

# The Constitutionality of *Ukuhlola*: A South African Cultural Practice.

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**ABSTRACT** The South African Human Rights Commission (SAHRC) as one of the chapter 9 state institutions supporting Constitutional democracy is mandated amongst others to promote respect for human rights and cultural practice. It also promotes the protection, development and attainment of human rights. It is within this mandate that the Human Rights Commission has observed the debates surrounding the prohibition of *Ukuhlola* (virginity testing) in the Children's Bill. *Ukuhlola* has been historically regarded as a necessary social tool to bring pride amongst virgin girls, the parents and community as a whole. *Ukuhlola* is still practiced in some of the communities in South Africa, in particular *Nguni* communities. *Ukuhlola* culture originated from Zulu culture and is prevalent mostly in KwaZulu-Natal Province. The motive was to receive the full *lobola* (the eleventh cow). *Ukuhlola* practice faded out during the past century, but has made a come back in various areas of South Africa including Kwazulu-Natal in recent years. South Africa's Moral Regeneration Movement<sup>3</sup> has decided to urge the return of *ukuhlola* of teenage girls as a tool to fight against women abuse, teenage pregnancies and HIV& AIDS.

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## 1. Introduction

The Constitution<sup>4</sup> is the supreme law of our country and it is built on the basic principles such as the promotion of equality and protection of human dignity and freedom. The Bill of Rights outlines the rights of people which the Constitution seeks to promote and protect. The practice of *ukuhlola* affects various rights of young girls and women in our respected societies. It can be viewed as being a practice which has been given authority by the right to culture in section 31 of the Bill of Rights, and this would seemingly intensify its importance as practice. Section 30 of the Constitution<sup>5</sup> deals respectively with languages and culture while section 31 of the Constitution deals with protection of culture, religious and linguistic communities. Section 30 provides that everyone has the right to use the language and participate in the culture of their choice: however, no one exercising these rights may do so in a manner inconsistent with any provision of the Constitution.

The Children's Rights Act<sup>6</sup> preamble specifically provides that every child has the rights set out in section 28 of the Constitution. Children are one of the most vulnerable groups in our societies and it is the duty of parents, the family and the state to actually show care towards them and also ensure a better life and future for them. The Constitution recognizes the vulnerability of children and seeks to protect them by inserting children's rights under section 28 of Bill of Rights. The promulgation of children's rights in the Constitution therefore means that cultural, social and religious practices which harm children must be condemned at all cost.

## 2. Founding values of the Constitution

The Constitution of the Republic has it in good authority that children are entitled to right to dignity<sup>7</sup>, freedom of the person (bodily integrity)<sup>8</sup>, equality<sup>9</sup>, protection from abuse<sup>10</sup> and the privacy<sup>11</sup>. The Constitution further states that children have the right to practice their culture and religion. The Constitution specifically recognizes in the preamble that "South Africa belongs to all who live in it, united in our diversity" and protects the rights of individuals in groups to practice their culture or religion in section 31 of the Bill of

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<sup>4</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>5</sup> Constitution of the Republic of South Africa, Act 108 of 1996

<sup>6</sup> Children's Right Act 38 of 2005

<sup>7</sup> Section 10 of the Constitution

<sup>8</sup> Section 12 of the Constitution

<sup>9</sup> Section 9 of the Constitution

<sup>10</sup> Section 28 (1)(d) of the Constitution

<sup>11</sup> Section 14 of the Constitution

Rights, however, section 31 contains a provision that cultural and religion rights may not be exercised in a manner inconsistent with any right in the Bill of Rights.

The practice of *ukuhlola* is viewed to be primarily affecting various rights of girls and women in that it infringes the fundamental rights such as the right to equality and dignity. It could nullify claims regarding the practice as essential and constructive to the needs of those involved in it. Most of the rights contained in the Bill of Rights are not absolute and the Constitution does not make allowance for the limitation of rights if it is done in accordance with the limitations clause<sup>12</sup>. Section 36 provides the criteria to examine the justification for limiting certain rights and gives factor to consider when balancing right against each other.

The founding values of the Constitution includes amongst others, human dignity, the achievement of equality and non-sexism. The Commission on Gender Equality is not convinced that *ukuhlola* as it is currently practiced protects the values enriched in the Constitution. The *ukuhlola* practice is designed to promote good morals and decreases sexual activities prior to marriages, thereby being an HIV& AIDS prevention mechanism. This practice constitutes sexism in that it particularly dwells on sexuality of girl-children in the form of their virginity and says nothing about the sexuality of boy-children. The promotion of good morals and health approach to sexuality is in itself a good social value and ones which should be embraced and be accordingly promoted.

The challenge is for communities to promote these values in cultural ways that are in line with the constitutional values. Young girls, and not young boys, are subjected to an intrusive physical examination of their private parts by a traditional examiner to determine if they are virgins. Girls who are tested and then declared to be virgins are awarded with certificates in a public ceremony. The practice does not outline how girls who have been victims of rape, incest and sexual abuse are dealt with in this procedure. Taking into the recent alarming high levels of sexual violence in South Africa, at any testing ceremony there must be young girls who are survivors of disastrous acts. The act of publicly declaring that these young girls are not virgins potentially exposes what has happened to them. This raises serious concern about secondary strain and accusations of these young girls.<sup>13</sup>.

The former Chief Justice, Arthur Chaskalson, in his Third Bram Fischer Lecture, said:

“Freedom does not mean total freedom. In democratic society freedom can never be absolute. It must be exercised with due respect to the legitimate interests of

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<sup>12</sup> Section 36 of the Constitution, Act 108 of 1996

<sup>13</sup> Children’s Bill (B70-B2003) submission to the select committee on Social Services (NCOP). Harmful Social and Cultural practices

other members of the society, and the countervailing claims of other constitutional values”.

Section 36 of the Constitution sets out the manner in which rights contained in the Constitution may be limited. The Constitutional Court has already been called upon to make the difficult determination of balancing cultural and religious rights against other rights that are enshrined in the Bill of Rights. The balancing of cultural rights with other human rights will, for a long time to come, be an on-going challenge and debate in the post-apartheid.

## 2.1 The right to equality

The South African society is required to do more to eliminate the indirect discrimination. The effects of discrimination may continue indefinitely unless there is a commitment to eradicate it.

It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on going negative consequences, the continuation of which is not halted, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is justice denied.<sup>14</sup>

Since the *ukuhlola* only applies to woman, one can therefore argue that the practice appears to violate the rights to equality, it discriminates against gender. This practice unfairly places the duty of being sexually responsible solely on women. The majority of leaders opposing the ban of *ukuhlola* are male (traditional leaders). It may therefore be argued that, *ukuhlola* is an ancient culture aimed at proving male domination and the submission of women<sup>15</sup>. The South African Human Rights Commission (SAHRC) takes the position that the cultural practice of *ukuhlola* constitutes a violation of the right of the child an unfair discrimination<sup>16</sup>. According to the Commission on Gender Equality, the practice of *ukuhlola* extremely affects women as it intensify their vulnerability in society by exposing them to dangers such as rape and other forms of abuse<sup>17</sup>.

In the case of Pillay<sup>18</sup> section 9 of the Constitution was adopted in recognition that discrimination against people who are members of disfavored groups can

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<sup>14</sup> *National Coalition for Gay and Lesbian Equality v Minister of justice* 1999 (1) SA 6 (66): 1998 (12) BCLR 1517 (CC)

<sup>15</sup> Virginty testing and the children's Bill. Children's institute, *University of Cape Town* 11 October 2005. A discussion paper

<sup>16</sup> South African Human Rights Commission, Position paper: *virginty testing*, July 2005

<sup>17</sup> See Commission on Gender equality; Submission (on the children's Bill) to the South African parliamentary national assembly. *Portfolio committee on social development* ( 10 august 2010)

<sup>18</sup> *Pillay v Kwazulu-Natal MEC of Education* 2006 9 SA 363 (EC)

lead to patterns of group disadvantaged and harm. Such discrimination is unfair. It builds and entrenches inequality amongst different groups in the society. The drafters realized that it was necessary both to prescribe forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their result are the primary purpose of section 8 and in particular section (2), (3) and (4) of the Constitution.

## 2.2 The right to dignity

The right to dignity is accordingly violated because revealing an individual's private parts to be disrupted in an *ukuhlola* ceremony leads to stigmatization and mocking by other participants as well as other community members. The SAHRC agrees that the practice is undignified and argue that the girls' dignity is violated due to the fact that some strangers have to publicly invade their privacy in order to determine whether they are virgins or not<sup>19</sup>.

## 2.3 The right to freedom and security of the person

This right includes the right to security in and control over your body. The commission on Gender Equality argues that *ukuhlola* without the informed consent of the girl violates the rights of the girl<sup>20</sup>. The SAHRC finds the argument that *ukuhlola* is done voluntarily unacceptable in light of coercion by families and societies to undergo testing<sup>21</sup>. Even some political leaders encourage it, a mere refusal to participate in a test for virginity may lead to conclusion of being deflowered and this places pressure on the girls to take part in tests.

## 2.4 The right to privacy

The manner of virginity testing commonly entails a public inspection of the female's vagina and it violates the right to privacy. Those who fail to test are marked and it means that the results of the test are made public. According to the Commission on Gender Equality, disclosing the girls-child's virginity status to others without their informed consent is an invasion of their privacy.

## 2.5 The right to be protected against maltreatment, abuse, neglect and degradation

This right is infringed upon in light of the dangers surrounding *ukuhlola*. Being exposed as a virgin is dangerous considering the belief by some that sex with a virgin can

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<sup>19</sup> Children's Bill 9B70b-2003) Section 305 (6) & (7)

<sup>20</sup> Children's Bill 9B70B-2003) section 305

<sup>21</sup> Section 139 of (B-2003), the section 76 Bill. Smacking of children is very common in South Africa in all communities and has cultural, religious and social roots.

actually cure AIDS. Virgins are also victims of a commodity in the trade of child trafficking.

There are also reports of participants physically harming themselves so as to fool testers and pass the test<sup>22</sup>. Some girls resort to anal sex in order to pass the test<sup>23</sup>. The Commission on Gender Equality also argues that victims of sexual offences are known to suffer abandonment, rejection and violence on disclosing their identity<sup>24</sup>

### 3. International human rights law

South Africa is party to a number of international human rights treaties that protect the girl-child from discrimination and violation of human rights. The treaties require the state to promote and protect the rights amongst others, to life and to security of the person without distinction of any kind, including gender. The United Nations Committee on the rights of children, a treaty monitoring body for the convention on the rights of the child has condemned the practice of *ukuhlola* in South Africa. In its concluding remarks on the report prepared by South African government on the implementation of the convention on the rights of the child in South Africa, the committee stated that<sup>25</sup>

“The committee is also concerned about the traditional practice of *ukuhlola* which threatens the health, affects the self-esteem and violates the privacy of girls”

The committee recommends that the state party undertake a study of *ukuhlola* to assess its physical and psychological impact on girls.

### 4. Rights and welfare of women in South Africa

South Africa has the highest incident on rape of women in the world, with the Interpol naming the country the “rape capital of the world in 2012” the country also has a very high levels of gender based violence, including attacks and killing people, rapes of children and infants, and trafficking of women. The Department of Women, Children and People with Disabilities (DWCPD) and the Commission for Gender Equality monitor implementation of regional instrument and other mechanisms to promote and protect the rights of women, children and people with disabilities. The Department of Women, Children and People with Disabilities also oversees legislation and policy development, implementation of gender equality and address sexual offences.

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<sup>22</sup> Some girls have reportedly pushed toothpaste or a piece of white lace dipped into tomato sauce into their vaginas to mimic a hymen, other girls have inserted meat into their vaginas to mimic tightness. Policy update- September 2004

<sup>23</sup> Teens turn to anal sex to keep virginity (South Africa: [www.news24.com](http://www.news24.com) June 26 2004.

<sup>24</sup> South African Human Rights Commission, Position paper: virginity testing, July 2005

<sup>25</sup> Committee on the Rights of the child, concluding observations of the committee on the rights of the child: South Africa Twenty-third session CRC/C/15/Add. 12 January 2000

The DWCPD also tackles harmful cultural practices, such as virginity *ukuhlola*. This function is strengthened by the independent role of the Commission for Gender Equality, despite numerous challenges, the right of South African women to access democratic participatory processes is being promoted. Human rights groups have condemned the practice of *ukuhlola* as it violates human rights and woman's dignity. The practice of *ukuhlola* carries health implications for those being tested unhygienic. The United Nations Convention on the Rights of the Child<sup>26</sup> states in article 24 (3) that states parties shall take all effective and appropriate measures with a view to abolishing traditional practice prejudicial to the health of children. Retaining the practice could be viewed internationally as an indication of South Africa's dereliction of its international obligation to protect children's rights. Thus not only does *ukuhlola* fail to be justified under section 36 of the Constitution, South Africa's International Obligation also demand for its removal.

## 5. Conclusion

In light of all that is articulated within the paper, it is still safe to conclude that cultural practices that are implemented before the coming into existence of the Constitution must be analyzed and be accordingly scrutinized in light of the Constitution so as to examine whether such practice can actually survive the Constitutional scrutiny. It is common cause that a practice such as *ukuhlola* which consequently does more harm than its intended positive purpose and which may result in the severe limitation of fundamental rights, may possibly not survive the current Constitutional era. The paper seeks to support and acknowledge the meticulous work done by the Commission on Gender Equality, it is the view of the Commission that the prohibition of *ukuhlola* in the Children's Bill constitutes a justifiable limitation of the cultural rights of the adherents of this practice.

Such limitation is, according to the Commission, reasonable and justifiable in the context of the constitutional values and provisions and South Africa's International Human Rights Law Obligations. The Commission further recognizes that aim of the practice may be seeking to achieve positive social values through cultural practices. The challenge to those who support *ukuhlola* is to develop the cultural practice within the confines of the Constitution. This cultural practice is such that it must be approached and ultimately be resolved in a manner that will set precedent for the future generations.

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<sup>26</sup> Ratified by South Africa on 16 June 1995



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