


A CONSTITUTIONAL DISPOSITION OF CULTURAL MALE CIRCUMCISION AS A HERITAGE RIGHT

ABSTRACT: South Africa's constitutional framework entrenches a variety of legislative imperatives that protects culture as a right. Sections 30 and 31 of the Constitution, 1996 were specifically enshrined to resonate with the spirit and purport of the need to protect cultural rights. Some statutory enactments such as Children's Act 38 of 2005 and Limpopo Initiation Schools Act 6 of 2016 are also highly respectful of cultural rights thereby enabling cultural families and communities to subject their children to practice any such cultural activities of their choice, but to the extent that it is practicable. It is argued that while South Africa's post-1994 constitutional apparatus are fundamentally rights-based orientated and thus require the state and every legal and juristic persons to be bearers of such a responsibility of protecting human rights, the state is correspondingly obligated to protect cultural rights as a constitutional entitlement in order for citizens to enjoy heritage as a right, either as a group or individuals with cultural orientation. Constitutionally speaking, the state is prohibited from engaging in acts that unjustly interferes with free enjoyment of heritage as a right. The article adopted a traditional legal doctrinal methodological approach, which is best suited for interpreting legislative instruments to capture a variety of plausible meanings and implications to a real life legal situation.

Keywords: *cultural rights; cultural male circumcision; human rights; administrative justice; heritage right.*

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1. Introduction

The practise of cultural male circumcision, otherwise widely referred to as traditional male circumcision is part of South Africa's long-held history of cultural practises and traditions that shaped the lives of the natives in many ways. Hence, if thoroughly engaged, cultural male circumcision could strengthen perspectives associated with cultural studies and their underpinning theories. This is because cultural studies have the ability to buttress potential for new models of cultural production and policy development (Chrisman, 2018, p. 147), while also being capable of influencing formulation of regulatory legislative framework. For the purpose of this article, cultural male circumcision is conceived as a concept that has far-reaching constitutional and administrative implications, at least from a human rights perspective. Constitutionally speaking, its continued existence translate into confirmation of a protection and realisation of the right to culture, while on the other hand, the continued exploitation for economic reasons by non-law abiders represents major threats to its existence and to a variety of rights entrenched in the Bill of Rights.

Both sections 30 and 31 of the Constitution of the Republic of South Africa, 1996 (*hereinafter; the Constitution*) respectively entrenched cultural rights.¹ This entails that any person who wishes to exercise a cultural activity or rite of passage in terms of the own preference may cite sections 30 and 31 as legitimately protected constitutional doctrines that enable them to enjoy cultural rights without being unduly disturbed. In simple terms, and constitutional speaking, by virtue of these provisions, everyone has the right to culture and cultural identity, including where applicable, the right to practice and enjoy the practice of what has widely become known as a traditional male circumcision. In accordance with Section 2 and of the Constitution, this entails that no arbitrary limitation of the right to culture can be permitted. To contextualise it, section 2 provides that the Constitution is the supreme law of the Republic, and that any law or conduct that is inconsistent with it is

¹ Section 30 – Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31 – (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community:

(a) to enjoy their culture, practise their religion and use their language and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

– (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

invalid and must be declared as such. Further, it provides that all obligations imposed by the Constitution must be fulfilled. To further contextualise and explain the implications of the constitutional injunction of constitutional supremacy doctrine on human rights, it is important to state that Chapter 2 of the Constitution makes provision for the Bill of Rights. In terms of section 7, the Bill of Rights is captured as the cornerstone of democracy, and the state is bound to respect, protect and promote and fulfil all rights in the Bill of Rights, subject only to the limitations clause in terms of the law of general application. In terms of section 8, the Bill of Rights is binding on the legislature, the judiciary, the executive, and all organs of state, and applies to all natural and juristic persons to the extent that it is applicable.

Against the above backdrop, it is important to countenance with the immediate implications of the concept of constitutional supremacy as an administrative concept, and its direct interaction with the idea of entrenching the constitutional application of the Bill of Rights. This is particularly significant in terms of how these critical foundational constitutional ideals impact on enjoyment of rights in practices of cultural activities as enshrined in sections 30 and 31. In this regard, it is worth mentioning that the practise of traditional male circumcision is one such a cultural activity that has for years been a subject of serious scrutiny. In the main, and understandably so, specific attention has been on critical aspects associated with contraction of diseases, multiple death cases and various forms of critical injury (Kepe, 2010, p. 732). It is for this reason that some perspectives have emerged, and are critically questioning how cultural male circumcision must be perceived especially when it adversely affect the best interest of the child through causing irreparable physical harm and loss of self-worth (Morei, 2017, p. 4).

2. Rationale and Research Approach

This article is predicated on arguing that South Africa's legal system recognises and protects customary law (Nhlapo, 2017, p. 1), which in turn provides the bedrock of reasoning within which cultural practices that culminated in constitutional cultural rights are protected. It has been observed that the practice of cultural male initiation has become the center of attention in various social sciences and legal studies. Indeed, various perspectives have emerged, including those informed by medical scholarship, sociology and social work and legal practitioners amongst others. It is against this backdrop that this article advocates that while there is generally a need to safeguard human wellbeing of those that opt to go through the rite of passage, there is

also a corresponding need to protect cultural male circumcision as a heritage right. It is accepted that while male circumcision is performed in various ways, it ought to be understood as a heritage shrine. Its significance is further buttressed by the fact that circumcision is now embraced as another tool to fight against the spread of HIV and Aids, which remains one of South Africa's major health hazards. Hence, the national Department of Health has been at the forefront of leading campaigns to encourage men to undergo circumcision in order to aid the effort of easing the pressures beleaguering the health system.

In context, cultural male circumcision is understood as a process of removing the foreskin on the male reproductive organ, often preferred to be performed on teenage boys. In most geographical locations inhabited by the natives, the practice is performed at designated areas, mostly away from homes, where the initiates spend weeks in the mountains, and being initiated through various activities. Such designated areas are referred to as initiation schools, thus making it a cultural rite practiced amongst various cultural groups and tribes. Although various tribes observe and practice cultural male circumcision in various ways, it is generally understood that the objective is widely the same. Most South African experiences describe it as ritual circumcision, and ascribe unto it, a prime heritage status, especially amongst Muslim and African communities that accept it as a part of an initiation into manhood (Deacon & Thomson, 2012, p. 5). Hence, Deacon and Thomson went on to highlight that owing to this reason, many African men across the African continent have been circumcised in a traditional context.

This article adopts a traditional legal doctrinal research approach, which is reliant on secondary data obtained through legislative legal instruments and research articles on the subject of cultural male circumcision. The article propagates for calibration of thoughts, in terms of which scholarly approaches influences society to embrace the view that rights-based approaches ought to realise that civil and political rights that are affected by malpractices associated with male circumcision must go beyond lamenting the existence of the initiation schools and begin to see cultural male circumcision not only as a human right but as a heritage right too.

3. A Brief Descriptive Background

Cultural male circumcision has been practiced over many decades. It is also accepted to be the oldest and most commonly performed surgical procedure across the globe (Mavundla, Netswera, Bottoman, & Toth, 2009, p. 395). However, on where its exact location of origin is remains a matter

of contest, although it has been acclaimed that it evolved as a religious rite performed on royalty, while others believe it was used to exert social domination over other tribes (Warner & Strashin, 1981, p. 968). In certain quotas, it has been argued that circumcision might have started as an early public health measure for preventing balanitis caused by accumulation of sand under the foreskin in the ancient societies (Bhattacharjee, 2008, p. 1). Hence, various theories exist surrounding the need for providing explanations with regards to how circumcision originated and what purpose it was actually meant to serve in the society. From the above, it can be discerned that indeed, the practice of circumcision has been in existence for decades (Austin, 2010, p. 318). In South Africa, the practice of cultural male circumcision has been linked with ritual-rites that have long been considered as part of upbringing for young boys in grooming them for future challenges. It has since crept permanently into every sphere of life to an extent that the practice became amongst the important aspects of our upbringing, being practiced arguably for both educational and developmental purposes. South Africa's history shows that cultural circumcision has also been perceived as useful for various reasons such as being an aid to achieve optimal hygiene where regular bathing was impractical.² As a custom, it is accepted to have offered advantages that superseded disadvantages to tribes that practiced it and thus led to its spread.³

4. Legal Instruments on Cultural Circumcision as a Heritage

The International Covenant on Cultural and Peoples' Rights (the ICCPR) is the primary international law that provides the bedrock within which legal norms on the recognition and protection of cultural rights of every person across the globe are realised. Therefore, section 30 and section 31 of the Constitution, 1996 buttresses the views encapsulated in the ICCPR when it comes to discussions around cultural rights. In this context, an important stipulation is that every person is guaranteed of freedom to choose and participate in culture and cultural activities of their choice, while retaining the right to also partake in cultural activities of a community to which they belong (Mswela, 2009, p. 177). It is in this spirit that we ought to accept that no matter how repugnant a certain cultural practice may seem, be it accepted that only those that regard it as their heritage should have the determining say

² History of male circumcision, at http://en.wikipedia.org/wiki/History_of_male_circumcision, Downloaded 2021 June 10.

³ *Ibid.*

when deciding social policy. Because cultural male circumcision often affects children, it is important to also note that the United Nations Convention on the Rights of the Child of 1989 is crucial. This is particularly important because article 24 makes provisions for cultural practices, which must in the end be balanced against children's rights to bodily integrity, health, social security, basic education, equality and so forth.

To properly locate the place of culture and heritage within the domain of human rights protections, it is important to look at how the African Charter on the Rights and Welfare of the Child of 1990 (*hereinafter, the African Charter*). A closer scrutiny of the African Charter would demonstrate that the Charter is in favour of recognising and protecting the right to culture, cultural practices and heritage of the natives in many ways (Sloth-Nielsen, 2012, p. 73). When interpreting human rights-based approaches to human development, it is also important to recognise that while the international legal instruments mandate states to enact statutory framework that protects everyone against harmful cultural activities, it should also be noted that these legal norms also recognise and protect cultural practices as a heritage right. Not only are states required to create an enabling environment within which heritage rights are safeguarded.

There are three notable pieces of legislation through which to interpret South Africa's perspective when coming to cultural rights and heritage. Such statutory framework includes the Traditional Circumcision Act 6 of 2001, Children's Act 38 of 2005 and Limpopo Initiation Schools Act 6 of 2016 (which was formerly called the Northern Province Circumcision Schools Act 6 of 1996). Each of these pieces of legislation give effect to a variety of constitutional provisions to effectuate the need to protect all rights in Bill of Rights. The fact sections 30 and 31 of the Constitution protects the right to culture implies that no haphazard limitation of the rights therein is permitted. In particular, the state is prohibited from interfering with the right to practise a preferred cultural custom called traditional circumcision, and this enables communities to opt to freely practice and enjoy their cultural rite without intervention from the state of any other person or entity (Maseko, 2008, p. 192).

While South Africa's legislation is generally predicate don rights-based approaches to human development, it is also discernible that a variety of such legislative provisions are customs conscious. It is the view of this article that such provisions largely recognise and protects the right to culture against undue infringement, either by the state or any entity. For instance, section 2 of the Limpopo Initiation Schools Act 6 of 2016 recognises and protects the sacred nature of cultural male circumcision through contextualising the

meaning of a traditional community and a traditional practice. This it does in the context of demarcating what may be considered as a sacred custom, worthy of a heritage status. However, the Limpopo Initiation Schools Act is not without issues especially when it comes to balancing preferences in terms of cultural and custom related permutations and the superimposed norms that are of imperial heritage.

South Africa also relies on the Children's Act to further define what may be considered acceptable in terms of global standards of children's rights protection. This is particularly relevant when approached from a point that appreciates that South Africa's children remain vulnerable to exploitation. While it has been argued by some that the primary relevance of Children's Act on male circumcision is premised on the need to curb the scourge of the reported deaths and general health hazards that adversely affect children's ability to develop. The importance of Children's Act is that it provides an overarching framework within which all matters that affect children can be resolved. This it achieves by formulating a clearly defined framework, which prescribes the regulatory instruments within which children may be and or not be subjected to a cultural circumcision. In general, section 12 of Children's Act describes instances where children may be permitted to undergo circumcision (Sloth-Nielsen, 2012, p. 79). By accepting that social and cultural circumcision of children may only be undertaken with in the context of specific social and cultural practices, the Act accepts that the right to culture is inherently interlinked with heritage. There is also a widespread interplay between the complex legislative imperatives and the long-held views about customs as customary rites and heritage of the natives.

5. Cultural Circumcision and its Historical Heritage Status

A cursory look into the historical archives would show that the practice of cultural circumcision occupies a crucial historical position in various sociological and anthropological groupings and positions of the natives in South Africa. Hence, it has been and is still regarded as a crucial custom rite that give broader meaning to cultural educational institutions where those that go through the rite are introduced to useful manly customary values that are necessary in shaping their societal disposition and their roles as men. In various cultural groups, it is accepted as a symbol of transiting from boyhood to manhood (Douglas & Maluleke, 2018, p. 584). There is also a widespread historical anecdotal evidence demonstrating that cultural male circumcision was used to socialise men into accepting the responsibility of protecting

women and children. This part is particularly crucial yet overlooked in almost all reports that are only focused on the unfortunate contemporary economic exploitative trends.

It is the thesis of this article that every traditional community or nation has a duty to pride itself about its own history in order to appropriately self-identify and remain truthful to invaluable group identification. This is aligned with the social identity theory, which describes a process where a group of individuals who accordingly possess common knowledge that they belong to a certain social category or group (Stets & Burke, 2000, p. 225), and thereafter appropriate specific value unto what defines their interrelations as a pursuit for a common goal. The issue of cultural circumcision would appear as requiring a similar approach. Put differently, this involves issues of respecting, upholding and preserving the national identity and heritage of those that consider it as a heritage matter. As a heritage phenomenon, cultural male circumcision plays an essential function in preserving constitutionally entrenched cultural rights that are often expressed through traditional activities. It has been reported that this custom is concerned with transferring cultural and traditional knowledge to generations of the future. When exercised in accordance with the Constitution, 1996, no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. This entails that every person is allowed to participate in cultural practices according to their preferences but within the limits of the law.

Bolstering its heritage status is a contemporary health benefit. It has since been widely accepted that cultural male circumcision also plays a fundamental role in providing greater health benefits especially in the context of alleviating risks associated with the spread of HIV/Aids, which remains one of the biggest health risks in South Africa. Most scholars and professionals in the medical profession have stated that it lowers risks of HIV transmission in men and other sexually transmitted diseases (Verquet, 2013, p. 1; Garenne, 2008, p.16), while reducing HIV transmission by 60% in men (WHO, 2012; Williams et al, 2006, p. 1032). Indeed, observational studies have restated the view that circumcision is associated with reduced sexual transmission of HIV in many instances (Doyle & Hill, 2011, p. 1). This is particularly with regards to transmission from female-to-male during sexual activity (Ibid) with reports and various studies emphasising the validity of arguments that male circumcision plays a significant role at least in the trials that have been conducted (Tobian et al., 2009, p. 2). As a result, the Department of Health encourages all men of appropriate to circumcise.

6. Conclusion

The object of this article was to show that cultural male circumcision continues to be a fiercely thoughtful human rights issue in South Africa. Not only does it affect the commonly discoursed civil and political rights, and socio-economic rights such as the right to dignity, right to equality, right to privacy, right to welfare and so forth. Its scope of application traverses across all rights in the Bill of Rights. Hence, the article argues that while foundational rights-based approaches have been focusing on the state enforcing normative legislative directives, communities that practise cultural circumcision as a heritage right also have a legitimate entitlement to demand that the state should protect the practice as a constitutionally entrenched heritage right. In this regard, it means the state is obligated to create an environment within which the traditional communities are able to enjoy the custom as a heritage entitlement. The article adopted a considerably different approach to reasoning in that it accepts that while South Africa's post-apartheid constitutional apparatus are fundamentally rights-based orientated and thus require the state and every legal and juristic persons to be bearers of such a responsibility of protecting human rights, it is argued that the state is also obligated to exercise restraint and care when engaging in acts that interferes with free enjoyment of heritage as a right. It is asserted that there are direct constitutional permutations that supports the view that the state's often stereotyped approach to cultural male circumcision is at odds with the constitutional injunction predicated on the need to also protect cultural rights as critical heritage entitlements.

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USTAVNA ODREDBA KOJA SE TIČE OBREZIVANJA MUŠKARACA KAO KULTUROLOŠKOG NASLEDNOG PRAVA

REZIME: U ustavni okvir Južne Afrike utemeljeno je mnoštvo pravnih obaveza koje štite kulturu kao pravo. Članovi 30 i 31 Ustava iz 1996. godine su posebno uneti da bi se usaglasili sa duhom i smislom potrebe da se zaštite

kulturološka prava. Neke zakonske uredbe kao Akt 38 o deci iz 2005. godine kao i Akt 6 o školama inicijacije Limpopoa iz 2016. godine takođe veoma uvažavaju kulturološka prava time što omogućavaju kulturološkim porodicama i zajednicama da svoju decu podvrgnu upražnjavanju bilo koje kulturne aktivnosti po njihovom izboru, ali u meri do koje je to izvodljivo. Tvrdi se da sve dokle je ustavni aparat Južne Afrike posle 1994. godine fundamentalno orijentisan ka pravima i na taj način zahteva da svako pravno i pravosudno lice bude odgovorno za zaštitu ljudskih prava, država je shodno tome u obavezi da zaštititi kulturološka prava kao ustavno pravo da bi građani mogli da uživaju u nasleđu kao pravu, bilo kao grupa ili pojedinci sa kulturološkom orijentacijom. Ustavno govoreći, državi je zabranjeno da se putem akata nepravredno meša u slobodno uživanje nasleđa kao prava. U radu je usvojen tradicionalni metodološki pristup pravne doktrine, što najbolje odgovara interpretaciji pravnih instrumenata kojima se obuhvata niz verodostojnih značenja i implikacija koje se odnose na pravnu situaciju u stvarnom životu.

Ključne reči: *kulturološka prava, obrezivanje muškaraca kao kulturološki fenomen, ljudska prava, upravno pravosuđe, nasledno pravo.*

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