

Healthcare & Life Sciences - South Africa

Balancing culture, religion and health: the legal framework for male circumcision

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Background

Male circumcision is an age-old practice that carries different meanings for men and women from both the cultural and religious perspectives. In some African cultures (eg, Xhosa), male circumcision is seen as a rite of passage into adulthood; it also has religious connotations and is widely practised by Jews and Muslims, although less so among Christians.⁽¹⁾

In South Africa in recent years, there has been an increase in advocacy for male circumcision for medical reasons. Compelling evidence has been provided that male circumcision reduces the risk of heterosexual men acquiring HIV by approximately 60%.⁽²⁾ Voluntary male circumcision drives launched by the National Department Health in various parts of the country have focused on young males.

Legislative framework

The South African healthcare legislative framework recognises the different contexts in which circumcisions occur within the diverse cultural and religious contexts and regulates these through the Children's Act (8/2005, as amended).

Section 12(8) of the Children's Act prohibits the circumcision of boys under the age of 16, except when the circumcision is performed for religious purposes in accordance with the practices of the child's religion and in the manner prescribed by the religion concerned, or "for medical reasons on the recommendation of a medical practitioner".

Section 12(9) of the act provides that boys older than 16 may be circumcised only if the child has consented to the circumcision in the manner prescribed in the regulations promulgated under the act and after the child has undergone proper counselling. Taking into account the child's age, maturity and stage of development, every boy has the right to refuse circumcision.

The General Regulations Regarding Children, published under Section 306 of the Children's Act in *Government Gazette* 33076 (April 1 2010), detail the requirements that must be met in order for a circumcision for cultural or religious purposes to be performed.

The dominant theme in the Children's Act is to protect the best interests of the child, and to do so by protecting children from practices such as circumcision which, in certain instances, may not be in the best interests of the child.

The question arises as to whether a male minor under the age of 16 who asks to be circumcised not for religious or medical reasons, but rather of his own accord, is permitted to undergo the circumcision in terms of the act. Under Section 12(8) of the Children's Act, the answer is no – even if the minor voluntarily requests the circumcision and a medical practitioner agrees to carry it out – as the circumcision would not be performed for religious purposes or as a result of an underlying medical condition.

The failure of Section 12(8) of the Children's Act to permit circumcision of boys under the age of 16 for cultural practices raises constitutionality issues insofar as the right to participate in cultural practices is enshrined in Sections 30 and 31 of the 1996 Constitution. Section 30 provides that "everyone has the right to use the language and participate in the cultural life of their choice" and Section 31 provides that persons belonging to a cultural community may not be denied the right to enjoy their culture. Consequently, it could be argued that circumcision of a boy under the age of 16 is in the

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best interests of that boy, and failure to allow him to undergo circumcision in accordance with cultural practices would violate his rights under Sections 30 and 31 of the Constitution.

Circumcision services are currently offered in the Free State, Gauteng, KwaZulu-Natal and Mpumalanga, and certain initiatives within these provinces are aimed at boys aged 14 and older. As the law stands the question also arises as to whether circumcision for the purposes of preventing the transmission of HIV is a medical reason for the circumcision of boys, bearing in mind the following:

- Given that the procedure is irreversible and entails the removal of the foreskin or prepuce (functioning parts of the penis) of boys who, in some cases, are not yet sexually active and therefore are not at risk of contracting HIV through sexual transmission (in the case of neonates), it may not always be clear whether the procedure is reasonable and in the best interests of the boy at the time.
- At the time of the circumcision, not all male minors may comprehend the reasons for and the implications of the circumcision.
- The emphasis on preventing the transmission of HIV may create the false impression that circumcised men are immune from being infected with the virus.

Every year, scores of young men attend various traditional initiation schools to undergo this important rite of passage into manhood. Over the years, the number of initiates requiring hospitalisation – with some having to undergo partial or total amputations – has steadily increased and has sparked the question of whether the law offers them adequate protection from the danger of a botched circumcision. The increased number of incidents may be attributed to:

- poor accessibility and construction of the facilities where the initiation takes place;
- poor wound care;
- delays in seeking medical treatment; and
- the procedures being performed by untrained and unskilled persons and, in certain instances, by persons who have just undergone the initiation process.

Comment

The Constitution and the Children's Act clearly and correctly recognise the right to practise religious and cultural practices such as circumcisions. However, the difficulty with recognising this right is that little has been done by the health and traditional affairs authorities at the national level to regulate the practice and to protect young boys from harm. Literature in the medical fraternity supporting male circumcision diverges on the issues of what is medically appropriate for boys to curb the transmission of HIV and the human rights of circumcised boys. It is hoped that the best interests of young boys and initiates who are to be circumcised are remembered and protected.

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Endnotes

(1) See www.unaids.org/en/Resources/PressCentre/Featurestories/2007/February/20070226MCpt1/ (accessed April 29 2014).

(2) See www.who.int/hiv/topics/malecircumcision/en/ (accessed April 24 2014).

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