

# THE CONSTITUTIONALITY OF THE STATE'S INTERVENTION WITH THE PRACTICE OF MALE TRADITIONAL CIRCUMCISION IN SOUTH AFRICA\*

Temba Maseko

*LLB LLM*

*Senior Lecturer, University of South Africa*

## Summary

This article analyzes the constitutionality of the state's intervention with the practice of male traditional circumcision in South Africa. The state intervened in the practice of traditional circumcision by promulgating legislation aimed at providing the observation of health standards in traditional circumcision, the issuing of permission for the performance of a circumcision operation and holding of circumcision schools. Provincial statutes are promulgated the Application of Health Standards in Traditional Circumcision Act 6 of 2001; Free State Initiation Schools Act 1 of 2004 and Northern Province Circumcision Schools Act 6 of 1996. Recently, in 2005 the state introduced the Children's Act 35 of 2005, to give effect to the Constitutional rights of children by prohibiting children below the age of 16 from being subjected to traditional circumcision that is detrimental to their well-being and also protecting them from discrimination, exploitation and from any other physical, emotional or moral harm. The first part of this article discusses the initiates' cultural right to practise traditional circumcision. The second part considers other constitutional rights to which the initiates are entitled. The final section analyzes the constitutionality of the state's intervention with the practice of traditional circumcision.

On the question whether the state's legislative intervention is constitutional, this article applies the internal limitation in section 30 and 31 of the Constitution and the general limitation clause in terms of section 36. The article concludes that the state's legislative intervention, in the practice of traditional circumcision, is justifiable both in terms of internal limitation in section 30 and 31(2) and the general limitation clause of section 36.

## 1 INTRODUCTION

Traditional circumcision is a cultural practice which is constitutionally recognised in South Africa.<sup>1</sup> This means that everyone, including the state, is

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\* I am indebted to my senior colleague, Professor Wessel le Roux for his comments on the first draft of this article. All errors and omissions remain my responsibility.

<sup>1</sup> Ss 30 and 31 of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"). S 30 provides that 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

prohibited from interfering with the right to practise traditional circumcision. Devenish argues that the right to practise one's culture allows members of communities to freely engage in the practice of their culture without intervention from the state or any other source.<sup>2</sup> The practice of traditional circumcision in South Africa, over the years, has been characterised by numerous complaints, deadly infections, loss of the initiates' reproductive organs due to the negligence of traditional surgeons who were often inadequately trained.<sup>3</sup> This prompted the state to interfere by introducing several pieces of legislation aimed at protecting the initiates' rights that were being violated by traditional circumcision.<sup>4</sup> The provincial legislation are: Application of Health Standards in Traditional Circumcision Act;<sup>5</sup> Free State Initiation Schools Act<sup>6</sup> and Northern Province Circumcision Schools Act.<sup>7</sup> The main objects of these provincial legislation are to provide for the observation of health standards in traditional circumcision; the issuing of permission for the performance of a circumcision operation and the holding of circumcision schools. Recently, in 2005 the state introduced the Children's Act<sup>8</sup> in order to give effect to the constitutional rights of children by prohibiting children below the age of 16 from being subjected to traditional circumcision that is detrimental to their well-being and also protecting them from discrimination, exploitation and from any other physical, emotional or moral harm.

In 2001 and 2003, the Congress of Traditional Leaders of South Africa deemed the state legislation (provincial legislation) to be an insult to their tradition and regarded these as infringing the rights of traditional communities.<sup>9</sup> In essence, the Congress was arguing that the state's legislative intervention amounted to the violation of their right to practise traditional circumcision without intervention. This article analyzes the constitutionality of the state's legislative intervention with the right to practise traditional circumcision. The first part of the article discusses the protection of the initiates' cultural right to practise traditional circumcision without intervention. The second part discusses other constitutional rights to which the initiates are entitled. The third and the last part critically analyzes the

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a manner inconsistent with any provision of the Bill of Rights. S 31(1) provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that 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.

<sup>2</sup> Devenish *A Commentary on the South African Bill of Rights* (1999) 421.

<sup>3</sup> Stinson "Male Circumcision in South Africa: How Does it Relate to Public Health?" <http://www.africanvoices.co.za/culture/circumcision.html> (accessed 24 March 2008); "Ten Boys Die of Circumcision in South Africa" <http://www.highbeam.com/doc/1G1-139640792.html> (accessed 03 April 2008).

<sup>4</sup> Sidley "Eastern Cape Tightens Law on Circumcision to Stem Casualties" <http://www.rho.org/html/hthps-b-02.html> (accessed 24 March 2008).

<sup>5</sup> 6 of 2001.

<sup>6</sup> 1 of 2004.

<sup>7</sup> 6 of 1996.

<sup>8</sup> 35 of 2005.

<sup>9</sup> Sidley <http://www.bmj.com/cgi/content/full/323/7321/1090/b?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=traditional+circumcision&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT> (accessed 24 March 2008); <http://www.cirp.org/news/mailandguardian-12-08-03> (accessed 24 March 2008).

constitutionality of the state's legislative intervention in the practice of traditional circumcision.

## 2 THE PROTECTION OF THE INITIATES' CULTURAL RIGHT TO PRACTISE TRADITIONAL CIRCUMCISION WITHOUT INTERVENTION

The meaning of culture that is relevant to customary law involves the people's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of the society.<sup>10</sup> The right to culture, including traditional circumcision, came into existence as a result of the two-stage negotiations process which resulted in the adoption of the Final Constitution, and it seeks to protect the rights of the community in a non-racial parliamentary democracy.<sup>11</sup> Traditional circumcision has its origin in the Middle East and there is a strong belief that the Bantu-speaking tribes of Africa adopted it as a result of the contact with the Arabs who had built stations along the shores of Africa where the Indian Ocean meets the East Coast of Africa.<sup>12</sup> It also emphasises a close relationship of the people who practise it with their ancestral spirits and it is believed that the Xhosa-speaking people regard it as a national rite which seeks to prepare the initiates to a life of adulthood.<sup>13</sup> It then qualifies as a cultural right as it incorporates beliefs, arts, laws and customs of people who are practising it, and like any other cultural rights, it is incorporated in sections 30 and 31 of the Constitution.

Although the word everyone has been used in section 30, this right, as Devenish has submitted, is by its nature group-oriented.<sup>14</sup> That is because individuals share their language and culture with other persons constituting a group or community.<sup>15</sup> Since traditional circumcision is a cultural practice, it is included under the word "culture" in sections 30 and 31. This right does not impose an obligation on the state to employ resources to develop it, but obliges the state to allow people to practise it.<sup>16</sup> Sach J, in the case of *Christian Education of South Africa v Minister of Education*, argued it this way:

"it is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and

<sup>10</sup> Bennett *Customary Law in South Africa* (2004) 79.

<sup>11</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (SCA) 711 par 22.

<sup>12</sup> Momoti *Law and Culture in the New Constitutional Dispensation with Specific Reference to the Custom of Circumcision as Practised in the Eastern Cape* September 2002 (unpublished LLM dissertation) Rhodes University 30.

<sup>13</sup> Momoti 31.

<sup>14</sup> Devenish 422.

<sup>15</sup> *Ibid.*

<sup>16</sup> Dlamini "Culture, Education and Religion" in Van Wyk, Dugard, De Villiers and Davis *Rights and Constitutionalism* (1994) 579.

practise their own religion as well as enjoy their culture and use their language".<sup>17</sup>

It is important to people who practise traditional circumcision, as it identifies them with whom they are and also enables them to enjoy the right to be different. Sachs J, in the case of *Christian Education of South Africa v Minister of Education* argued it this way:

"Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individual and communities being able to enjoy what has been called the right to be different. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitutes a strong weave in the overall pattern".<sup>18</sup>

Sections 30 and 31 appear to be similar in wording with article 15(1) of the International Covenant on Economic, Social and Cultural Rights (1966), which provides, among other things, that the state parties recognise the right of everyone to take part in a cultural life.<sup>19</sup> They are also similar to article 29 of the Convention on the Rights of the Child (1989), which provides that the education of a child is geared towards developing a respect for his or her cultural identity, language and values, for the cultural values of the country in which the child is living, the country from which he or she may originate and for civilizations different from his or her own.<sup>20</sup> Cultural rights are also incorporated in article 27 of the International Covenant on Civil and Political Rights (1966), which obliges the state parties not to deny people belonging to ethnic, religious or linguistic minorities the right, among other things, to enjoy their culture.<sup>21</sup> There are two differences, however, between section 31 and article 27: the recipients of the protection offered by section 31 are not referred to as "minorities" but as those who belong to a cultural, religious or linguistic community and the word "ethnic", used in article 27, has been replaced with the term "cultural".<sup>22</sup>

Article 27 is supplemented by a more general right to self-determination which vests in all people.<sup>23</sup> Although in international practice self-determination tends to be confined to situations where people are claiming

<sup>17</sup> *Christian Education South Africa v Minister of Education supra* par 23.

<sup>18</sup> *Christian Education South Africa v Minister of Education supra* par 24.

<sup>19</sup> South Africa has only signed and not ratified the Covenant. This means that this Covenant is not binding on South African law and it does not have any legal effect in domestic law. However, it is expected, in terms of article 18 of the Vienna Convention on the Law of Treaties (1969), to refrain from acts which would defeat the object and purpose of the Covenant. Further in *S v Makwanyane* 1995 3 SA 391 (CC) 413 par 35, the Constitutional Court held that binding as well as non-binding international law may be taken into account when interpreting a right in the Bill of Rights.

<sup>20</sup> South Africa has ratified the Convention on the Rights of the Child (June 1995). So it is a binding instrument on South African law.

<sup>21</sup> South Africa has signed and ratified the Convention on Civil and Political Rights (December 1998). It is therefore a binding instrument on South African law.

<sup>22</sup> *Christian Education South Africa v Minister of Education supra* par 23.

<sup>23</sup> Bennett 84, citing article 1(1) of the International Covenant on Civil and Political Rights, and Economic, Social and Cultural Rights and Legal Consequences for states of the Continued Presence of SA in Namibia 1971 ICJ Reports 16 31.

political independence, it is a broad concept that includes a right to cultural development.<sup>24</sup> On a regional level cultural rights are incorporated in the African Charter on Human and Peoples' Rights (1981).<sup>25</sup> Article 22 of the African Charter provides people with a right to their economic, social and cultural development. This allows people who are practising traditional circumcision to develop it in the manner that suits them. South African courts are also obliged to respect and enforce these international instruments, discussed above, protecting the right to practise traditional circumcision. Section 39 and 233 of the Constitution requires the courts to consider international law when interpreting the Bill of Rights.

The right to practice traditional circumcision is, however, limited as it has to comply with other provisions of the Constitution.<sup>26</sup> This ensures that the practice of traditional circumcision does not violate other rights to which people who are practising traditional circumcision are entitled. The court in the case of *Christian Education South Africa v Minister of Education* argued that the limitation in these sections ensures that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.<sup>27</sup> This means that it is unlikely for a court to enforce the practice of traditional circumcision that has the effect of infringing any other right in the Constitution.

The Constitution intensified the protection of cultural rights by establishing the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>28</sup> In terms of section 185, the Commission is responsible for the following functions:

- (a) it promotes respect for the rights of cultural, religious and linguistic communities;
- (b) it also promotes and develops peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and lastly
- (c) it recommends the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities led to the enactment of the Commission for the Promotion and Protection of the Rights of Cultural,

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<sup>24</sup> Bennett 84.

<sup>25</sup> South Africa ratified the African Charter on Human and Peoples' Rights (July 1996). It is therefore a binding instrument on South African law.

<sup>26</sup> Ss 30 and 31(2) of the Constitution.

<sup>27</sup> *Christian Education South Africa v Minister of Education supra* par 26; and Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 634, have explained the limitation in ss 30 and 31(1) as follows: the constitutional protection of community identity is not a licence to that community to violate the rights of its members or anyone else.

<sup>28</sup> Title 3 of the Constitution.

Religious and Linguistic Communities Act,<sup>29</sup> which also protects and promotes the cultural rights.

### **3 OTHER CONSTITUTIONAL RIGHTS THAT THE INITIATES ARE ENTITLED TO**

As it has been mentioned sections 30 and 31(2) require traditional circumcision to comply with other provisions of the Constitution. This, it has been mentioned, ensures that traditional circumcision does not infringe other rights to which people who are practising it are entitled. Those rights are as follows:

#### **3 1 The initiates' right to health care**

The initiates' right to have access to health care is guaranteed under section 27(1) of the Constitution. Section 27(2) obliges the state to enact legislation or other measures to achieve the progressive realization of the initiates' right to health care, subject to available resources. The concept "progressive realization" in section 27(2) requires the state to gradually take reasonable measures aimed at satisfying the initiates' right to health care.<sup>30</sup> The initiates' right to health care is further protected by section 7(2) of the Constitution, which places a negative as well as a positive obligation on the state to respect, protect, promote and fulfil their rights including their right to health care. The duty to respect the initiates' right places a negative obligation on the state and other parties to abstain from preventing or impairing the initiates' rights to health care.<sup>31</sup> The duty to protect imposes a positive obligation on the state to protect their right to health care by formulating and enforcing legislative and executive measures to regulate and control the negative impact private parties may have on the initiates' right to health care.<sup>32</sup>

Child initiates' right to health care is also protected by section 28(1)(c) of the Constitution which provides every child with the right to basic nutrition, shelter, basic health care services and social services. This calls for immediate state intervention, in the protection of the initiates' right to health care, since its text does not give any indication that its rights are limited by the resources available to the state.<sup>33</sup> The state is also, in terms of subsection (1) (d), obliged to prevent harm to child initiates.

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<sup>29</sup> 19 of 2002.

<sup>30</sup> Liebenberg "The Interpretation of Socio-Economic Rights" in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds) *Constitutional Law of South Africa* Vol 2 2ed (2006) 33-41 (emphasis added), citing the case of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46, 2000 11 BCLR 1169 par 45.

<sup>31</sup> Liebenberg 33-58; and Brand "Introduction to the Socio-Economic Rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 9.

<sup>32</sup> Brand 37.

<sup>33</sup> Friedman and Pantazis "Children's Rights" in Woolman *et al Constitutional Law of South Africa* Vol 2 2ed (2006) 47-6.

The initiates' right to health care is also affirmed by article 12 of the International Covenant on Economic, Social and Cultural Rights (1966), which obliges the state parties to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>34</sup> In order to achieve the full realization of this right, the state parties are required among other things to prevent, treat and control the epidemic, endemic, occupational and other diseases, and to create the conditions which would assure to all medical service and medical attention in the event of sickness.

### 3 2 The initiates' right to dignity

The initiates' right to human dignity is guaranteed by section 10 of the Constitution, which provides that everyone, including the initiates, has inherent dignity and the right to have their dignity respected and protected. This requires the acknowledgment of the value and worth of all individuals, including the initiates, as members of society.<sup>35</sup> The initiates' right to human dignity is important as it constitutes one of the values on which the Constitution of the Republic of South Africa is founded.<sup>36</sup> It also qualifies as the most important of all human rights and as the source of all other personal rights in the Bill of Rights, discussed above, to which the initiates are entitled. O' Regan J, argued it as follows:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in chap 3” (interim Constitution).<sup>37</sup>

Human dignity is one of the measures that the court uses to evaluate the reasonableness of the state's actions in fulfilling the socio-economic rights. Yacoob J, in the case of *Government of the Republic of South Africa v Grootboom* argued it as follows:

“it is fundamental to take into account the inherent dignity of human beings when evaluating the reasonableness of the state action”.<sup>38</sup>

This means that the court must consider the initiates' dignity when evaluating the reasonableness of the states' action in fulfilling the initiates' right to health care. On a regional level, the initiates' right to dignity is guaranteed under Article 4 and 5 of the African Charter on Human and

<sup>34</sup> The signature of South Africa to this Covenant, as it has been mentioned, obliges it to refrain from acts which would defeat the object and purpose of the treaty. Further, in *S v Makwanyane supra* par 36-37, the Constitutional Court held that binding as well as non-binding international law may be taken into account when interpreting a right in the Bill of Rights.

<sup>35</sup> S 1 of the Constitution.

<sup>36</sup> *S v Makwanyane supra* par 328; and Currie and De Waal 274.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 par 83; and Woolman “Dignity” in Woolman *et al Constitutional Law of South Africa Vol 2 2ed* (2006) 36-59, citing the case of *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

Peoples' Rights. Article 4 requires the state parties to ensure that the initiates are entitled to respect for their life and integrity and that they are not arbitrarily deprived of this right. Article 5 obliges the state to ensure that the initiates have the right to the respect of their dignity inherent in a human being and that all forms of exploitation and degradation of man particularly, among others, torture, cruel, inhuman or degrading punishment and treatment, are prohibited.

### **3 3 The initiates' right to equality**

Section 9(1) of the Constitution entitles the initiates to enjoy equally with others the protection and benefit of the law. Article 3 of the African Charter on Human and Peoples' Rights also affirms the initiates' right to equal protection of the law. The state and private individuals are prohibited from unfairly discriminating directly or indirectly against the initiates on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>39</sup> In the context of the practice of traditional circumcision, the most applicable ground is the one of culture. This requires the state and private individuals to respect and protect traditional circumcision as a cultural practice by not unfairly discriminating against the initiates on the basis of such a cultural practice.

On a regional level, the unfair discrimination against the initiates is prohibited by the African Charter on the Rights and Welfare of the Child (1990)<sup>40</sup> and the African Charter on human and Peoples' Rights (1981). Article 21 of the Charter on the Rights and Welfare of the Child prohibits cultural practice that is harmful to the child's health and those that are discriminatory to them on the ground of sex or other status. Article 2 of the African Charter on Human and Peoples' Rights obliges the state parties to ensure that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

On an international level, article 26 of the Covenant on Civil and Political Rights obliges the state parties to ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It prohibits unfair discrimination against the initiates on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### **3 4 The initiates' right to life**

In terms of section 11 of the Constitution, everyone (including the initiates) has a right to life. This right is regarded as the most important right and as

<sup>39</sup> S 9(3) and (4).

<sup>40</sup> South Africa ratified the Charter on the Rights and Welfare of the Child (October 1997). It is therefore binding on South African law.

the source of all other personal rights in the Bill of Rights.<sup>41</sup> It requires the state to take a leading role in re-establishing respect for human life and dignity in South Africa.<sup>42</sup> The initiates' right to life depends not only on biological existence, cognitive and intellectual ability, but also on material means and access to social goods, which include basic and essential inputs necessary to keep their biological life going.<sup>43</sup> The basic interests (nutrition, water, shelter and health-care services) impose an obligation on the state to ensure that the initiates have access to them in order to protect their lives.<sup>44</sup> It must, however, be noted that access to water, shelter and health-care services constitute socio-economic interests and the state is only obliged to progressively provide them and their fulfilment is also subject to the availability of the resources.

Article 4 of the African Charter requires the state parties to ensure that every human being, including the initiates is entitled to respect for their life and integrity and that they are not arbitrarily deprived of this right. The initiates' right to life is also incorporated in article 2 of the International Covenant on Civil and Political Rights (ICCPR) which protects the initiates' right to life by requiring states to provide an effective remedy for abuses and to ensure the rights to life for all individuals in their jurisdiction, without distinction of any kind. Article 6 of the Covenant requires the state to ensure that every human being has the inherent right to life, which shall be protected by law.

### **3 5 The initiates' right to freedom and security of a person**

Section 12(2)(b) authorizes the initiates with a right to freedom and security of the person, which includes, the right to security in and control over their bodies; and section 12(1)(d) entitles the initiates with the right not to be tortured in any way. The right to freedom and security of a person is inspired by article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, which imposes a duty on the state parties to protect people from violence or bodily harm whether inflicted by state officials or by individuals, by groups or institutions.<sup>45</sup>

Article 6 of the African Charter on Human and Peoples' Rights protect the initiates' right to freedom and security of a person by obliging the state parties to ensure that every individual has the right to liberty and to the security of his person. It further provides that their right to freedom and security of a person could only be limited by the law. Further, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) protects the initiates' right to

<sup>41</sup> *S v Makwanyane supra* par 144; and Currie and De Waal 274.

<sup>42</sup> Pieterse "Life" in Woolman *et al Constitutional Law of South Africa* Vol 2 2ed (2006) 39-18.

<sup>43</sup> *Ibid.*

<sup>44</sup> Pieterse 39-19, citing the case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); 1997 12 BCLR 1619 par 39.

<sup>45</sup> Bishop and Woolman "Freedom and Security of a Person" in Woolman *et al Constitutional law of South Africa* Vol 2 2ed (2006) 40 48.

freedom and security of a person by requiring states to provide an effective remedy for abuses and to ensure the rights to life and security of the person of all individuals in their jurisdiction, without distinction of any kind, including sex. Article 3 of the Covenant also incorporates the initiates' right to freedom and security of a person in so far as it provides that everyone has the right to liberty and security of a person.

### 3 6 The initiates' right to privacy

The initiates' right to privacy is provided for by section 14 of the Constitution, in terms of which everyone has a right to privacy. Their right to privacy is based on their human dignity and it preserves their choice of when and how much they allow others to know about their personal affairs or interfere with their mind, body or private activities.<sup>46</sup> It also preserves their dignity, including their physical, psychological and spiritual well-being.<sup>47</sup>

On an international level the initiates' right to privacy is protected by Article 10 of the African Charter on the Rights and Welfare of the Child, which requires the state parties to ensure that child initiates are not subjected to arbitrary or unlawful intervention with their privacy, family home or correspondence, or to the attacks upon their honour or reputation. Article 17 of the International Covenant on Civil and Political Rights also imposes a duty on the state parties to ensure that child initiates are not subjected to arbitrary or unlawful intervention with their privacy and that they provide the protection of the law against such intervention. Child initiates' right to privacy is also protected by article 16 of the Convention on the Rights of the Child (1989), which prohibits subjecting children to arbitrary or unlawful intervention with their privacy and also protection of the law against such intervention.

### 3 7 Children's rights

Section 28(2) obliges the state to consider the child initiates' best interests in every matter concerning them. The best interest requirement entails an obligation on the parents to care for child initiates and it also requires the state to create the necessary legal and administrative infrastructure to ensure that child initiates receive the protection they are entitled to in terms of section 28.<sup>48</sup> Although there seems to be no concrete definition of the concept "best interests of the child", the Constitutional Court has reaffirmed the significance of this principle in the case of *Minister of Welfare and Population Development v Fitzpatric*.<sup>49</sup> International law has also accepted

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<sup>46</sup> Devenish 55.

<sup>47</sup> *Ibid.*

<sup>48</sup> Currie and De Waal 619, citing the case of *Bannatyne v Bannatyne* 2003 2 SA 363 (CC) par 24. The principle of the best interests of the child is also incorporated in the objects of the Children's Act 38 of 2005.

<sup>49</sup> 2000 3 SA 422 (CC) par 17-19.

that in every matter concerning the child, the child's best interests must be of paramount importance.<sup>50</sup>

Article 19 of the Convention on the Rights of the Child obliges the state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from, among other things, injury or abuse, neglect or negligent treatment, maltreatment, while in the care of parents, legal guardians or any other person. State parties are also required in terms of article 24(3) of the convention to take all effective and appropriate measures aimed at abolishing traditional practices prejudicial to the health of the children. Article 36 of the Convention obliges state parties to protect the child against all other forms of exploitation that are prejudicial to any aspects of the child's welfare. As it has been mentioned, in aligning itself with this Convention, South Africa enacted the Children's Act 35 of 2005, which prohibits subjecting child initiates to traditional circumcision which is detrimental to their well-being.

#### **4 DOES THE STATE'S LEGISLATIVE INTERVENTION LIMIT THE RIGHT TO PRACTISE TRADITIONAL CIRCUMCISION, WITHOUT INTERVENTION?**

As it has been mentioned, sections 30 and 31 of the Constitution allows people who practise traditional circumcision to practise it without intervention. This prohibits both the state and private parties from interfering with the cultural right of traditional circumcision. It is without a doubt that the state legislative intervention in the practice of traditional circumcision, limited the right to practise culture of traditional circumcision without intervention. That is the case because, both the National and Provincial legislations regulate the manner in which traditional circumcision is to be performed and stipulate the requirements to be complied with before traditional circumcision is performed.

#### **5 IS THE LIMITATION OF THE RIGHT TO PRACTISE TRADITIONAL CIRCUMCISION WITHOUT INTERFERENCE CONSTITUTIONAL?**

The examination of the internal limitation in sections 30 and 31(2) is a point of departure when determining whether or not the limitation of the right to practise traditional circumcision is constitutional. If traditional circumcision does not comply with the internal limitation in sections 30 and 31(2), in other words, if it violates other provisions of the Constitution, the state's legislative intervention should be deemed constitutional.

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<sup>50</sup> The principle of the best interest of the child is also incorporated in the African Charter on Human and People's Rights and in the African Charter on the Rights and Welfare of the Child. Article 18(3) of the Charter on Human Rights obliges state parties to ensure among other things, the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Article 4 the Charter on the Rights and Welfare of the Child requires the state parties to ensure that the best interests of the child shall be the primary consideration in all actions concerning the child.

If traditional circumcision survives the internal limitation, in other words, if it does not infringe other provisions of the Constitution, the state would have to justify its legislative intervention in the practice of traditional circumcision in terms of section 36.<sup>51</sup> However, the court in the case of *Christian Education of South Africa v Minister of Education* seemed to have ignored the internal limitations in sections 15(3)(b), 30 and 31(2), and proceeded to apply section 36 factors to determine whether section 10 of the Schools Act 84 of 1996, prohibiting corporal punishment in schools, constituted a reasonable and justifiable limitation of parent's religious rights allowing the practice of corporal punishment in their schools. The court's reasoning for ignoring internal limitation was as follows:

"the second relates to oppressive features of internal relationships primarily within the communities concerned, where s 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant. This is clearly an area where interpretation should be prudently undertaken so that appropriate constitutional analysis can be developed over time in the light of the multitude of different situations that will arise. If it possible to decide the present matter without attempting to give definitive answers on a complex range of questions in a new field, as many of which were not fully canvassed in argument, then such a course should be followed. In the present matter I think that it is possible to do so."<sup>52</sup>

This reason could be interpreted to mean that the court should apply the internal limitation in sections 15(3)(b), 30 and 31 if it has been specifically referred to them. If it has not been specifically referred to the internal limitation, then it can apply section 36 factors. The court in the *Christian's* case, due to the absence of a specific referral to the internal limitation, assumed that corporal punishment is not inconsistent with other provisions of the Bill of Rights as contemplated by section 31(2) and that section 10 of the Schools Act which limited the parents' religious rights both under sections 15 and 31 of the Constitution. It then applied section 36 factors and concluded that section 10 of the Schools Act limited the parents' religious rights allowing corporal punishment in their schools in a reasonable and justifiable manner.

Woolman and Botha criticised the court's decision of ignoring the internal limitation in sections 15 and 31(2). They argued that the court's failure to recognise the internal limitation in section 31(2) might have been a mistake on the part of the court.<sup>53</sup> If it was not a mistake, they further argued, it is possible that a right to community religious practice could be deemed consistent with other rights in Chapter 2 and still be impaired by the law in question, and if that is correct, then the analysis would proceed to section 36 enquiry.<sup>54</sup> In determining whether the limitation of a right is constitutional, as a result of the criticism, this article analyzes both instances: where the court has been specifically referred to internal limitation in sections 30 and 31 and

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<sup>51</sup> Bennett 95.

<sup>52</sup> *Christian Education South Africa v Minister of Education supra* par 27.

<sup>53</sup> Woolman and Botha "Limitations" in Woolman *et al Constitutional Law of South Africa* Vol 2 2ed (2006) 34-34.

<sup>54</sup> *Ibid.*

where it has not been specifically referred to internal limitation, in which case, it has to apply section 36 factors.

## 5 1 Internal limitation in sections 30 and 31(2)

Our courts have not, since the inception of the Constitution, been specifically asked to apply the internal limitation in sections 30 and 31(2) of the Constitution.<sup>55</sup> As it has been alluded to, sections 30 and 31(2) essentially require a person or people who practise traditional circumcision to practise it in the manner that does not violate other provisions of the Constitution. Friedman and Pantazis, on their analysis of the case of *Christian Education*, as it has been mentioned, argued this as follows:

“The Final Constitution s 31(2) acts as an internal modifier to the right to practice religion: it thereby prohibits a person or group from practising their religion in a manner inconsistent with the Constitution. Thus, even if the prohibition on corporal punishment was a *prima facie* violation of the right to practice religion, because corporal punishment administered by schools was a violation of another provision, s 31 itself was not violated.”<sup>56</sup>

### 5 1 1 Does the practice of traditional circumcision violate other provisions of the Constitution?

Deadly infections and loss of initiates’ reproductive organs associated with traditional circumcision seem to violate the initiates’ right to health care, dignity, equality, freedom and security of a person, life and the best interests of the child initiates’ requirement. Traditional circumcision’s violation of other rights of the Constitution renders the state’s legislative intervention with the practise of traditional circumcision constitutional. In other words, the right to practice traditional circumcision was not violated. In essence, the internal limitation in sections 30 and 31(2) qualifies the state’s intervention as the justifiable limitation of the initiates’ right to practise traditional circumcision without intervention.

## 5 2 General limitation in terms of section 36

As it has been mentioned, in terms of the *Christian’s* case, the general limitation clause is applicable where the court has not been specifically referred to internal limitation in sections 30 and 31(2). Section 36 allows a right to be limited by law of general application and such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Law of general application entails that the law must be sufficiently clear, accessible and precise and those who are affected by it can ascertain the extent of their rights and obligations.<sup>57</sup> Over

<sup>55</sup> *Christian Education South Africa v Minister of Education supra* par 27.

<sup>56</sup> Friedman and Pantazis 47-17.

<sup>57</sup> Mcquoid-Mason “Are the Restrictive Provisions of Sections 2(1)(c) and 5(5) of the Choice on Termination of Pregnancy Act 92 of 1996 Unconstitutional”? 2006 31(1) *Journal for Juridical Science* 127.

and above that the law of general application must apply equally to all and it must not be arbitrary in its application. This does not mean that the rule must apply to every individual in the country, and the test is satisfied if the law targets a particular group of people to which it is relevant.<sup>58</sup> The state's legislative intervention complies with the requirements of the law of general application. That is the case because the state's legislations are clear, accessible and precise as they regulate the initiation schools and the manner in which traditional circumcision is to be practised. Further, people who are practising it can ascertain their rights and obligations. In addition, the state's legislations are relevant to the people who are practising traditional circumcision as their culture.

Reasonableness and justifiability of the law of general application are measured with the sufficient proportionality between the infringement of a fundamental right and the benefits the limitation is designed to achieve.<sup>59</sup> The balancing process takes into account the following factors: nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

#### (a) Nature of the right

The nature of a right refers mainly to the importance of a right,<sup>60</sup> and the importance of a right to practise traditional circumcision cannot be overemphasised as it is constitutionally recognised. Traditional circumcision qualifies as a social behaviour which is valued as an inherited cultural tradition and is also one of the cultural systems that the societies use to preserve stability in the social system.<sup>61</sup> On an international level, the right to practise traditional cultural rituals is incorporated in the following instruments which are binding on South African law: International Covenant on Economic, Social and Cultural Rights,<sup>62</sup> International Covenant on Civil and Political Rights,<sup>63</sup> and the African Charter on Human and Peoples' Rights.<sup>64</sup>

#### (b) The importance of the purpose of the limitation

Limitation is deemed reasonable and justifiable if it serves an important purpose in a constitutional democracy, and if all citizens would deem the purpose as compellingly important.<sup>65</sup> The importance of the purpose of the

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<sup>58</sup> Currie and De Waal 170.

<sup>59</sup> Currie and De Waal 176.

<sup>60</sup> Malherbe "The Constitutionality of Government Policy Relating to the Conduct of Religious Observances in Public Schools" 2002 35(3) *TSAR* 391 409.

<sup>61</sup> *Christian Education South Africa v Minister of Education supra* par 22.

<sup>62</sup> Article 15(1), which provides, among other things, that the state parties recognise the right of everyone to take part in a cultural life.

<sup>63</sup> Article 27 obliges the state parties not to deny people belonging to ethnic, religious or linguistic minorities the right, among other things, to enjoy their culture.

<sup>64</sup> Article 22 provides people with a right to their economic, social and cultural development.

<sup>65</sup> Mcquoid-Mason 2006 31(1) *Journal for Juridical Science* 129.

limitation assists in deciding whether the limitation is justified in view of the nature of the right that is limited.<sup>66</sup> A limitation that does not serve as the protection of public safety, order, health, morals, the fundamental rights and freedom of others, does not justify limitation of rights.<sup>67</sup> Malherbe has argued that a limitation directed at the protection of matters such as people's personal integrity and dignity would be regarded much more favourably.<sup>68</sup>

The state's legislative intervention seems to comply with the requirements of the importance of the purpose of the limitation. This is the case because the state's legislative intervention seeks to protect the most important rights of the initiates, such as their right to health care, life, dignity and other rights they are entitled to.<sup>69</sup>

On an international level South Africa is obliged to comply with the following international instruments: Convention on the Rights of the Child,<sup>70</sup> International Covenant on Civil and Political Rights,<sup>71</sup> International Covenant on Economic, Social and Cultural Rights<sup>72</sup> and the African Charter on the Rights and Welfare of the Child.<sup>73</sup>

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<sup>66</sup> Malherbe 2002 35(3) *TSAR* 410.

<sup>67</sup> Malherbe 2002 35(3) *TSAR* 411, citing Currie and De Waal *The Bill of Rights Handbook* (2001) 158-159 for the kind of purposes so far accepted as legitimate by our courts.

<sup>68</sup> Malherbe 2002 35(3) *TSAR* 412, citing the case of *Christian Education South Africa v Minister of Education supra*.

<sup>69</sup> South African Human Rights Commission, Terms of Reference of Public Hearings on Initiation Schools <http://www.pmg.org.za/files/gazettes/060922initiation.pdf> (accessed 24 March 2008). The South African Human Rights Commission reported that 215 of the initiates had died 118 others had lost their manhood in the Eastern Cape since 2001. The Commission also reported that more than 2000 initiates had been hospitalised during the same period.

<sup>70</sup> Article 16 obliges the state parties to ensure that no child shall be subjected to arbitrary or unlawful intervention with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; article 19 requires the state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child; article 24(3) requires the state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children; article 36 obliges the state parties to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare; article 37 imposes an obligation on the state parties to ensure that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.

<sup>71</sup> Article 2 requires governments to provide an effective remedy for abuses and to ensure the rights to life and security of the person of all individuals in their jurisdiction, without distinction of any kind, including sex; article 3 provides everyone with the right to liberty and security of a person; article 6 requires the state parties to ensure that every human being has the inherent right to life and that this right shall be protected by law and no one shall be arbitrarily deprived of his life; article 17 obliges the states to ensure that no one is subjected to arbitrary or unlawful intervention with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation; and article 26 which requires the state parties to ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

<sup>72</sup> Article 12 obliges the state parties to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It also requires the state to take the following steps in order to achieve the full realization of this right: The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the

Recently the World Health Organization (WHO) and Joint United Nations Programme on HIV/AIDS (UNAIDS) statistics have shown that circumcision reduces the risk of acquired infection of HIV/AIDS in heterosexual men by 60% in South Africa.<sup>74</sup> Even if these statistics were released before the state enacted the legislation, it wouldn't have made any difference. In other words it would still be justifiable to limit the initiates' right to practise traditional circumcision as circumcision does not offer 100% protection against HIV/AIDS.<sup>75</sup>

### (c) The nature and extent of the limitation

The emphasis on the nature and extent of the limitation is on whether the limitation is a serious or relatively minor infringement of the right.<sup>76</sup> Essentially the infringement of a right should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.<sup>77</sup> The court in the case of *S v Lawrence*; *S v Negal*; *S v Solberg* argued it this way:

"The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of a right, the more compelling must be its justification. Conversely, the lighter the transgression, the less stringent the requirements of justification."<sup>78</sup>

Does the state's legislative intervention amount to a serious or relatively minor infringement of the right to practise traditional circumcision? The state's legislative intervention seems to be a minor infringement of the right to practise traditional circumcision. The reasons are as follows: the state's legislative intervention sought to protect the other important rights of the initiates, discussed above; the state's legislative intervention did not completely abolish the practice of traditional circumcision, but merely introduced the standards aimed at protecting the initiates' rights, discussed above. All the state's legislation require is the practice of traditional circumcision that complies with the provisions of the Constitution.

### (d) The relation between the limitation and its purpose

The question under the relation between the limitation and its purpose is whether the law serves the purpose that it is designed to serve.<sup>79</sup> In essence

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creation of conditions which would assure to all medical service and medical attention in the event of sickness.

<sup>73</sup> Article 21 prohibits cultural practice that is harmful to the child's health and those that are discriminatory on them on the ground of sex or other status.

<sup>74</sup> Green Circumcision: an answer to HIV? <http://www.thestar.co.za/index.php?fArticleId=3601738> (accessed 04 April 2008).

<sup>75</sup> *Ibid.*

<sup>76</sup> Currie and De Waal 181.

<sup>77</sup> *Ibid.*

<sup>78</sup> *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 10 BCLR 1348 (CC) 1406 par 168; and Malherbe 2002 35(3) *TSAR* 413.

<sup>79</sup> Currie and De Waal 183.

there must be a good reason for the infringement of a constitutional right<sup>80</sup> or there must be a rational relationship between the limitation and its purpose which is established by the presence of a clear and legitimate purpose.<sup>81</sup> The main objects of the state's legislation are to provide for the observation of health standards in traditional circumcision; the issuing of permission for the performance of a circumcision operation and holding of circumcision schools. The state's legislation were in response to, as it has been mentioned, numerous complaints, deadly infections, loss of the initiates' reproductive organs due to the negligence of traditional surgeons who were often inadequately trained.<sup>82</sup> Essentially, the state's purpose, as it has been mentioned, was to protect the initiates' rights, by reducing deaths and injuries associated with traditional circumcision. This constitutes a good reason for infringing the right to practise traditional circumcision and that has been consolidated by the Minister for Provincial and Local Government in May 2004. The Minister alluded to the fact that there had been a 70% decline in incidences of unlawful initiations since 2001.<sup>83</sup>

(e) Less restrictive means to achieve the purpose

This means that if other means could be used to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent, those means must be used.<sup>84</sup> This compels those that limit a right to show that alternative measures to achieve the purpose have been considered.<sup>85</sup> It also requires a careful analysis of the purpose of the state's legislations that interfere with the right to practise traditional circumcision without intervention.<sup>86</sup>

The question is whether there are less restrictive means that the state could have used to protect the initiates' rights or to reduce deaths and injuries associated with traditional circumcision. It is submitted that the state's legislative intervention was the only least restrictive means that the state could use to achieve the protection of the initiates' rights. This is the case because the state's legislations limited the right to practise traditional circumcision to a minor extent, as they did not completely eradicate the practice of traditional circumcision, but regulated it to protect the initiates' rights in terms of the Constitution. Further, the purpose of the state legislation (reducing deaths and injuries associated with traditional circumcision, thereby

<sup>80</sup> *Ibid.*

<sup>81</sup> Malherbe 2002 35(3) *TSAR* 413.

<sup>82</sup> Sidley Eastern Cape tightens law on circumcision to stem casualties <http://www.bmj.com/cgi/content/full/323/7321/1090/b?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=traditional+circumcision&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT> (accessed 24 March 2008); <http://www.cirp.org/news/mailandguardian> 12-08-03 (accessed 24 March 2008).

<sup>83</sup> Opening address by Minister Mufamadi, Minister for Provincial and Local Government, Traditional Initiation Conference held on 24 May 2004, [http://www.thedplg.gov.za/index.php?option=com\\_content&task=view&id=120&Itemid=36](http://www.thedplg.gov.za/index.php?option=com_content&task=view&id=120&Itemid=36) (accessed 24 March 2008).

<sup>84</sup> Currie and De Waal 183.

<sup>85</sup> Malherbe 2002 35(3) *TSAR* 414.

<sup>86</sup> *S v Manamela* 2000 3 SA 1 (CC) 41 par 96.

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protecting the rights of the initiates) is so important that it justifies the state's legislative intervention in the practice of traditional circumcision.

## **6 CONCLUSION**

The right to practise traditional circumcision is constitutionally recognised and it could only be interfered with if it does not comply with the Constitution. In determining whether the right to practise traditional circumcision has been constitutionally interfered with, the internal limitations in sections 30 and 31(1) must be considered. The internal limitations in sections 30 and 31(1) are only considered when the court has been specifically referred to them. In the absence of such a specific reference, the court is allowed to apply section 36 factors, in determining whether the right to practise traditional circumcision has been constitutionally interfered with. It is likely that the state would succeed if it relies on the internal limitations in sections 30 and 31(2) on the issue of the constitutionality of its intervention with the practice of traditional circumcision. This is the case because deadly infections, loss of the initiates' reproductive organs due to the negligence of traditional surgeons who were often inadequately trained, constituted the violation of the other constitutional rights of the initiates. In other words the state's intervention with the practice of traditional circumcision would be deemed as constitutional.

On the application of section 36, it has been established that the state's legislative intervention, in the practice of traditional circumcision, qualifies as a law of general application. It has also been established that the right to practise traditional circumcision is an important right, and that the state's legislative intervention limited the right to practise traditional circumcision to a minor extent as it did not completely eradicate the practice of traditional circumcision. It merely introduced the standards aimed at protecting the initiates' rights, discussed above. It has also been shown that the state's purpose constituted a good reason for infringing the right to practise traditional circumcision, as it aimed at reducing deaths and injuries associated with traditional circumcision. Lastly it has been established that the legislations were the least restrictive means that the state could use to achieve the protection of the initiates' rights, because the state's legislations limited the right to practise traditional circumcision to a minor extent as they did not completely eradicate the practice of traditional circumcision, but regulated it to protect the initiates' rights in terms of the Constitution. It is then submitted that, on the application of section 36, the state's legislative intervention, in the practice of traditional circumcision, was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. That is so because the initiates' rights, discussed above, outweighed the right to practise the culture of traditional circumcision.