing the harmful ones at a national level.

This dissertation is based on the case of the UThukela District Municipality (UDM) which offered the Maidens' Bursary Scheme (MBS) to young women who are virgins in the district on the condition that they remain virgins for the duration of their qualifications at tertiary institutions. Therefore, the focus of this study is on the cultural practice of virginity testing (VT) as a tool for MBS. The divergent views regarding VT caused apparent conflict between human rights and cultural rights. This suggests the need for further intervention regarding VT by the abovementioned spheres.

This section of the chapter presents the possible recommendations in relation to the cultural practice of VT. This is discussed in accordance to the different levels of intervention.

5.1.1 International level

The international level's intervention in relation to cultural practices is notable through conventions, charters and covenants and various committees' general comments, concluding observations and so on. CEDAW, the CRC and ACRWC for example,

demand signatory countries to abolish harmful cultural practices (HCPs). Gaffney-Rhys (2011) asserts that international law plays a significant role in the campaign against the HCPs because it emphasises the gravity of the issues concerned. These international treaties also have clauses that require signatory states to submit periodic reports at intervals specified in the relevant treaty regarding the changes made as a response to the demands provided. For instance, the CRC (article 44(1)) provides that:

States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights.

In this regard, at the twenty-ninth meeting of Chairs of the human rights treaty bodies (2017), it was reported that South Africa is behind schedule and/or late submission in relation to submitting reports timeously to the human rights treaties. Late submission of reports negatively affect the ability of the Committee to intervene timeously. Hence, I would submit that there is a need for a national monitor who will ensure that the relevant departments responsible for drafting reports do so timeously. This is effectively the role of the South African Human Rights Commission (SAHRC) as the national human rights institution (NHRI) responsible for monitoring human rights abuses and also monitoring compliance of state departments with relevant international and regional law norms in this regard.

There is an overlap with the mandate of the Commission for Gender Equality (CGE), an institution promoting democracy under the Constitution as well. However the CGE is not an NHRI and thus not of the same international standing as the SAHRC. That notwithstanding, its constitutional mandate requires the CGE to promote respect for the protection, development and attainment of gender equality (section 187 of the Constitution). This mandate allows it to monitor and evaluate measures such as legislative, policies and practices of the state, including not only customary law and practices, but also local government policies and practices. The CGE can further also conduct public awareness and education on particular gender equality topics. With the

ability to accept complaints and conduct investigations, as well as the necessary powers of subpoena and litigation, it is a force to be reckoned with.

During the media outrage over the MBS, the CGE intervened, finding through its investigation that there are divergent views about MBS. The CGE recommended that the MBS be removed from the bursary category and its policies be amended. The CGE recommended that the councillors in the UDM should receive training on gender equality including domestic legislation, international and regional instruments to which SA is in signatory (CGE Investigatory Report, 2016). These can be argued as impactful recommendations. Councillors in the municipality are not permanent government employees and therefore when they are not re-elected by their respective party members as representatives in local government such institutional knowledge gained from appropriate training may be lost. I would further submit that training on gender equality should be part of an induction process during the 'hiring' stage of members of the government organisations. This will promote service rendering while keeping in mind the protection of human rights.

5.1.2 **National and Local levels**

Gaffney-Rhys (2011) states that the international instruments have had a positive influence on the implementation of policies to ban harmful cultural practices at the national levels. South Africa has taken legislative measures in response to its obligations under human rights treaties specifically on cultural practices. Some of these has been discussed in this dissertation. Respectively, the Children's Act and PEPUA's provisions regarding the cultural practice of virginity testing has been discussed. For example, VT is classified as one of the HCPs by PEPUA. One may argue that one of the reasons for the persistence of HCPs is that culture is viewed by the society as 'natural', 'the only way' etcetera (Ras-Work, 2006) by the society that practices it. This applies to the MBS as the bursary advocates did not identify any harm caused by it to society.

For this reason, one may recommend a strong emphasis on the implementation of consciousness-raising (awareness) at a national level. Murove (2010) argues that consciousness-raising interventions should commence by highlighting positive aspects of people's cultural practices as entry points for engaging with cultural practices that may be harmful. This may also involve encouraging a coordinated approach among institutions, agencies, and organisations to introduce subjects such as gender equality in schools and universities (Ras-Work, 2006). This coordinated approach in the education sector is of course ironic considering that the MBS was aimed at providing access to education for the recipients of the bursaries, but in a way that arguably discriminated against them based on their gender/sex.

Such interventions can also be extended to community levels where consciousness raising campaigns can be implemented. Consequently, there are many positive cultural practices that protect children and women (Ras-Work, 2006). Therefore, tasked individuals for campaigns may use the positive aspects of culture when engaging individuals and groups as an entry point which will provide the necessary space when they present the harms that some of the cultural practices cause in the society.

5.2 Conclusion

The cultural practice of VT is ostensibly updated for contemporary times by its advocates to meet up with current societal concerns. Hence, the original purpose of VT was to ensure chastity before marriage but now is aimed, ostensibly, at curbing social ills and for the purpose of women empowerment. The purpose of this study was to explore whether virginity testing can be deemed a measure that empowers women.

With the MBS, the condition for the continuance of a bursary was that the recipients maintain their virginities for the duration of their pursuit qualifications. Some of the findings of this study portray two divergent views. On the one hand:

- VT is portrayed as a tool for women empowerment when a woman who cannot afford to pay tertiary fees is awarded with monetary assistance to do so; and

- VT is also argued to constitute women empowerment when women and the community are actively involved in suggesting and implementing possible solutions to existing social problems such as unwanted pregnancies for example.

On the other hand:

- VT as women empowerment is discounted on the basis that the awarding of MBS is a coercive method for young women to undergo VT;
- VT as a condition for MBS is discriminatory as the burden falls on women, poor women at that, to maintain their virginity and not on men;
- the definition of 'virginity' as the presence of a hymen is medically unproven; also
- Virginity can be 'faked' through *inter alia* insertion of objects similar to re-virginisation through hymenoplasty.

Another fundamental point from the study is that the UDM accepted the recommendations made by the CGE on MBS. This means that young women who had already received the bursary were no longer subjected to regular virginity tests to maintain it. Therefore, this study concludes that offering financial assistance to young women to further their studies with the intention to encourage them to maintain their status as virgins cannot be said to empower women.

The South African Constitution, protects cultural diversity, and as such persons belonging to a cultural community may not be denied the rights to enjoy and practice their culture. Pertinently, though, this right may not be exercised in a manner inconsistent with any provision of the Bill of Rights. The rights of an individual to equality, dignity, privacy and freedom and security of the person take precedence over cultural rights. State departments must tread carefully when seeking to impose 'incentives' for maintaining social norms that have a discriminatory impact (even unintended) on the very beneficiaries of the measure.

Shuhmann (2010: 96-97) asks:

How do we deal with the hijacking of women's empowerment discourse (Gqola, 2006) by conservative groups and agents of a backlash within the ruling [party]? In the name of representing gender equality, national uplifting and an anticolonial attitude which claims to strengthen non-Western traditions irrespective of their patriarchal inequalities, they re-enforce a narrow understanding of gender relations and the diversity within femininities and masculinities of all shades.

Traditionalists in the MBS debacle seem to wish to hark back to the 'prize' of virginity that may have existed in pre-colonial times. The reality is that virginity, and its place within gender relations, does not play the same role in women's lives (whether gender conforming or not). Heteronormative and patriarchal depictions of sexuality goes against the gender equality that the constitutional democracy ascribes to. The constitutional order is premised on a number of foundational values, one which is non-sexism and non-racism (section 1(b) of the Constitution). Cloaking VT as a form of WE and as such a tool to obtain educational and employment advantages has backfired for the UDM's MBS. However, the compromise in the Children's Act regulation of VT remains and should be resolved by parliament as this position is not supported by international and regional law.

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