

Virginity testing in South Africa: Re-traditioning the postcolony

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Abstract

Umhlanga is a ceremony celebrating virginity. In South Africa, it is practiced, among others, by the Zulu ethnic group who live mainly in the province of KwaZulu Natal. After falling into relative disuse in the Zulu community, the practice of virginity testing made a comeback some 10 years ago at around the time of the country's first democratic election and coinciding with the period when the HIV pandemic began to take hold. In July 2005 the South African Parliament passed a new Children's Bill which will prohibit virginity testing of children. The Bill has been met with outrage and public protest on the part of Zulu citizens. Traditional circumcision rites are also addressed in the new bill but are not banned. Instead, male children are given the right to refuse to participate in traditional initiation ceremonies which include circumcision. This paper asks why the practice of virginity testing is regarded as so troubling to the new democratic order that the state has chosen to take the heavy-handed route of banning it. The paper further asks why the state's approach to traditional male circumcision has been so different to its approach to virginity testing. Finally, the paper asks what these two challenging cases in the country's new democracy tell us about the nature of liberal democratic citizenship in South Africa 10 years after apartheid's formal demise.

Résumé

L'umhlanga est une cérémonie qui glorifie la virginité. En Afrique du Sud, elle est pratiquée entre autres par les zoulous, groupe ethnique présent principalement dans la province du Kwazulu Natal. Après un abandon relatif par la communauté zouloue, la pratique du test de virginité a fait un come back il y a environ une dizaine d'années, à peu près au moment des premières élections démocratiques du pays et de l'apparition de l'épidémie de VIH/sida.

En juillet 2005, le parlement sud africain a adopté une nouvelle loi de protection des enfants qui interdit les test de virginité. Cette loi s'est heurtée à l'indignation et aux protestations publiques de citoyens zoulous. Les rites traditionnels de la circoncision sont également abordés par la nouvelle loi sans toutefois être interdits. En revanche, les enfants de sexe masculin ont le droit de refuser de participer à des cérémonies rituelles d'initiation, parmi lesquelles la circoncision. Cet article s'interroge sur les raisons pour lesquelles le test de virginité est considéré comme troublant par le nouvel ordre démocratique, au point que l'état a choisi la méthode forte de son interdiction. Il va jusqu'à demander pourquoi l'approche de la circoncision masculine traditionnelle par l'état est si différente de celle du test de virginité. Enfin, l'article s'interroge sur ce que ces deux enjeux dans la nouvelle démocratie de ce pays nous disent sur la nature de la citoyenneté démocratique et libérale, dix ans après la disparition officielle de l'apartheid.

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ISSN 1369-1058 print/ISSN 1464-5351 online © 2006 Taylor & Francis
DOI: 10.1080/13691050500404225

Resumen

Umhlanga es una ceremonia en la que se celebra la virginidad. En Sudáfrica es practicada entre otros por el grupo étnico Zulú que vive principalmente en la provincia de KwaZulu Natal. Después de caer en desuso en la comunidad Zulú, la práctica de la prueba de la virginidad volvió a aparecer hace unos diez años en el momento en que el país celebraba sus primeras elecciones democráticas y coincidió con el periodo en que la pandemia de VIH/sida empezó a causar estragos. En julio de 2005, el parlamento sudafricano aprobó una nueva propuesta de ley del menor que prohíbe hacer la prueba de la virginidad a menores. Esta nueva ley ha provocado indignación y protestas en gran parte de los ciudadanos zulúes. Los ritos tradicionales de circuncisión también se abordan en la nueva ley pero no están prohibidos. En lugar de eso se concede a los niños el derecho a negarse a participar en las ceremonias tradicionales de iniciación que incluyen la circuncisión. En este ensayo se plantea la pregunta de por qué el nuevo orden democrático considera tan problemática la práctica de las pruebas de virginidad para que el Estado haya optado por la estricta vía de la prohibición. Asimismo se plantea por qué la postura del Estado con respecto a la circuncisión masculina tradicional ha sido tan diferente a su planteamiento sobre las pruebas de la virginidad. Para terminar, en este documento se examina qué significado tienen estos dos problemáticos casos en la nueva democracia del país para la naturaleza de la ciudadanía democrática y liberal en Sudáfrica, diez años después de la desaparición del apartheid.

Keywords: *Citizenship, liberalism, African sexuality, African ontology, African culture*

Introduction

I am not renting children owned by the government. If my ancestors tell me to do this, I can't argue with them. (Mrs Luthuli, a mother who supports the practice of virginity testing and insists that her own children are tested annually; cited in *PlusNews* September 2005)

Umhlanga is an annual Zulu reed dance ceremony celebrating virginity. Those who participate must be 'certified' virgins and the process of certification has come under the spotlight in South Africa's new liberal democratic dispensation. After falling into disuse the practice of virginity testing made a comeback some 10 years ago at around the time of the country's first democratic election and coinciding with the period when the HIV/AIDS pandemic began to take hold. In July 2005 the South African Parliament passed a Bill (Republic of South Africa Children's Bill 2005) which has yet to be approved by the National Council of Provinces¹ but which, once enacted, will prohibit virginity testing of children² (Chapter Two, Section 12 (4): 'Social, Cultural and Religious Practices'). Additionally, Section 12 (6a) makes any person who is responsible for the protection of a child, but who allows the child to undergo virginity testing, guilty of an offence.

Ironically, at the very moment of its impending criminalization on the grounds of infringement of liberal democratic civility, in a phenomenon that Chabal and Daloz (1999) have referred to as the 're-traditionalization' of African societies, what is rhetorically repeatedly referred to as the 'ancient' practice of virginity testing is enjoying a contemporary revival of popularity after a long period of dormancy. The 2005 annual *Umhlanga* royal Zulu reed dance ceremony saw the apparently enthusiastic participation of 20,000 'maidens'. Presiding over the ceremony Zulu monarch King Goodwill Zwelithini told the assembled crowd that the practice of virginity testing is 'at the core of our pride'. He criticized the government for having failed to consult him, as head of the Zulu nation, on the new law and called on 'them [the government] to leave me alone with my culture' (Mthethwa 2005: 6). At the same ceremony, far from agreeing to curtail the practice, the king announced plans for its extension to virginity testing for men—also said to be an

‘ancient’ practice. Echoing the contemporary in-trend discourse of gender equality, the king proclaimed ‘I will not encourage virginity testing for women without doing the same for men’ (Mthethwa 2005).

In contrast to its approach to virginity testing the Children’s Bill, in Chapter Two, Section 12, also deals with the traditional practice of male circumcision rites but here the approach is quite different: young males are given the right to refuse to undergo traditional circumcision. Section 12 (5) states: ‘Taking into consideration the child’s age, maturity and stage of development, every male child has the right to refuse circumcision’. How are we to interpret the differences in the way in which the new law, ostensibly aimed at the protection of all children and their rights, treats these two challenging cases in the country’s new democracy? And why is it that virginity testing, which, unlike traditional male circumcision, has been implicated in no recorded deaths, and which takes place with the approval and willing involvement of its young female participants and their families or guardians, has been regarded as so troubling to the new democratic order that the response has been the heavy-handed one of banning? The answers to these questions must necessarily be complex and manifold. They take us to wider debates about the nature of democratic citizenship as it is being forged and contested in South Africa’s nascent democratic state.

Post-1994 South Africa has seen the emergence of a set of institutions for the protection of values of individual human rights, freedom of choice, diversity, tolerance, the rule of law and constitutional supremacy—in short, a liberal democratic political system. Critics of the practice of virginity testing argue that it violates liberal norms governing children’s rights to privacy, bodily integrity and dignity—all of which are enshrined in the country’s Constitution. The constitutionally enshrined Commission on Gender Equality has been at the forefront of advocacy efforts to halt the practice of virginity testing which it has described as discriminatory, invasive of privacy, unfair, impinging on the dignity of young girls and unconstitutional. Supporters in contrast have vowed to defy the impending ban, arguing that the practice is fundamental to their ability to express their value and dignity as members of a specific cultural community. From one point of view then, the new regime of rights needs to be brought to bear to liberate citizens from an invasive, backward and discriminatory practice. From a different point of view democratic constitutionalism is experienced as a new mechanism of surveillance which restricts choice and freedom.

In part what is at stake in this debate is what Posel (2004: 231) has called ‘contending moral worlds’, one of which places the rational, rights-bearing, inherently valuable individual at the centre of its ontology, while the other proposes that a valuable person is something one becomes and that one’s relationship to others is central to this process of becoming. As Yeatman has suggested (2001: 141) modern political subjecthood depends on the concept of an individual who is not subject to the authority of any other except by their consent and who is also free to withdraw this consent. In contrast, what is variously termed a standpoint of ‘African humanism’ (Praeg 2000: 267) or *ubuntu*’ (from the Zulu maxim *umuntu ngumuntu ngabantu*, that is, ‘a person is a person through other persons’ (Shutte 1993: 46) contrasts starkly with liberalism’s autonomous, rationally choosing individual subject.

The impending ban on virginity testing, then, can be understood in one sense as an attempt to establish the certainty of liberal conventions over forms of behaviour that are thought to violate those conventions. This article argues, however, that if we evaluate the ban from the perspective of liberalism itself, and especially if we contrast the new Bill’s approach to virginity testing with the way in which it deals with male circumcision rites, firstly, it poses difficult questions about the purportedly central place of consent in the liberal edifice. Secondly, it reveals real limitations in liberalism’s ability to cope with

difference, in this case the difference between an ontology of authority contrasted with freedom, of the individual contrasted with the community versus an ontology of freedom realized through autonomy, of the individual inseparable from the communal.

Central to liberalism is the idea that people must generate, by way of individual, voluntary consent, all their social relationships if they are to preserve their human essence, their freedom (Hirschmann 1992: 5). 'Over himself, over his own body and mind', Mill (1859) averred, 'the individual is sovereign'. Since freedom is fundamental to being human according to liberals, we need very strong grounds for its limitation. Mill proposed as is well known, that the only basis on which we can limit a person's freedom is the prevention of harm to others. Finally, Mill argued that the state has no business interfering with a person's actions where they are based on 'free, voluntary, and undeceived consent and participation'. Those who wish to ground their support for the virginity testing ban within the liberal framework of choice and consent, then, must do so on one of two grounds: either, the argument must be that the choice to participate is not a truly free or informed choice or the argument must be that the practice is harmful to others. Alternatively, the state must take a paternalist line against Mill and say that the practice is harmful to the freely consenting participant and that it is this harm that the ban prevents. Let us now examine each of these possibilities in turn.

The participants who appear freely to choose to have their virginity tested are either not really freely choosing because they are influenced by an oppressive cultural milieu or are incapable of autonomous choice because they are minors. Therefore the state's interference in their choice is allowable

Visual evidence of virginity testing ceremonies does not suggest any hint of overt coercion. No-one is being physically restrained or forced to submit to testing. In contrast annual reed dance ceremonies, which are, these days, frequently photographed or televised by the news media, appear as joyful, celebratory occasions with singing, smiling participants. So the participants appear freely to consent to the practice. Why not allow them that to which they consent?

One possible answer would be to say that what the law does is to protect minors because minors are not capable of free, voluntary and informed consent. While liberal democracies tend to operate with a strong presumption in favour of privacy, especially in sexual matters, consent to harm is not viewed favourably, especially on the part of minors (Yoshino 2003). Perhaps, we might say then, the issue is about the capacity of minors to consent. Perhaps the state in this case has taken a perfectly appropriately paternalist stance since paternalism is, after all, warranted in the case of minors. Is it not precisely the role of the state to protect those who are not in a position, because they are too young, frail, poor, etc to make free and rational decisions? Moreover, is it not the state's role to do so even when a minor's parents or guardians appear to want to sanction an apparently harmful practice?

There are two difficulties with this. Firstly, it does not explain why the Bill should treat male minors in the case of circumcision differently to female minors in the case of virginity testing. Both practices involve contact with the genitalia of a minor in non-formally medicalized settings by adults whose actions are communally sanctioned. The approach the Bill takes on circumcision which is to give the child the right to refuse to participate rather than a blanket removal of the capacity to consent, is much more in line with recent international legal thinking which suggests that the state should take into account and give weight to the views of 'mature minors'. In 1999, for example, in the USA, 17 year-old

Alexis Demos won on appeal her right to refuse a possibly life-saving blood transfusion. Demos and her parents objected on religious grounds because as Jehovah's Witnesses they believe a blood transfusion would violate a biblical prohibition on 'eating blood' (Ellement 1999). This judgement echoes the UN Convention on the Rights of the Child which states, in Article 14 that (1) States shall respect the right of the child to freedom of thought, conscience and religion; (2) States shall respect the rights and duties of the parents and when, applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child; and (3) that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others (United Nations 1989).

The preamble to South Africa's Children's Bill gives recognition to the UN Convention on the Rights of the Child along with a number of other international instruments for the protection of the rights of children. However, the document itself, despite having a section on 'Parental Responsibilities and Rights' does not provide any guidance on the substance of parental rights with regard to the moral, religious and cultural instruction of children especially where the substance of a family's values in this regard differ markedly from that of the majority or of the hegemonic state view. Elsewhere in the Bill however, the stance taken in the Demos case is affirmed. For example, Chapter 2 (10) says: 'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.

This approach of consulting the child which is taken in the Demos case and apparently affirmed in the Bill itself is indeed the approach taken in relation to traditional male circumcision rights. So why an outright ban on virginity testing but not on male circumcision? Traditional male circumcision is clearly by far the more physically threatening of the two practices. In the Eastern Cape, where traditional circumcision rites are widely observed, since 1995, more than 6000 boys have been admitted to hospital, more than 300 have died and 76 have had their genitalia amputated (Adams 2005). Indeed a growing international movement against the circumcision of babies has put forward the argument that circumcision is 'medically unwarranted mutilation and disfigurement' and as such is 'a clear case of child abuse' (Brigman 1984: 1)—commonly defined as the intentional, non-accidental use of physical force that results in injury to a child.

In contrast both to circumcision which involves the actual removal of a part of the body and to the more standard international cases of life-saving medical intervention, virginity testing appears as somewhat innocuous. And whether or not it is takes us to the heart of the dilemma. There is no objective standard for determining whether or not the practice is harmful or innocuous. Our attitude depends on an overall disposition that we might have to matters of privacy, sexuality, the appropriateness of physical contact on the part of strangers with a person's genitalia, the sexuality of children, the rights and duties of parents and so on. The historical record shows wide variation in attitudes to these matters in human societies across time and space. What is at stake here is precisely the construal of the practice and there is no value-neutral mechanism for deciding between those who see it as an accepted, non-abusive part of a culture's mechanism for instructing its youth in sexual responsibility and policing that responsibility in dangerous times versus those who see it as skating very close to child abuse. Again, the example of circumcision is instructive with some seeing it as vital to the very achievement of adult personhood while others see it as tantamount to physical assault.

If the Bill is taking a paternalist stance to protect children then, why the contrasting approach in the Bill to female virginity testing and male circumcision? It would appear that the Bill evinces a double standard with regard to its own commitment to consult the views of those children who are of a certain age and level of development. It is difficult not to conclude that the gender of the participants plays a role in determining whether or not the state is prepared to acknowledge the veracity of their consent. Nancy Fraser has argued that despite the presence of women in state and national parliaments, the status of women's citizenship remains problematic in the modern body politic where 'the capacities for consent and speech, the ability to participate on a par with others in dialogue ... are connected with masculinity' (1989: 126). We are presented here with the apparently contradictory circumstance of a discourse of women's rights and women's liberation which in reality has the practical effect of prescribing the choices and capacity to consent of the state's female subjects.

This perhaps provides us with part of an answer but there is still the question of why the Bill takes an exclusively prescriptive stance on the question of cultural and religious practices. Section 12 of the Bill which is devoted to 'Social, Cultural and Religious matters, is solely about the prohibition of various practices rather than the affirming of any rights to religious or cultural freedom. The general tenor is clearly signalled by the opening sentence of Section 12: 'Every child has the right not to be subjected to social, cultural and religious practices that are detrimental to his or her wellbeing'. A specific moral stance is being taken here which not only constructs certain cultural practices as incontrovertibly harmful but also constructs certain kinds of subjects as incapable of rational consent. The suggestion here seems to be that there are certain kinds of South Africans who have yet to be made 'civil'. In what is a common refrain within liberal analyses of the 'African crisis', rational consent as the basis for the social contract is upheld but what is questioned is the ability, particularly of African subjects, to be the autonomous, rationally choosing selves that liberalism requires. This is a view taken up by many commentators on the African crisis (see for example Shils 1992, Diamond 1994, Hyden 1997). As Kelsall puts it (2003: 23), 'they hope to change [Africans] into "citizens" who want the right kinds of thing'. Williams and Young have described such initiatives as 'a project of cultural transformation designed to create "liberal selves"' (1994: 100). In denying the participants in virginity testing ceremonies the veracity of their own choices, the suggestion is that these are not civil subjects, that they are not in the position to exercise 'true' or real choice and that choice must therefore be denied them until such time as they are recreated, liberal selves.

A second possible argument for the ban, namely that it is harmful

There are two possibilities here. The first is to say that the practice harms the participants themselves. It is perhaps germane to point out that in contrast to, say, traditional male circumcision rites, or to sadomasochistic sexual practices, where actual physical hurt occurs, the harm that is thought to occur in the case of virginity testing would not be physical hurt or assault to the body but would rather be harm to dignity or an infringement of privacy or possibly physical violation although not of a forced kind and not in a way in which the body is injured or hurt.

Since we have already established that participation appears to take place freely and with consent, then in order to show harm to the participants we would have to take the view that someone can be harmed with their consent. This is not an unusual stance for a liberal state to take. For example, in relation to (not uncommon) state prohibitions on sadomasochistic

sexual practices, some states have taken the view that participants are 'harmed' by these practices despite their enthusiastic consent and protestation that far from being harmed they derive benefit and enjoyment from the practice. Moreover, the pressing need to preserve life or prevent physical injury has not been the only or even the most common reason for the state taking the view that a person can be harmed by that to which they explicitly consent. Indeed, such concerns as dignity and moral conviction are often invoked as reasons for paternalism that override other pressing concerns. For example, in October 2002 stuntman Hans Wackenheim, who protested a 1995 French ban on the practice of 'dwarf throwing' which, he said, deprived him of his livelihood, lost his case before the United Nations Human Rights Committee which said that the need to protect his human dignity was paramount even though he himself did not feel that his dignity was infringed (Chachere 2002). The case of virginity testing is not dissimilar. What these examples show is that liberal states are not neutral with regard to conceptions of the good. Instead, what we are seeing is that a very particular moral stance is being taken which is that virginity testing is wrong and repugnant, no matter what the participants might think.

A second possibility is to say that the practice is harmful not just to the participants but to others. If we take this latter view, whether or not the participants consent to being tested is immaterial. If we can show that the practice is harmful not just to the participants but to others then the state is justified in prohibiting it under the harm principle. But how could others be said to be harmed by a person consenting to have her own virginity physically verified? One possibility is to suggest that the practice upholds a system of patriarchal inequality which harms women (or indeed, humanity) in a general sense and that, given the South African state's overall commitment to gender equality, the ban is appropriate.

The difficulty with this argument is that, as many feminists would attest, there are many common practices which might be thought to uphold patriarchy: women taking their husbands' surnames after marriage, unequal responsibility for domestic labour and childcare in the home, for example. But while the state or its representatives may well bemoan this reality, the response has hardly been one of criminalization. In the case of male circumcision rituals, for example, the place of these in upholding a patriarchal ordering of society can be shown to be much weightier than that of virginity testing (see for example, Mtuze 2004). So the perpetuation of patriarchy defence does not help us to understand why the state has chosen to focus so specifically on this one practice and to single it out for criminalization while its approach to other seemingly similar cases has been quite different.

Moreover, whether or not the practice of virginity testing in fact contributes to a generally harmful patriarchy is always going to be difficult to demonstrate. Many appear to hold the view that, in contrast, participation in the reed dance is empowering, fun and affirming. For example, on observing the *Umhlanga* in Swaziland (South Africa's neighbouring state which lies some three hours drive from Pretoria) newspaper columnist Mercedes Sayagues (2005: 35) commented that *Umhlanga* is about celebrating the beauty and virtue of young women, the 'flowers of the nation'. For the girls, Sayagues noted, *Umhlanga* appeared to be 'fun, like summer camp, away from home, parents and chores ... They feel special, valued, part of the life of the nation ... It is great to see all girls stride with a proud step, regardless of flab or size. I call that empowering'.

Again, the point is that the state is not simply making an objective judgement or indeed one based on the clear will of consenting individuals. Citizenship is neither a neutral concept nor is it ever empty of specific value content. While it is true to say that citizenship has no necessary political content, that citizens, in the civic-territorial version of

nationalism, have rights and obligations but not necessarily a common culture, historically, of course, citizenship has always gone along with identity (Parkins 2002: 10). Liberalism may posit a fantasy of a disembodied citizenship but the reality is that only the most privileged citizen, the ‘iconic citizen’ can view citizenship as an empty space, an absence of substance. Those who do not style themselves in the mould of the rational individualist of liberalism’s imaginings and therefore find themselves at the margins, know that the space of citizenship is always embodied, occupied, identified.

A further possible argument for the ban is that this is a case of justifiable paternalism

As the foregoing discussion has highlighted, the Bill seems to suggest, in its outright ban of the practice of virginity testing, rather than leaving participation up to the individual choice—either of sufficiently mature participants as in the case of male circumcision or of loving families as in the case of many other choices which the state leaves to parents—that virginity testing is wrong and harmful. Removing from citizens the right to make wrong choices about their own wellbeing takes us to the longstanding debate regarding paternalism. The problem of paternalism can be summed up as follows: is the state ever justified in limiting the freedom of citizens for their own good? Many liberal-minded thinkers have answered in the negative. If freedom means having choices then we should also be allowed to make choices that might seem to others to be wrong choices or harmful choices. The liberal position is that there are very important moral reasons to respect the decisions a person makes about their own life; in fact, so important that a person ceases to be a full human being if we undermine their freedom to choose their own life paths. Paternalism represents tricky ground for liberalism precisely because of the importance of consent to the doctrine’s entire edifice. Mill’s harm principle was meant to provide a simple way out of the problem: the state can legislate to prevent us from harming others but never, and Mill was very clear on this subject, from harming ourselves. A good state is one in which people are allowed to pursue their own ideas about what is and is not a good life.

The immediate answer that might be given here is that the ban on virginity testing is appropriate paternalism because the state is intervening to protect minors from a harmful practice. But this defence of the ban does not really remove the heart of the difficulty which is about deciding whether or not the practice is in fact harmful and whether or not the state is justified in intervening. Where does the state’s right to interference end and parental authority begin? In cases of sexual abuse it would certainly be no defence to say that the child willingly participated. Nor would it be a defence to say that the activities took place with the permission of the child’s parents or guardians. Indeed in sexual abuse cases the latter are not infrequently at the centre of criminal indictment. On the other hand, we routinely allow parents to make choices about their children’s wellbeing which are clearly harmful. Take nutrition for example. The state does not routinely intervene to ensure that parents provide fresh foods and keep their children away from fizzy drinks and diets high in sugar and fat despite the real danger of chronic disease and early death that such decisions pose. The point is that there is no value-neutral way of deciding what is harmful. In our contemporary climate which some have characterized as being one of ‘moral panic’ (see for example, Singer 1993), the policing of sexuality is regarded as particularly urgent so that its regulation is elevated over other possible harms. But this prioritization is not achieved by the objective weighing of the harm to dignity of a traditional virginity test versus the harm to

physical health of a poor diet even if it were possible to devise such an objective measure. Instead, a particular, value-laden rather than value-neutral choice is being made by the state and the question then becomes one of whose values are here being affirmed and whose denied and in whose interests?

If the establishment of a set of common values which the state enforces is problematic in western liberal democracies it is intractable in contexts of weak states, ethnic, linguistic and cultural diversity and very uneven levels of economic industrialization—in other words in the sort of context of genuine and wide diversity that characterizes much of Africa. For example, whereas laws prohibiting polygamy would be widely accepted by the vast majority of citizens of Western liberal societies, in a country like South Africa, polygamy is regarded by many, including leading political representatives in government such as former Deputy President Jacob Zuma, as a perfectly acceptable practice. Zuma, a practising polygamist, has also made public his support for virginity testing. On the other hand, while many liberal states have moved to protect the rights of gay citizens, for example, to marriage and adoption, in the majority of African states such rights are regarded by many as morally repugnant and there has been widespread calls by leading political representatives across the continent for the criminalization of homosexuality.

In answering the question of whose values are being affirmed when the lie of state neutrality is exposed—as it routinely is—the common response in post-liberation contexts has been to invoke the legitimising force of the ‘will of the people’. Praeg (2000: 294) has argued that following liberation the abstract notion of ‘the people’ has emerged as the legislating subject. Praeg follows here Lyotard’s discussion (1984: 31) of the emergence of the meta-narrative of liberation:

[t]he ‘people’ (the nation, or even humanity), and especially their political institutions, are not content to know – they legislate. That is, they formulate prescriptions that have the status of norms. They therefore exercise their competence not only with respect to denotative utterances concerning what is true, but also prescriptive utterances with pretensions to justice’.

For Lyotard (1984: 30, cited in Praeg, 2000: 287–288) it is

... not at all surprising that the representatives of the new process of legitimation by ‘the people’ should be at the same time actively involved in destroying the traditional knowledge of peoples, perceived from that point forward as minorities or potential separatist movements destined only to spread obscurantism.

Citizenship, Berlant (1997: 20) reminds us, is ‘a status whose definitions are always in process. It is continually being produced out of a political, rhetorical, and economic struggle over who will count as “the people” and how social membership will be measured and valued’. Who are ‘the people’? We cannot, in a constitutional state easily answer ‘the majority’. In a constitutional state, the point of having a constitution is to place out of the reach of majorities certain freedoms and rights regarded as fundamental to the ability of a democracy to flourish. So even if it could be established that a majority favoured a ban on virginity testing this in itself would not certify the state’s right to ban the practice.

Disciplining the (African) Subject

It would seem from the foregoing discussion that the ban on virginity testing is difficult to uphold on any straightforwardly liberal grounds. The ban moreover exposes one of the core contradictions at the heart of consent theory which is that in reality the need for authority

takes precedence over freedom. Rousseau was upfront about this: citizens should be forced to be free; Locke talked of ‘tacit consent’. While freedom and consent are the alleged basis of liberal theory, citizens who do not seem to have quite the right ideas about what they ought to be consenting to, or what their duties and obligations truly are, have always been a problem for liberalism. Kelsall (2003: 24) calls this the problem of the ‘self’ and argues that astute liberals have long been aware of it:

In order for democracy to function in its classical sense, or even for it to survive in a procedural sense, certain things must change. Ordinary people, in their infinite variety, must be re-constructed as individualistic, civil, critical, rational citizens. Ambitiously, the entire population will be re-fashioned in this mould. The tools with which to do this are the market, the media and NGOs.

The legitimising device that is used discursively to justify the ban on virginity testing is the suggestion that it represents a return to the past. In his discussion of the way in which the present civil order presents itself to us as unquestionably morally superior to the past and how any break with it is viewed as a return to the uncivil, Praeg (2000: 291) describes how what he calls the ‘narrative of return’ functions as an interpretive device which renders illegitimate all challenges to the state’s hegemony. Here we are presented with the threat of return to an Africa characterized by autocratic lawlessness. The ideological function of this narrative, as Praeg points out, is one of conformity. It offers us either an embrace of liberal democratic values or the return to lawlessness.

In contrast, those who are proponents of virginity testing argue that it is precisely the break with tradition that represents the threat to social order. Ironically, this is a significant (selectively used) strand in the state’s own political discourse with the President one of the major proponents of the ‘African Renaissance’ styled as the mining of the continent’s traditional practices in the service of its renewal. Tropes of African traditionality, African values, and the explicit disavowal of ‘imported’, ‘foreign’ European ideas and ways have formed an important discursive thread in the nation-building rhetoric of significant commentators in the country’s new ruling elite. Here we see exemplified the contradiction highlighted by Williams and Young (1994: 96): ‘There is then on the one hand an aspiration to build on the indigenous, and on the other a recognition that the indigenous may be an obstacle’. Precisely part of the complexity of contemporary South African citizenship is the mining of a, in part colonially-invented set of mythological African traditions for identity in a liberal democratic state dominated by market individualism.

What these tensions take us to as Kelsall has suggested (2003) is the debate about the ‘African self’. The intractable moral dispute about whether or not virginity testing is an infringement of privacy and dignity appears in part to be based on assumptions of ontological individualism which have been questioned specifically in terms of their veracity in the African context. Part of the revulsion against a practice like virginity testing relies on the notion of an ontologically isolated self which must not be violated, which cannot consent to be violated because its essence is freedom and autonomy; it is here that its dignity resides. What if we pose a different human essence—one based on an essential connectedness to others? As Nomagugu Ngobese, the founder of the Nomkhulwane Culture and Youth Development Organization and one of the country’s more prominent virginity testers has argued, the focus on individual rights ignores the fact that ‘we don’t live alone, we live communally here’ (cited in *PlusNews*, September 2005). Shutte argues that in African thought ‘the sharp distinction between self and world, a self that controls and changes the world and is in some sense “above” it, this distinction so characteristic of European philosophy, disappears. Self and world are united and intermingle in a web of

reciprocal relations' (1993 cited in Kelsall 2003: 11). Chabal and Daloz claim that 'African societies are self-evidently not mass societies composed of discrete individuals detached from their communal environment' (1999: 146). If this is one's ontological presumption about the self then a practice like virginity testing can be seen as part of the realization of the fundamental humanity of the participants rather than its violation.

Hirschman's description (1992: 9) of liberalism's contradistinction between freedom and authority makes clear how different is this view from a sense of freedom achieved through community as expressed in the African idea of self-realization through others:

Freedom and authority, individual and community are defined in opposition to each other from the very start. This is where the concept of abstract individualism comes into play: because individuals are seen as so radically separated from one another, the relation between individual and community seems inherently irreconcilable. Abstract individualism requires a conception of freedom as the absence of external restraints, and of authority as one of those restraints. It intimately depends on a concept of the individual that is at odds with community.

We should not underestimate the potential for conflict that these differences in world-view can hold. Post-modernist approaches (see for example Bayart 1993, Chabal and Daloz 1999, Mbembe 2001) to the African crisis have argued that the roots of Africa's difficulties lie precisely in the existence of these disjunctive ontological logics. These approaches suggest that 'crisis is a result of a lack of fit between imported political institutions, ideas of development and extant ideas of person, economy and state' (Kelsall 2003: 29). In a similar vein the Comaroffs have talked of a 'dual' or contradictory colonial subject, at once liberal, at once tribal (1993: 62, cited in Kelsall: 8) and Chabal (1992: 30) has warned of the danger 'that the use of the ready-made Western liberal concept of the individual which is implicit in liberal democratic theory will obscure the understanding of the complexity of the individual who lives in contemporary Africa'.

Clearly virginity testing is not regarded as a 'civil' practice and those who participate in it are not (good) liberal selves, so much so, that to continue to participate in the practice risks exclusion altogether, at least temporarily, from citizenship through criminalization. In response to their perceived marginalization in the new constitutional order, supporters of virginity testing propose their own version of a narrative of return—what Praeg would call a 'counter narrative of return'. Here we are presented with a morality tale in which the vaunted accoutrements of progress are pernicious. They represent loss: of culture, of morality, of family life and personal integrity and, in the context of HIV/AIDS, the story can reasonably include the caution that life itself is threatened. In this counter-narrative of return, to go back is to be renewed, to slough off the burdens of colonialism and its imposed ways and to find healing and wholeness in a pristine imagined past. Reinstatement of the practice of virginity testing is characterized within this narrative as part of a broader move for the revival of 'indigenous knowledge systems' suppressed during the apartheid era.

Of course, like all stories, these counter narratives of return depict an imaginative universe rather than a 'real' one. There is no pristine, intact self or culture or set of traditions to which to return. What Makang refers to as the 'ethnological' discourse on African tradition reduces African traditions to 'a fixed past and to a nostalgia for an original state, the ethnological discourse strips African people of their historicity ... By not taking into account the great upheavals, such as colonialism, which occurred in recent times in the African universe, tradition of the ethnological kind is condemned to marginalization' (1997: 327). But it is not only western scholars of Africa that take this ahistorical view of tradition. The notion of a pristine past corrupted by European intervention but to which a

return is the solution to contemporary ills, is also proposed by those who style themselves 'traditionalists'. And as Praeg points out, these reconstructive narratives are themselves re-inventions of Africa from a contemporary, ideological perspective (2000: 302). In the case of virginity testing, the practice in its newly revived form has evolved considerably leading some to lament that it has 'lost its essence'. For example, the practice has been commercialized in recent years with the introduction of a fee for each test and the presentation of certificates (which command an additional fee) for those who pass the test.

The tropes of tradition, then, problematic realities as they are, often emerge as very central to the contestations that take place in nascent nation-building exercises. As Hobbes reminds us, for the contract to be valid the civil relationships we enter into must not only be entered into voluntarily but must be of some value to the consenting partners, 'Of the voluntary acts of every man, the object is some Goode to himselfe' (*Leviathan*, p.192 cited in Hirschman 1992: 5). For new states, political allegiance is often difficult to secure. The political legitimacy of the liberal democratic, individualist, rights-based project relies on the ability of a regime to fulfil an implicit (in Africa at the least) social democratic contract with its electors. Failure to do so will always run the risk of popular aspirations taking on the garb of traditional and ethnic figurations (see for example, Olukoshi 1998). In South Africa where some of the most basic elements of the state's contractual obligations are by no means clearly in place, such as with regard to the maintenance of law and order or the securing of economic benefits for citizens, the temptation on the part of those who regard themselves as excluded or disadvantaged in the new order, to turn to what Kelsall has called 're-imagined ethnic traditions—often heavily spiced with cultural borrowings from the West' (2003: 20) will be ever-present.

In South Africa's nation-building discourse, the notion of the 'rainbow' nation has been influential. In contrast to the idea of a melting pot in which differences are gradually thawed, the rainbow metaphor suggests a celebration of difference—strength in diversity is the implied motto. But as recent scholarly scrutiny of the notion of citizenship has shown (see for example, Vasta 2000), behind difference or diversity always lurks the suspicion of the potential for conflict or social disorder and therefore the impulse to homogenize difference is strong. For all its proclaimed celebration of South Africa's rainbow of 'cultures' State ideology is based on a universalism which suggests uniformity in the goals of 'the people'. In the end the notion of representation which is central to democracy requires an imagined unitary subject who is capable of being represented. Difference is very threatening to this imaginary.

Will it work? Will the installation of the putatively universal values and goals of the rational liberal individualist subject work as the basis for social order in South Africa? The answer we give will in part depend upon whether or not we buy into a popular notion of South Africa's 'miraculous' exceptionalism in African terms. Elsewhere on the continent the installation of liberal norms has not been an unmitigated success, to say the least. As a result, several scholars (see for example, Kelsall 2003) of the continent and its much publicized crisis have suggested the need for more, not less, sensitivity to indigenous norms.

Africa has long been penetrated by modernity and its 're-traditions' are modern ones. The problem, as Mbembe puts it, is that 'the postcolony is chaotically pluralistic ... characterized by ... a tendency to excess and lack of proportion' (2001: 102). Many aspects of African societies remain comparatively anarchic. Some commentators have celebrated this very disorderliness as containing the possibility of escape from the 'net of discipline'. Here, says Kelsall (2003) referencing de Certeau (1984) and Foucault (1979), the net is 'too full of holes to capture and constrain its subjects; to render them docile, that is to say,

for state surveillance and for industrial capitalism'. Seen through this lens, the ban on virginity testing imposed by South Africa's new Children's Bill, emerges as an attempt to tame this incendiary pluralism, to discipline the subject and forge, under the veil of freedom of choice, the docile citizen which is required by liberal democracy no less than by any other version of the state. As Kelsall reminds us (2003: 31), freedom has its costs, and Africa's instability is arguably one of these. While liberalism uses many guises (implied consent for example) to resolve the contradiction between freedom and social order, we should be under no illusions. The impending ban on virginity testing is about the disciplining of the body, not its emancipation.

Notes

1. South Africa's Parliament is bicameral: consisting of the National Assembly and the National Council of Provinces (NCOP). The composition of the NCOP is determined by provincial elections. The NCOP has 90 members (ten from each of the country's nine provinces). The lawmaking power of the NCOP is weaker than that of the National Assembly. The Constitution defines four different types of legislation: constitutional amendments, money bills, ordinary bills not affecting the provinces (section 75 bills) and ordinary bills affecting the provinces (section 76 bills). The new Children's Bill is a section 75 bill. In the case of such bills, the National Assembly can, by a simple majority, pass the legislation into law, despite an NCOP veto (Calland 1999: 23).
2. In terms of the Bill, the age of majority is 18 years.

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