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Marakalala, Malose Jan

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Marakalala Malose Jan MSc (Med) Bioethics and Health Law

Ethics of Non-Therapeutic Body Modifications in Children

Submitted to the faculty of health sciences, University of Witwatersrand, Johannesburg, in partial fulfilment of the degree Master of Science in Medicine in Bioethics and Health Law

Supervisor Name: Prof Kevin Behrens

Qualifications: BA, MA, PhD

Position: Associate Professor

03 March 2022

Declaration

I Marakalala Malose Jan

Student Number 1580240, am a student registered for MSc (Med) Bioethics and Health Law, Research Report (SCMD 7000) in the year 2021.

I hereby declare the following:

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- I have followed the required conventions in referencing the thoughts and ideas of others.
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Signature: Marakalala MJ……

Date: 03/03/2022

Acknowledgements

I thank the University of Witwatersrand, Faculty of Health Sciences, Steve Biko Centre for Bioethics for having granted me the opportunity to pursue this masters. I also thank the lecturers who were very diligent and supportive in providing the required skills and study materials toward this program.

Secondly I thank Ms Tebogo Dithung for being available to assist whenever I had challenges during the course of this program. She is very efficient and approachable and always ready to assist.

Finally, I send very special words of thanks and gratitude to Professor K. Behrens for having held my hand from 2018 when I started with this project of research. He has always been guiding me even when my academic writing was very rusty. I thank him for his patience, attention to details and also for being frank. He was able to revert back to me timeously whenever I made Submissions for my work to be reviewed. I really do appreciate his insight into the subject.

Abstract

The subject of Non-Therapeutic Body Modifications (NTBM) in children in the South African setting seem to be out of the radar. It is not thoroughly discussed in the South African circles of academia and in society at large. Here I aim to bring this issue to the fore so that it may receive the necessary attention that I think it deserves. In this research report I focus on only four types of NTBM in children, namely: Body piercing, Labia Minora Elongation (LME), Tattooing and Male circumcision. I seek to defend a claim that the four types of NTBM cannot be morally and legally justifiable. I focus on the ethical and legal arguments to defend this claim. I also provide a brief literature on each practice, which shed some light into the complications of each practice as well as their purported benefits.

I also argue that the South African legal framework is not adequately protecting children on NTBM practices. The good intention of the Children's Act 38 of 2005 are falling short when coming to NTBM in children as the rights of parents to practice their culture, religion or social practices seem to reign supreme of the rights of children, not to be subjected to "detrimental religious or cultural practices". These practices are largely not legally justifiable in their current form as there is lack of alignment between the Constitution and Children's Act.

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CHAPTER 1

INTRODUCTION

In this research report I explore this question: Are Non-Therapeutic Body Modifications (NTBM) in children morally and legally defensible? In this study a child will refer to anyone less than 18 years old. This was chosen to be in line with the age of majority as stipulated in the Children's Act 38 of 2005 Section 17. Firstly, I must state that for the purposes of this research report my focus will be in the South African context. However, some of the literature used will be from the international community because most of the peer reviewed papers available consists of studies conducted outside South Africa. Cultural practices that could previously be dee0med alien to a native South African may now find expression in the post-modern South African society due to the impact of globalization. Secondly, there are many NTBM, however, for the purposes of this research report I only focus on four types of NTBM, namely: Body Piercing, Tattooing, Labia Minora Elongation (LME) and Male Circumcision. I chose these four types because at face value I observed that they seem innocuous and are widely accepted and practiced in society. Yet, as I shall argue, there are good grounds for thinking that these practices are not as innocuous as they might appear. In addition to this observation, what chiefly sparked my curiosity into this subject is that, during my first few years of clinical practice I observed that parents pierce their children's ears at a very young age and that some of these children present with complications. Their reasons for doing so include, but were not limited to culture, religion, aesthetic, social conformation, and extending to simply, "I just did it because many people are doing it". Others would say: "their child will need the piercing in the future, so I might just do it now while they are still young". It is against this background that I will be exploring these

reasons and others to see whether they are good enough to outweigh the children's moral rights of autonomy, and are thus morally defensible. Furthermore, I will also explore if they are good enough to outweigh the legal rights of children to "psychological and bodily integrity" as enshrined in the section 12 (2) of the Constitution of South Africa, and are thus legally defensible. Having noted these four types of NTBM, I will now describe each type briefly.

Body piercing

This is defined by Bui et al (2013) from (Schultz, Karshin, and Woodiel, 2006) as "the insertion of jewellery and other objects into artificially made openings in the body parts such as, but not limited to ears, eyebrows, nostrils, lips, tongues, navels, nipples and genitalia of both genders". This type of body art is viewed by many as innocuous, however from as early as 1998: Tweeten & Rickman (1998) have reported many non-infectious and infectious complications. (p. 737). As an example, let's consider an extreme case of a Mursi child who may find herself/himself on our shores and is expected to have her traditional lip plate inserted[1]. This type of piercing is not practiced in South Africa. But if it does occur: How will it be construed in our South African setting? Surely many would consider it as an act of mutilation. It is therefore important that our law be framed in a way that will cater for such cases. In a study by Quaranta *et al* (2011) in University of Bari in the region of Apulia, Italy, it was found that the mean age of piercing was 15.3. In another study conducted in Nigeria by Gabriel et al (2017) it was found that nearly 37.2% of the respondents pierced their children's ears in their first week of life. Although I could not find any comparative studies conducted in South Africa that could provide the trends of the mean age for piercing, one can surmise that the picture may not be too different from the international trends based on the anecdotal data observed in clinical practice. Bearing in mind that the legal age of being a major in SA is 18 as highlighted earlier, 1 week and 15.3 years are a

very tender ages. The Children's Act of 2005 in chapter II (12) (1) imposes a prohibition against subjecting a child to "social, cultural and religious practices which are detrimental to his or her well-being". (Children's Act 2005). It is worth noting that such prohibitions are only specifically applied to the practices of Circumcision, Female Genital Mutilation/ Female Circumcision and Virginity Testing. There is not any direct reference to body piercing [1] in the Children's Act. Holbrook, Minocha & Laumann (2012) noted that "piercing doesn't require licencing in many countries and that it is not typically done by people who are in the medical fraternity" (p. 13). This is the case even in South Africa. Moreover, body piercing is not classified by the United Nations (UN) as part of traditional harmful practice in the UN study on violence against children (2006). However, according to the recommendations of the South African Council for Piercing and Tattoo Professionals (2014) the recommended age for body piercing is 16 years. Of note is that the South African Council for Piercing and Tattoo Professionals recommendations are just that, recommendations. They are not enforceable. They will not able to protect a Mursi child who might find herself/himself as a laughingstock or a subject of humiliation should he/she find himself/herself in one of our schools.

Tattooing

Lombard & Berg (2014) reported that this ancient practice has now started to gain popularity (p.193). It is defined as "an act of making indelible patterns by inserting pigments in the skin" (Mataix & Silvestre 2009, p.644). With the surge in popularity of tattoos, it is important that there be more enforceable regulations dealing with this form of body art. The regulations are needed because, like body piercings, tattoos also have many complications, ranging from

[1] Mursi girls or boys in Ethiopia pierce their lower lip, sometimes upper lip then stretches it to insert a clay or metal plate. The stretching can last from 3 to 6 months with the age of beginning the process being from 15- 18 years. (bodyartforms.com. 2004).

"infectious to non-infectious, immediate and late complications as well as local and systemic complications which are of serious public health concern" (Diekmann *et al*. 2016. P.69). For instance, Serup, Kluger & Bäumler (2015) showed that tattooing may result in serious bacterial infections, as bacteria may pass into the bloodstream causing sepsis, fever, and other severe systemic infections and ultimately death. These complications are not only recorded amongst those who do tattoos in unlicensed tattoo parlours only. They can occur in any tattooing settings as I will demonstrate in the next chapter. Although some would want to make us believe that this practice is harmless, the evidence is proving to be on the contrary. The complications can be fatal and extremely disabling. Subjecting the unsuspecting public, particularly children to this type of practice without proper checks and balances is reckless and irresponsible to say the least. Children may find themselves being discriminated against because of the negative perceptions that people may have towards tattoos as noted by Sagoe, Pallesen & Adreassen (2017) from (Adams 2009, Braithwaite et al 2001and DeMello 1993) that "visible tattoos were associated with criminality, deviant behaviours and incarceration .The ethics of exposing minors to this practice need to be evaluated". (p. 568). This may result in social and psychological harms. "South African Council for Piercing and Tattoo Professionals regulations are not enforceable at this moment as such we are only relying on municipalities to try and regulate the premises where tattooing is practiced using each city's own by laws' (SACPTP, 2014). This point to the fact that there is a lacuna in our law which has left this practice unregulated, as I will show in a section dealing with the legal arguments.

Labia Minora Elongation (LME)

Labia minora elongation is one of the controversial and emotive practices performed in the sub-Saharan Africa and it is defined by Perez, Aznar & Bagnol (2014) it as a process of "expansive

modification of the inner lips of the female external genitalia or labia minora by a process of elongating it with the help of a variety of herbs, oils, creams and other instruments". (p. 155). Women in this part of the world are subjected to huge societal pressure to undergo this practice. Hence some of them undergo labiaplasty when they reach western countries where this practice is not considered to be an essential aspect of womanhood. (Perez, Aznar and Bagnol, 2014). Nurka (2015) assert that surgeons promote labiaplasty "as the solution to physical and mental 'discomfort' and chafing, especially with prolonged sitting, cycling, or wearing tight clothing; interference during sporting activities; painful or awkward sex; asymmetry; childbirth 'distortion': genital embarrassment and lack of confidence".(p. 207). With these indications that are cited by surgeons for performing labiaplasty, it is concerning that LME is promoted in sub-Saharan Africa. Women undergo this procedure to restore their bodies to their "original" form. This is put nicely by Nurka (2015) when she argues that: "what aesthetic genital surgery actually restores is a hetero-normative body that obliterates all traces of embodied difference" (p. 223). Women who had LME done would want to eliminate all its traces. In the last review of World Health Organization (2008) on Female Genital Mutilation (FGM) classification, some argued unsuccessfully that labia minora elongation should not be included as part of type IV FGM. [2] I agree with those who argued to the contrary that this practice belongs to type IV FGM of the WHO and should remain in type IV. It was found through a systemic review study by Perez, Aznar and Bagnol (2014) that "health risks associated with labia minora elongation include severe pain and stigmatization of those who fail to comply with the practice" (p. 168).

[2]These complications are amongst reasons for arguing that this practice should remain classified as harmful and is part of FGM type IV as it is currently.

Male Circumcision

According to World Health Organization (Manual for male circumcision under local anaesthesia and HIV prevention services for adolescent boys and men), male circumcision is defined as "the permanent and complete removal of the foreskin (or prepuce), the fold of skin that covers the head (or glans) of the penis" (April 2018). The objective of developing this manual was to prevent the spread of HIV. In the preface of this manual WHO states that "in 2007, due to consistent and compelling scientific evidence that men who are circumcised have a 60% reduced risk of acquiring HIV transmitted through heterosexual contact, the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) recommended male circumcision as an additional option for HIV prevention". (WHO, April 2008). At this stage let me mention that there is a contrary view that is held by other scholars which I will articulate later. The South African government has adopted the contents of this document to develop the new national guidelines on Voluntary Medical Male Circumcision (VMMC) through the National Department of Health (2018). These guidelines allow the children as young as 10 years to "consent" for the procedure or rather assent to the procedure "voluntarily". The Children's Act

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[2] WHO classification of FGM
Type I involves partial or total removal of the clitoris and/or the prepuce. (clitoridectomy). Type II involves partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora(excision). Type III involves narrowing of the vaginal orifice by cutting and bringing together the labia minora and/or the labia majora to create a type of seal, with or without excision of the clitoris (infibulation). Type IV includes all other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization (unclassified/symbolic circumcision). (WHO, 2008)

38 of 2005 Section 12(8) (a) (b) in South Africa allows for male circumcision even for infants for religious and medical purposes. This should raise alarm as the age of majority in South Africa is 18. On the cultural front, Ntombana (2016) contends that "research should avoid reducing initiation practice to mere circumcision. Its historical role as a rite of passage must be acknowledged in order to understand the current meaning of the process" (p. 633). He adds that this centuries-old tradition is also riddled with scores of misfortunes wherein in some instances young men have died or suffered many health complications. (Ntombana, 2016). This practice holds a special cultural significance. In the Xhosa setting its significance is summarized by Vincent (2008) on the case study she conducted on behalf of WHO, Male Circumcision Policy, Practices and Services in Eastern Cape Province of South Africa. She writes that:

"These rites play a social role, mediating inter-group relations, renewing unity and integrating the socio-cultural system. For instance, by entrusting a son to a kinsman for circumcision a father is demonstrating his trust in, and commitment to, the group. Senior males are usually responsible for the cutting and it is expected that the pain involved will be endured stoically. Symbolically, circumcision is both a death (of the boy) and a rebirth (of the man). It is a dramatic enactment of the separation of the son from the mother and the integration of the man into the community. As such, it is a central public endorsement of a culture's accepted norms of heterosexual manhood". (p. 7).

The symbolism and cultural significance attached to it is much deeper. This probably explains why many young men would be drawn towards the practice despite the risks that have been widely reported. I will be elaborating on these weaknesses when I argue my point later in this research report. Having given a brief description of each practice, I now will outline the rationale of this study.

Rationale of the study

On face value one may wonder why I decided to make an enquiry into things such as body piercing, tattooing, labia minora elongation and male circumcision. After all, some of these practices have been there from time immemorial. (Anwar, Munawar and Qashif, 2010, Perez, Aznar & Bagnol, 2013). These practices seem to be 'normalized' by society such that most of us are desensitized to their existence. When we come across a six months old baby with an ear piercing or even with a missing foreskin, or even any complication as a result of NTBM, we hardy flinch or notice. We ignore the fact that these children didn't give consent to be pierced or cut, nor were they consulted. Let alone that they were unable to object or give an opinion. Most importantly, they don't have the capacity to assent. There seem to be potential gross human-rights violations that are taking place in front of our eyes, yet we fail to take heed. Having noted these issues, I decided to undertake this study in order to achieve the following: Firstly, I would like to stimulate discourse amongst the scholars in the field of bioethics as well as amongst the human rights activists particularly those who are inclined towards children's rights. These communities will need to look deeply into the details of what moral and legal justifications there are for allowing NTBM to continue in their current form. The fact that some of these modifications are permanent, places a moral duty on these communities to make sure that these practices are taking place under more controlled conditions, and more importantly by those qualified to perform these practices. Some may need to be abolished completely. Secondly, one needs to bring about awareness to society on the ethics of performing NTBM in children. I seek to highlight that in most instances we may be trampling upon the rights of children without even noticing. Could it simply be because there is lack of awareness from our part? This will be argued in chapter 4 when I'll dealing with the legal arguments. By highlighting the ethical and

legal issues surrounding NTBM, one hopes that society will become more conscious towards them. Perhaps this could translate into a different approach to these practices. Parents might also be persuaded to allow children to reach the age of majority before subjecting them to or allowing them to have any NTBM. Thirdly, I would like to bring to the fore the medical complications of NTBM. This will include short term and long-term complications as well as physical and psychological complications. The most important complications are psychological ones. In most instances as society we tend to ignore the psychological impact of NTBM. This may be due to lack of awareness or simply because we expect children to just toughen up. After all, our forebears went through the same practices, even the current generation must go through them. It is therefore very important that society be sensitized and starts to recognize that this vulnerable sector of our society needs to be protected. Not because they are weak, but rather because as a species we are evolving and so should our moral values. Our legal fraternity should also evolve.

Lastly, the study seeks to bring about discourse in the legal and health care fraternity to effect changes in legislation and enact health regulations governing NTBM. If I manage to argue successfully that these practices cannot be legally defensible, then there might be a necessity to relook at the legalities surrounding these practices. On the other hand, the medical fraternity might also be persuaded to not perform procedures like male circumcision whenever there are no medical indications. The rights of children to autonomy may then be more entrenched. I found that there are compelling reasons to conduct this study in a South African setting as this will add to the body of knowledge in the field.

Thesis Statement

In this research report I will defend the position that NTBM in children under sixteen years is not morally and legally defensible.

Objective of the Study

The first objective of this study is to demonstrate that the autonomy of a child in relation to NTBM needs to be respected as it is sacrosanct.

The second one is to demonstrate that the moral rights and legal rights of children are being trampled upon in most cases where NTBM are performed.

The third objective is to defend the claim that there is a need to regulate NTBM in children.

The final one is to make a compelling case that may result in a change in legislation governing NTBM.

Research Methodology

My research is entirely normative, and library and desktop-based. I critically discuss existing literature and analyse it ethically and legally. The relevant government legislation, regulations, theoretical frameworks and significant concepts found in sources are analysed and critiqued. I consider literature from research articles, books, Google scholar, PubMed, government's legislation and other academic search engines and relevant sources. This method is used because my research report is normative. It does not involve any human or animal subjects: or new data collection.

Key words used to search were: Body piercing and children, complications of body piercing, tattooing and children, complications of tattooing, labia minora elongation and children,

complications of Labia Minora Elongation, male circumcision and children, complications of Male Circumcision, non-therapeutic body modifications in children, deontology, Utilitarianism, and legal bases of Non-Therapeutic Body Modifications.

Argumentative Strategy

Chapter 2 of this research report is a build-up for the arguments that will follow in chapter 3 and 4 in that it will be providing a basic overview literature of each practice. I will provide empirical evidence relating to the physical and psychological complications of each practice and to highlight some of the potential benefits of the practices where such exist. This chapter will help the reader to appreciate my arguments when I will be endeavouring to answer the question of this study.

In chapter 3 I deal with the ethical issues surrounding NTBM. Here I apply the moral-theoretical pluralism arguments. The two moral theories I use here are utilitarianism and deontology. I will elucidate the reasons for choosing these two theories in chapter 3. This will be followed by legal arguments in chapter 4, wherein I apply mainly the South African Constitution, Children's Act 38 of 2005, African Charter on the Rights and Welfare of the Child (1990) as well as available case law to consolidate my arguments.

On the moral-theoretical pluralism arguments, firstly, I subject NTBM in children to the theory of utilitarianism. I argue that the prospective "benefits" of NTBM are outweighed by the pain and suffering that the children are put through during these procedures. I have already pointed out that there is a vast amount of literature available that proves that there are many complications that occur from these practices including some fatalities. Hence the purported "benefits" of NTBM cannot be put ahead of the potential harms that could occur. In addition we

know that no normal child can derive pleasure from pain. The theory of utility emphasizes that we should "maximize pleasure while minimizing or avoiding harm" (Pieper 2008, p.322). Therefore, it would be prudent that we avoid practices that could potentially harm children until they are of the age where they are capable to assent for such practices. On the Utilitarian front I will defend the claim that: *the overall benefits of NTBM in children seem to be out-weighed by the potential overall harms and therefore, we should adopt the rule that NTBM in children is morally impermissible.*

Secondly, on a deontological front I consider what Kant would say. Kant would argue that we should not be allowed to alter our children's bodies permanently. For Kant it will not matter whether these alterations are in line with our culture, religion, social norms or for aesthetic purposes. Using the second formulation of the categorical imperative I put forward *Kantian deontological arguments for why NTBMs are ethically unjustifiable*. Here I will be making a claim that: *Acts of Non-Therapeutic Body Modifications in children fail the test of "respect for persons" – the second formulation of Kant's Categorical Imperative*.

Lastly, on the legal arguments, guided by the provisions of the South African Constitution, the Children's Act and African Charter on the Rights and Welfare of the Child, I make the following four claims; *1. When children are subjected to NTBM their right to equality as enshrined in the constitution is not fully realized. 2 Their right to "freedom and security of the person" as stipulated in section 12 of the Constitution is violated. 3. The current practice with respect to NTBM appears to favour the rights of parents/guardians to "freedom of religion, belief and opinion" over the rights of children not to be subjected to "harmful religious practices". 4. These four types of NTBM are not in the best interest of the child.*

These arguments are followed by a small section of my conclusion. From a brief background that I have provided above, it is evident that there are conflicting moral rights. The rights of parents/guardians to religious, cultural, social and aesthetic practices against the rights of children. The rights of underage children to "decorate" themselves against their protection from self-harm. Being that as it may, on balancing of benefits versus risks of NTBM and moral rights of children versus rights of parents on rearing their children without state interference, I will elucidate that there is enough literature that proves that these NTBM cannot be morally defensible. In addition, by highlighting the discrepancies in the SA legislation, it will be clear that NTBM in children cannot be legally defensible.

One may ask why 16 years? Why not 12 years to be in –line with section 129 of the children's act which permits children of 12 years to consent to medical procedures. Or even 18 years to be in-line with the age of maturity? I chose the age of 16 years arbitrarily because I believe that at that age children in general may be in the position to appreciate the social, cultural, religious and social implications of these practices. They may also be able to understand the basic medical complications that may occur. The age of 16 years is also in-line with the age for consent for virginity testing and male circumcision. It is also in line with the age for sexual consent according to the Criminal law (Sexual offences and related Matters) Amendment Act 32 of 2007 on sections (1), (15), (16) and (57). Ganya, Kling and Moodley (2016) noted that "Over the years there has been mounting empirical evidence suggesting lowering age thresholds for decisional capacity in children. For example it has been demonstrated that children below 12 years can make well considered decisions… " (p. 2). Although children younger than 16 can make decisions about their medical treatment options, I argue that NTBM are not essential for saving

lives as medical interventions. NTBM if not medically indicated may be deferred until the child reaches the age of 16 years without them suffering any permanent damage.

CHAPTER 2

2. NTBM IN CHILDREN: BRIEF BACKGROUND AND OVERVIEW OF THE LITERATURE

In this chapter I explore some of the literature which deals with each of these practices. I will not provide any argument for or against the practices. The purpose of this chapter is to provide a brief background on each of these practices. Its other purpose is to assist the reader to comprehend some of the more technical aspects of each practice, based on empirical evidence. Some of the facts stated in this chapter will seem like a repeat of the brief descriptions that I have highlighted in chapter 1. However, here I go into more details on each practice. This review will give readers a sense of what influenced the views I defend on each practice. It will also clarify some of the misconceptions and myths that some people may have about each practice. I will first briefly describe a plethora of reasons that influence the persistence of the continued practice of NTBM on children. These reasons include those given by parents and those given by children themselves. Some of the factors influencing NTBM's prevalence in society mirror each other for each practice (e.g.; culture, religion, social pressures and aesthetics) as we will see later in this section. Having highlighted the reasons for NTBM, I'll then address their impact on children. These will include the infectious and non-infectious complications. I will also look at the often-ignored psychological impact of NTBM. Finally, I'll also highlight some of the purported benefits of NTBM in cases where there are any. It is against this background literature that I will consolidate my arguments.

2.1. NTBM in children: Body piercing

Body piercing is an ancient practice that has spanned centuries and regions. (Beers, Meires and Lofiz, 2007). There are a variety of reasons given for the practice, which I turn my attention to now. In a study conducted in Nigeria (South West and North Central regions) by Gabriel et al respondents gave reasons for ear piercing, which included "beautification, sex identification, and culture" (2017, p. 519). Scholars like Beers, Meires and Lofiz (2007), have found other reasons people give for body piercing such as, self-expression, initiation rites, to become a member of a group for religious and spiritual connotations as well as for sexual pleasure. These have also been variously identified in studies by other authors such as, Halloran (2015), Singh and Petersen (2006), Griffee et al (2017), Van Der Meer, Schultz and Nijman (2008), Vanston and Scott (2008). On the other hand, Armstrong et al. (2004) and Bui et al. (2012) have shown that there are other reasons for individuals to undergo body piercing, including the need for an individual to cope with psychosocial-stressors or to redefine themselves following a violation on their bodies or other forms of abuse. These are some of the benefits attributed to body piercing that were found amongst adults and teenagers.

I now give some consideration to some of the possible negative consequences of this practice. Body piercing has been associated with many complications. In a study performed in England by Bone et al it was shown that 250/1940 (12.8%) of piercings resulted in complications which required medical attention. (2008). Some of the local complications recorded by Beers, Meires and Loriz included abscess formation, cellulitis, contact dermatitis, keloid formation, urethral rupture, paraphimosis, impaction of the jewellery, periodontal problems, gingival recession, septic arthritis etc. (2007). Furthermore, there are also some serious systemic infections that can result from body piercing, have been reported by Beers, Meires and Loriz (2007) as well as

Holbrook, Minocha and Laumann (2012) which include the following: hepatitis B, C and D, HIV, tetanus, infective endocarditis, glomerulonephritis, toxic shock syndrome and tuberculosis leprosy.

I've briefly highlighted some of the negative and positive impacts of body piercing. Now I will look at tattooing in the following section. Of note is that some of the complications that may occur with body piercing may also occur with tattooing.

2.2. NTBM in children: Tattooing

According to Islam et al (2016, p. 273) the term tattoo is derived from a Tahitian word "ta-tau" which means "the result of tapping". They further note that the earliest evidence of tattooing dated from approximately 3000BC. It was discovered from a frozen mummy named "Otzi the ice man" in 1991 in the Italian-Austrian Alps. (Islam et al 2016). In Western society this ancient practice was once associated with criminals or marginal people and Christian missionaries sought to prohibit the practice. Moreover, Pope Hadrian in 787 issued a papal decree against tattooing as it was associated with pagan beliefs. However, this practice was reintroduced to Europe in the 18th century back by sailors who were returning from the South-seas where it was commonly practiced. (Marti, 2012, p. 2). Far more recently in South Africa, Lombard and Bergh have noted 'a surge in this practice in the post-modern era'. (2014, p. 193).

There are several reasons for people to opt for tattooing. Balci, Sari and Mutlu (2015) noted that others are influenced by culture and social movements as well as the need for self-expression. Mataix and Silvestre (2008) and Lombard and Bergh (2014) reported that teenagers do tattoos for aesthetic as well as social conformity. Brooks et al 2005 also noted that some do tattoos for self-expression. Marti (2012) reported that people did tattoos for religious beliefs, aesthetics and

cultural reasons. Junqueira, Wanat and Farah (2017) also noted from Kluger (2010) that religion, culture and aesthetics are some of the reasons for tattooing. Lui and Lester (2012) "found a small but significant association between a history of abuse of various forms and choosing to have tattoos and body modifications later in life" (p. 27). The significant finding of this study was that women who were sexually abused turn to have body modifications later in life in order to try to cope with their previous ordeal. (Lui and Lester 2012). This may be a beneficial result of this practice on those who have been through such physical and emotional trauma. Tattooing is also a vital technique used in clinical medicine to conceal scars, hair loss and vitiligo amongst others. (Rogowska et al. 2017, Drost et al 2017). This is another huge advantage of tattooing as it may be able to contribute to restoring the patient's self-esteem and improve their psychological wellbeing. (Mataix and Silvestre 2008) as well as Drost et al (2017) showed that others people do this for cosmetic reasons post-surgery or following extensive injuries. These are also advantages of the practice.

On the flip side Kluger (2016) pointed out that tattoos are not harmless as they are associated with "local infections, potential sepsis and viral borne infections if performed with lack of hygiene". (p. 111) This is also supported by Dieckmann et al (2006) who did a systemic review of the reported complications of tattooing from 1984 to 2015. They documented the following local non mycobacterial infections: abscesses, cutaneous diphtheria, erythema, necrotizing fasciitis or tissue necrosis, pustules or papules, staphylococcal scalded skin syndrome and cellulitis. They also recorded a number of systemic ones, viz. – abdominal compartment syndrome, bacteraemia, endocarditis, iliopsoas abscess, necrotizing pneumonia, toxic shock syndrome, septicaemia, septic shock and multiple organ failure, spinal epidural abscess, tropical pyomyositis and xantho-granulomatous pyelonephritis. Most of these complications are also

documented by several other scholars including, Mataix and Silvestre (2008), Das, Baker and Venugopal (2012), Islam et al (2016) and Wenzel et al (2013). There are also other risks of contracting viral infections like Hepatitis, B, C, D, HIV and Herpes Simplex Viruses, Jafari et al (2012), Simunovic and Shinohara (2014) and Show et al. (2019). Lastly there have been reported cases of *Mycobacterium chelonae* and *Mycobacterium abscessus*. (Simunovic and Shinohara, 2014) and (Sergeant et al, 2012). Next I'll turn my attention to labia minora elongation.

2.3. NTBM in children: Labia Minora Elongation

This is an ancient practice that is predominantly practiced in many countries in Sub-Saharan and central Africa including South Africa (Basotho, Venda and Lovedu). (Perez, Aznar and Bagnol 2014, Perez et al 2016, Bagnol and Mariano 2008).

It is also practiced extensively in the Tete province of Mozambique where 87% of girls reported to still be practicing it or have already elongated their labia. (Audet et al 2017, Bagnol and Mariano 2008). Perez, Anzar and Bagnol (2014: 160) found that the "age of initiation to the practice ranges from 8 years to 14 years old".

There are several reasons for practicing labia minora elongation that were given by participants in a study by Cruz & Mullet (2014) in Mozambique provinces of Maputo, Zambezi, and Nampula. They included: "1. preparing girls for their sexual life. 2. Because I like to have solitary pleasure. 3. Because my mother did it. 4. Expressing my disagreement with white people's sexual attitudes. 5. for becoming able to control sexual excitation. 6. for being able to dominate my partner during sexual act. 7. Maintaining a good image of myself. 8. for being considered a respectable person. 9. Complying with my family's wishes. 10. For being able to give further pleasure to my partner" (p. 854).

Some of these findings mirror those of other studies conducted by Francois et al. (2012), Perez, Bagnol and Mariano (2015), Bagnol and Mariano (2008) in Tete province of Mozambique as well as that performed by Koster and Price (2008) in Rwanda. Perez and Namulondo (2011) and Perez, Aznar and Bagnol (2014) point out that girls are expected to conduct labia minora elongation before menarche as a rite of passage to womanhood. In addition, Perez et al (2015) noted from the anthropological literature on Zambia by Labrecque (1982), that labia minora elongation was required for marriage of Bemba girls from as early as 1931. In another study conducted by (Perez, Aznar and Bagnol (2015) in Tete province of Mozambique it was found that girls who fail to comply with labia minora elongation practice are subjected to ridicule and are stigmatized by both men and women, to the effect that some male respondents also indicated that they wouldn't marry a woman who hasn't undergone it.

Having noted the reasons advanced by various scholars for performing labia minora elongation, it must be borne in mind that according to WHO LME is classified as Type IV Female Genital Mutilation. i.e., "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons" (WHO 2008, p. 4). WHO together with other partners Office of the United Nations High Commissioner for Human Rights (OHCHR) , Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme (UNDP), United Nations Economic Commission for Africa (UNECA), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Population Fund (UNFPA), United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Education Fund (UNICEF), United Nations Development Fund for Women (UNIFEM) resolved to: "work towards the elimination of female genital mutilation" (p. 21). Scholars have raised concerns about the potential harmful complications of labia minora

elongation as well as the risk for predisposing women to sexually transmitted diseases including HIV, difficulty in urinating due to pain in the commencement of the procedure, dyspareunia, infections, anxiety, potential obstetric complications (during delivery) later in life and psychological impact on children. (Perez, Aznar and Bagnol 2014, 2015), (Bagnol and Mariano 2008) and (Perez and Namulondo 2011). Meanwhile other authors have recorded some of the perceived advantages of labia minora elongation. Koster and Price (2008), Bagnol and Mariano (2008) Larsen (2010) and Audet et al (2017) suggested that it enhances women's sexual pleasure, allow them to keep their partners, improve health seeking behaviour, allows for social inclusion, improves the look of their vagina and promotes hygiene.

The last type of NTBM to be outlined in the next section is also an emotive one; male circumcision.

2.4. NTBM in children: Male Circumcision

According to Abara: "Worldwide, close to 100% of boys are born with a phallus which has a 'hood' known as the prepuce or *foreskin of the penis*. The few born without a full prepuce may have congenital anomalies, such as hypospadias" (2017, p. 55). Male circumcision is an ancient practice that has been in existence from time immemorial. It is practiced by various races and people from different parts of the world. This is done for many reasons including; rite of passage, religion, culture and aesthetic. (Ntombana 2011, Vawda and Maqutu 2011, Tchuenche et al 2015, Alkhenizan and Elabd 2016, Sorokan, Finlay and Jefferies 2015). Abara (2017) reported that "neonatal and childhood circumcision in Canada is commonly practiced for parental preferences and/or for social, cultural, hygiene-specific purposes and for pathological conditions that do not respond to non-invasive and medical techniques" (s. 59). Recently it has been touted as a procedure that reduces the risk of female to male transmission of HIV in heterosexual

relationships by up to 60%. (Auvert et al, 2005). This view has been defended by various scholars including Wamai et al (2015) and Morris et al (2017) amongst others, wherein they advocated for infant male circumcision. On the clinical side male circumcision is indicated in various medical conditions, such as, phimosis, paraphimosis and balanitis xerotica Obliterans and recurrent urinary tract infections. (Abara 2017, Dave et al 2017, Davis et al 2019, Hayashi and Kohri 2013, Morris et al 2017). Morris et al (2017) one of the proponents of infant medical male circumcision maintain that it should no longer be considered a controversial procedure but rather a necessary one as it will save governments a lot of money in the future. (p. 97). Van Howe notes the conclusion of American Academy of Paediatrics (AAP) that "evaluation of current evidence indicates that the health benefits of new-born male circumcision outweigh the risks: furthermore, the benefits of new-born male circumcision justify access to this procedure for families who choose it. Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some STIs, and penile cancer" (2013, p. 1). However, Van Howe (2013) pointed that this conclusion by AAP failed to quantify the risk and benefits. Moreover, other scholars also are of the view that the risks of circumcision are significant. Simpson, Carstensen and Murphy (2014), pointed out that there are potential risks of complications such as local infections, severe systemic infections, bleeding (death from unrecognized bleeding), meatal stenosis, skin adhesions and redundant foreskin. Svoboda, Adler and Van Howe (2016) notes from The Royal Dutch Medical Association complications such as ''infections, bleeding, sepsis, necrosis, fibrosis of the skin, urinary tract infections, meningitis, herpes infections, meatitis, meatal stenosis, necrosis and necrotizing complications'' (p. 265). With the HIV pandemic being such an overwhelming problem in sub-Saharan Africa medical male circumcision was adopted as one of the public health interventions

intended to reduce the risk of transmission of HIV. Despite these findings there are others who found that there are other factors that contribute to the transmission. And that more needs to be done to address those factors than to focus mainly on male circumcision. For example, Rasmussen et al (2016) conducted a study wherein they looked at two retrospective HIV surveys conducted in Guinea- Bissau from 1993 to 1996 (1996 cohort) and from 2004 to 2007 (2006 cohort) wherein they concluded that "While circumcision is protective overall against HIV, their findings suggested that factors such as traditional circumcision and sexual behaviour may increase HIV infection risk. Ethnical, methodological and temporal factors continue to play an unclear role in the relationship between male circumcision and HIV" (p. 6). Furthermore, another study by Rosenberg et al (2018) found that "medically circumcised older men in rural South Africa had higher HIV prevalence than uncircumcised men, despite the biological efficacy of voluntary medical male circumcision and the South African policy explicitly targeting HIV-negative men for circumcision" (p. 8). With respect to STIs Van Howe (2013) conducted a systemic review and meta-analysis and concluded that "most specific STIs are not impacted significantly by circumcision status. These include chlamydia, gonorrhoea, Herpes Simplex Virus, and Human Papilloma Virus" (p. 35). Although Voluntary Medical Male Circumcision (VMMC) is beneficial, it has not been a silver bullet that its proponents hoped it could be. As Wamai et al (2011) noted statistics from USAID that "based on its current data, the main mode of infection globally (heterosexual transmission) is growing" (p. 11). This is despite an increase in voluntary medical male circumcision in Sub-Saharan Africa. Dave et al (2017) conducted a systemic review study wherein their they developed guidelines for Canadian Urological Association aiming "to present the current evidence on the benefits of circumcision, the optimal anesthesia/analgesia requirements of neonatal circumcision, the possible complications of

circumcision, and its effect on sexual function and sensation, as well as the care of a normal foreskin in early childhood". (p. E 76). They concluded that: "…universal neonatal circumcision is not justified based on the evidence available". (p. E 94). Having given brief literature background above, I will consider these available facts in the next two chapters to argue for moral and legal indefensibility of these practices.

CHAPTER 3

3. WHY NTBMS ARE ETHICALLY UNJUSTIFIABLE

In this chapter I will be advancing the ethical arguments in support of my thesis statement. Having briefly outlined what different scholars are saying about each practice in so far as their complications, advantages, disadvantages and some of the reasons given for people to continue with practices in chapter 2 above. I will use two moral theories, namely: Utilitarianism and Deontology. The first moral theory that I will use in defence of my claim is Utilitarianism. Here I will be defending the claim that; the overall benefits of NTBM in children seem to be out-weighed by the potential overall harms and therefore, we should adopt the rule that NTBM in children is morally impermissible. This is followed by the section that deals with deontological arguments.

3.1. Utilitarian arguments for why NTBM are ethically unjustifiable

In his book titled *An Introduction to the Principles of Morals and Legislation* Jeremy Bentham defines the principle of utility as "that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness". (Bentham, 1781, p. 14). Another prominent advocate of Utilitarianism John Stuart Mill espoused that "Utility (The Greatest Happiness Principle) holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness". (Mill, 1879, p. 9). This was well paraphrased by Rachels and Rachels (2015) when they note that: "the principle of utilitarianism requires us in all circumstances to produce

the most happiness and the least unhappiness that we can". (p. 99). In other words the theory is concerned mostly with minimizing harm while enhancing the overall wellbeing of those affected be our actions. Mill (1897) refers to happiness as "intended pleasure, and absence of pain, whereas unhappiness is pain and the privation of pleasure" (p. 10). The theory of utilitarianism hinges on two types of utility (act –utilitarianism and rule-utilitarianism). According to Hooker (2000) act-utilitarianism has two versions:

"1. An act is right if and only if its actual consequences would contain at least as much utility as those of any other act open to the agent. 2. An act is right if and only if its expected utility is at least as great as that of any alternative". Meanwhile, rule utilitarianism states that "an act is morally permissible if and only if the rules with the greatest expected utility would allow it" (p. 24). Here I'll be leaning towards rule-utilitarianism to argue my point. This is because rule-utilitarianism "agrees with the common conviction that individual acts of murder, torture, promise-breaking and others can be wrong even if they produce more good results than their omission would produce" (Hooker, 2000). Martin (2008) quoted from Mabbott (1939) that "rules are justified by the good results which would follow *if* they were generally obeyed". (p. 229). While we are drafting rules, their effectiveness will depend on whether they are followed, moreover, their justness will also depend on the type of results they will produce in so far as producing more pleasure while minimizing discomfort. In this section I will defend the claim that:

The overall benefits of NTBM in children seem to be out-weighed by the potential overall harms, and therefore, we should adopt the rule that NTBM in children is morally impermissible.

Here we can develop a rule that prohibit acts that generate overall unhappiness. In developing this rule we have to look at the consequences of each of the four NTBMs under examination in

this report. The rule in this case is that: *children must not be subjected to harmful non-therapeutic practices*. The acts of performing any of the NTBM are in themselves wrong even though some are said to produce "benefits". Each practice is considered separately, starting with male circumcision.

3.1.1. A rule utilitarian argument for why male circumcision of children is morally wrong.

First I discuss the practice of male circumcision, to show that it is harmful to children and thus it is morally impermissible. I submit that its purported prospective "benefits" are outweighed by the potential overall complications as I will demonstrate shortly. Article 24 of United Nations' Office of United Nations High Commissioner of Human Rights (OHCHR) states that: "state parties shall take all effective and appropriate measures with the view to abolishing traditional practices prejudicial to the health of children" (September 1990). Bearing the wording of this article in mind I will demonstrate that these acts of NTBMs under discussion are prejudicial and harmful to children, and that there are sufficient grounds to enact the rule to abolish their practice in the current form. When a child undergoes circumcision, who ultimately benefits? Whose happiness is maximized? Who becomes unhappy? Who derives happiness from cutting the foreskin of a six months old male infant? No child derives happiness from these acts. There has been differing views regarding the harmfulness of the practice versus its benefits. The lawfulness of the practice has also been put on the spotlight. The two most prominent ones are between the AAP (American Academy of Paediatrics) and TLRI (Tasmanian Law Reform Institute). AAP maintain that infant male circumcision is beneficial and that its benefits far outweigh the risks. (AAP, 2012). On the other hand TLRI highlight the rights of children to not be subjected to harmful practices. It also puts more emphasis on potential complications of the procedure. (TLRI, 2012).

Auvert et al reported on the findings of their "randomized, controlled, blindly evaluated intervention trial" they conducted in South Africa Orange Farm and surrounding areas, (Johannesburg), that Male Circumcision reduces the risk of HIV transmission by 60% on heterosexual males. (2005). Two other studies were also conducted in Uganda (Rakai) and Kenya (Kisumu) which has shown the risk of HIV transmission to be reduced by 48% and 53% respectively. (Hargreave, 2010). The results of these three studies prompted WHO and UNAIDS in 2007 "to recommend that Medical Male Circumcision be recognized as an additional important intervention for prevention of heterosexually acquired HIV infection in men". (WHO, April 2018). The South African government also adopted the program of Voluntary Medical Male Circumcision (VMMC) as a measure to curb the spread of HIV transmissions. Although the position of WHO and that of the South African government was informed by those three studies, (Rosenberg et al 2018, p. 8) have shown that the rate of HIV infection is high amongst medically circumcised older men in South Africa. This is evidence that circumcision is not a silver bullet for prevention against HIV. Circumcising young boys with the hope of reducing their risk of contracting HIV may be outweighed by proper public health education and home education about HIV and sexual health matters in general. Children may benefit more from thorough and intensive education as well as training about good hygiene of their sexual organs and reproductive health. Unfortunately, these measures are labor intensive, time consuming and require maximum participation of multiple stakeholders like, parents, teachers, school health practitioners, nurses in local clinics etc. The quick solution seems to be just to snip it, which for me seem like an easy way out a sticky quagmire of real socially challenging issue of public health. Adults don't seem to want to invest their time and energy on teaching and supporting of their children when it comes to issues of sexuality and reproductive health. Thus subjecting

children to the pain of circumcision for hygiene purposes is not in the best interest of the child as it is outweighed by other less invasive methods that will benefit the child with no harm. The rule that seek to minimize harm while maximizing pleasure is best served by avoiding circumcision in favour of other non-invasive measures that I have outlined above.

Of course from a religious parent's point of view the child will benefits more as it's a very important religious rite. The religious significance of the practice cannot be ignored. Tasmania Law Reform Institute (TLRI) in its legal opinion phrased the importance of religion this way: "circumcision has socio-cultural significance to some individuals and communities in Australia and around the world. It is an integral part of several mainstream religious faiths. It can be an important initiatory rite. It also has significance as a community or family tradition for many individuals" (TLRI, 2012, p. 43). Without seeking to be seen as belittling those who are religious fundamentalist, it is important to highlight that for morality to be rationally defensible it must not rest entirely on religion. A morally right decision should not simply depend on the religious convictions or even on the cultural ones – it needs to be defended rationally.

Morality should be independent of such influences as they turn to be extreme at times. The most famous example I can cite as the example is of other religious group who are almost always on the news for suicide-bombings, yet they draw their conviction from religion and justify their actions with religion. There is no justification for killing innocent people. Even though they may believe that they are fighting the "holy war" and that in so doing there isn't anything morally wrong with their actions, I argue that their actions are morally reprehensible. Religious convictions cannot be a yard-stick for measuring a morally right action as they are able to justify the killing of innocent people (men, women children, elderly, crippled and abled bodied).

Rachels and Rachels (2015) briefly outlines how the fathers of utilitarianism were very revolutionary as they have shown that when it comes to morality, "gone are all references to God or abstract moral rules 'written in the heavens'. Morality is no longer understood as obedience to some divinely given code or some set of inflexible rules". (p. 100). If we discount the inflexible rules imposed by religion or culture in the case of male circumcision, we are able to draw a very rational rule that will protect and benefit the child. Rachels and Rachels (2015) further argue that "it is often difficult to find specific moral guidance in the scripture. We face different problems than our ancestors faced 2000 years ago: thus, the scripture may be silent on matters that seem pressing to us". (p. 59). For example with the advent of technology we are able to diagnose foetal abnormalities that could lead to a child with debilitating genetic conditions. Then we are able to advise the mother to terminate pregnancy. For some religious individuals that act of abortion may not be acceptable. Although the mother will benefit from it as she would be spared the troubles of carrying a foetus to term knowing that it will not make it.

Now with male circumcision the practice can be deferred until the child reaches the age of 16. This will generally benefit him as he will do something that he shall have chosen willingly and with a better understanding of the basic pros and cons of the practice when the time comes.

On the other hand the cultural benefits of the practice cannot be summarily dismissed. For example male circumcision has a very significant role in the South African context. Among various Xhosa clans it is central to what makes one a man as alluded in chapter one. However, we can take note of the assertions by Durojaye, Okeke and Adebanjo (2014) that "despite these positive aspects of culture, however, it is not in contention that some cultural practices are harmful and inimical to the enjoyment of women's fundamental rights and freedoms" (p. 6170). I would add that this is also applicable to young boys undergoing male circumcision. Given that

we are dealing with the vulnerable section of our population who still need to be guided, nurtured and protected. In these cases of male circumcision there are no compelling reasons or justifications for deforming young boys' genitals with no absolute health benefits. This however, is contrary to the 2012 AAP policy statement's conclusion that upon "evaluation of current evidence indicates that the health benefits of new-born male circumcision outweigh the risks and that the procedure's benefits justify access to this procedure for families who choose it" (p.585). In defence of my view that the overall burdens of the practice out-weigh its prospective benefit, I'll draw your attention to other scholars e.g.; Frisch et al (2013) who have identified the cultural biases by the eight task force members who compiled the AAP report. This cultural bias that Frisch et al has identified casts a shadow of doubts over the AAP report's objectivity. Although AAP is considered to be the leading authority on health policy matters internationally, as observed by Bates et al (2013): it seems to me that it erred in its recommendations of non-therapeutic infant circumcision. This is because, as Frisch et al (2013) further pointed out:

"…the AAP report suggests it will take approximately 100 circumcisions to prevent 1 case of Urinary Tract Infection (UTI). Using reasonable European estimates cited in the AAP report for the frequency of surgical and postoperative complications (approximately 2%), for every 100 circumcisions, 1 case of UTI may be prevented at the cost of 2 cases of haemorrhage, infection, or, in rare instances, more severe outcomes or even death" (p. 797). Drawing from these assertions, one is able to deduce that the benefits are outweighed by the burdens of this practice. Frisch et al (2013) also identified the important aspects of the criteria that need to be met to justify any preventative medical procedure as "cost effectiveness, subsidiarity, proportionality and consent" (p. 797). In this case, the proportion of those who may suffer complications of the procedure is higher that of those who are likely going to get infections if uncircumcised.

Moreover, there is no consent obtained from the children themselves. The justification of the practice based on its preventative capabilities falls away.

Utilitarianism requires us to maximize well-being while minimizing suffering. The rules of which could possibly justify this practice are not resulting in the overall greatest utility at this point as it is done on defenceless innocent infants and children. For instance, Krill, Palmer and Palmer, (2011, p. 2462) are amongst those associating the cutting of the foreskin with short-term complications such as bleeding and pain, and that there may also be long term complications like meatus stenosis and gangrene. A clear balance should be struck between these acts that are detrimental and their expected overall benefits. This implies that although there are some benefits that other authors have stated as shown in chapter two, such benefits in terms of this theory do not automatically validates these acts as it has been shown that they are outweighed by harms.

On the psychological aspect of the practice it would seem as though young boys are made to feel incomplete or even to feel as though they have some sort of disability if they didn't undergo it. That has a potential of causing them even more damage psychologically. This feeling of bodily imperfection is understood by Bentham as:

"That condition which a person is in, who either stands distinguished by any remarkable deformity, or wants any of those parts or faculties, which the ordinary run of persons of the same sex and age are furnished with: who, for instance, has a hare-lip, is deaf, or has lost a hand. This circumstance, like that of ill-health, tends in general to diminish more or less the effect of any pleasurable circumstance and to increase that of any afflictive one". (1781, p. 44).

If children are made to feel inadequate because they didn't undergo this or that procedure, it can lead to anxiety and psychological affliction. Paradoxically, they are them lured into undergoing the practice which may result in more physical and psychological side effects which are life-long in other instances.

Moreover, surgeons are subjecting male children to surgery without any "real" medical indication. Male circumcision is a serious and life changing type of modification that shouldn't just be performed without obtaining proper consent from a child who has the capacity to assent. Male circumcision is irreversible. Svoboda, Adler &Van Howe (2016) have also claimed that it reduces male's sexual sensation and pleasure as it amputates normal healthy tissue which plays an important role in the mechanical actions during sexual intercourse. Thus men are robbed of the true sexual pleasure that could otherwise be obtained if they were not circumcised. This impact of male circumcision on men's sexual pleasure is also the same as that occurring in women after FGM. Svoboda, Adler and Van Howe (2016) noted that "ordinarily doctors should operate on a child under exceptional circumstances and as a last resort where all conservative management have failed". (p. 264). This statement is telling: it highlights the fact that children are an exceptional group of people who need to be treated in a special way by the medical fraternity. One cannot just operate on them willy-nilly. After the procedure parents shall have fulfilled their cultural or religious obligations while the child is reeling in pain and is left with a scar for life.

I have already highlighted some of the more serious infectious and non-infectious complications that may arise from any of these practices. Yet, there seem to be no moral obligations placed on the society or authorities to protect this vulnerable sector of our society. Mill (1879) wrote that: "according to the Greatest Happiness Principle, the ultimate end, with reference to and for the

sake of which all other things are desirable (whether we are considering our own good or that of the other), is an existence exempt as far as possible from pain; and as rich as possible in enjoyment, both in point of quantity and quality….". (p. 17). It implies that the happiness of children should be put ahead of those of adults in cases of NTBM. Children are supposed to be kept as far as possible from harmful practices. This should be the case irrespective of parent's desires to conform to any of their religious, cultural, aesthetic or any form of their social conformity. The principle of utility implores us to look at their overall enjoyment. The reality is that male circumcision is a harmful practice and amounts to genital mutilation. It is a known fact that no child enjoys feeling pain, thus Mill (1879) asserted that "the only desirable ends are pleasure and freedom from pain" (p. 10). These practices are therefore violating the basic tenants of what constitute the greatest happiness principle by not resulting in the ultimate ends, which are happiness and pleasure.

Conversely, there are the common medical indications for male circumcision; e.g. phimosis, para-phimosis, and balanitis. These indications are not absolute. Marques, Sampaio and Favorito (2005) found that "topical treatment of phimosis using 0.05% betamethasone ointment presented a success rate of 94.2%, regardless of the form and degree of foreskin retraction" (p. 373). With such a high success rate, it's clear that there are no compelling circumstances to opt for surgical intervention as first line treatment option while there are optimal conservative treatments that can cure these conditions. The overall end attained by performing this procedure is far outweighed by the conservative management of these conditions although surgery is said to be "medically" indicated. The notion of avoiding pain by opting for conservative management is very much in line with the greatest happiness principle. What is more concerning is that the proponents of male circumcision are saying the procedure is painless because it is done under local anaesthesia.

They discount the painful injection that numb the pain after some time. They also ignore the pain that will follow after the local anaesthetic has worn off.

From a utilitarian's perspective, it is apparent that male circumcision of children falls short of any justification using this theory. There is no sound justification that can be derived using utilitarianism to defend male circumcision in children. I now turn my attention to the practice of LME.

3.1.2. A rule utilitarian argument for why Labia Minora Elongation in children is morally wrong

LME is classified by WHO as a harmful traditional practice. Its proponents tried without success to persuade WHO in 2008 to remove it from the list and not classify it as type IV Female Genital Mutilation. Bagnol and Mariano (2008) published a paper wherein they advocated for its removal from Type IV FGM classification, however in the same paper they acknowledged that the practice can be linked to susceptibility to UTIs and HIV. They also could not deny that there are socioeconomic factors that lead woman to be forced into this practice. Be that as it may, Perez, Aznar and Bagnol (2014) reported that the practice is still continuing unabated in the sub-Saharan Africa. Here I show that the so called benefits of the practice are not cogent. I'll also show that the proponents of this practice are advocating for it mainly from a cultural relativism's perspective, which I will also demonstrate that it is a weak argument. Audet et al (2017) reported that this practice is initiated from the teen years with the likelihood adult women initiating it being low, even though this is possible. Therefore I submit that we should formulate the rule that prohibits LME and that such a rule should be adequately enforced to curb this practice. Children will benefit from such a rule, thus mitigating against the potential harms of the practice. Other proponents of LME Koster and Price (2008) in their closing remarks on their study also acknowledged that the practice is posing danger to the wellbeing of women and they concluded

that: “it is important to note that WHO mentions the use of corrosive substances and herbs in vaginal practices and considers these detrimental to women’s health. Our study suggests that, apart from the risk of lesions and infections that arise from the elongation of the labia minora, the use of plants by Rwandan women enlarging their labia minora is potentially beneficial to their health”. (p. 201). Here the authors speak of the practice being “potentially beneficial” that on its own speak of the uncertainty that is there with respect to the overall benefits of the practice. On the side of the burdens of this practice there is certainty that they occur. There are no proven benefits of these herbs instead they are associated with corrosion of the skin thus predisposing women to contracting HIV and UTIs. In trying to balance the benefit of the procedure versus its negative impacts on women it is clear that the balance tilt towards the practice being responsible for more harms than benefit. Larsen (2010) concedes that the respondents in the study reported that they do it for male sexual pleasure in heterosexual relationships, apart from aesthetic reasons. These concessions are an indication that the practice predominantly benefits men. One other concerning issue is that Larsen (2010) found that girls are simply coerced from a young age to engage in this practice as preparation for marriage and as a rite of passage. In a study conducted by Larsen (2010) in Rwanda Kigali it was found that the mean age of the practice was said to be 11.7 years with the earliest being 7 years. The tender age at which this practice is started is concerning. This concern is raised sharply by Khau (2012) when she wrote that: “If girls are expected to start elongating their inner labia before the first menstrual period, then the legitimacy of free and consensual elongation stands to question. How free can an eight-year-old be to decide for or against labial elongation? If it is a rite of passage into womanhood, then it means those women who do not conform are supposedly not complete women”. (p. 765). She is correct to point out that in this patriarchal society young girls are indeed put between a rock and

a hard place. The choice becomes obvious to avoid being seen as an outcast and run as risk of being ostracised by the community and the family. From a cultural perspective the sole purpose of a woman's existence is to satisfy a man. They are trained for a future heterosexual relationship. This starts from being taught how to sit next to a man, how to talk to a man, how to give an appropriate gaze to a man, how to sleep with a man etc. This is type of approach to life is a good fertile ground for breeding homophobia and other forms of discrimination. Women from these parts of the world are stripped of their sense of self. They go out of their way to put even corrosive substances into their vaginas while stretching their labia so that there is friction during sex. Not-withstanding the pain associated with the friction and other side effects of this procedure, women simply have to get on with it.

Perez & Namulondo (2011) identified a number of risks associated with the practice: e.g. pain, swelling, bleeding, neuro-sensitivity and anxiety. Of all this risks the most concerning is anxiety, as it is brought about by what these young women are told. Perez & Namulondo (2011) noted from a study by Namutebi & Kafuuma (2009) that "girls are intimidated and forced into labial elongation. Wherein, for example, if they try to resist, they may be threatened with being left naked on the road with corn poured over their genitalia, with hens to feast on them". (p. 49). Children are literally forced to engage in the practice. These threats are a way of ensuring that young girls do not have a choice but to practice LME. Although other authors like. Perez and Namulondo (2011), Larsen (2010), Koster and Price, (2008) and Bagnol and Mariano (2008) among others maintained that the practice enhances both partners sexual pleasure, and that it helps them to keep a man in the marriage as well as helping them to avoid complications and pain during child birth, Khau (2012) found the evidence that points to the contrary. She found that the purpose of the procedure was to reduce women's sexual desires, and that her other

respondents reported that their partners continued to have other sexual relationship. She also found that the issue of less pain during delivery cannot be substantiated. It is also more interesting is that in a study conducted by Perez et al (2015) amongst Zambian women who have migrated to Cape Town, South Africa, some participants reported that the practice was solely for benefiting male partners. This supports the findings of Khau (2012). In the same study by Perez et al (2015) some participants go to the extent of mixing their vaginal fluid in their partners' meals to ensure that the partner doesn't leave them and that others went to the extent of cutting their genitalia to facilitate the process of LME and to darken the labia and create a tattoo for sexual pleasure. This highlights the lengths that women could go to keep their men. It also invariably imply that this practices are done with the main purpose being to ensure that man remain faithful in the relationship. Perez & Namulondo (2011) found that some men in their study were in polygamous-relationships, while with women who had undergone the practice. Therefore, the notion that this practice assists women to keep their men is a fallacy. I argue that this practice is meant to benefit men because of the patriarchal nature of our society. Our socio-political construct is of such a nature that it inculcates the notion that women's wellbeing should be built around what will please men. Women are taught to endure pain for as long as what they are doing will ultimately please men and will earn then the rite of passage into their social or cultural group. Khau (2012) sums it up nicely when she asserts that: "Significantly, most societies privilege heterosexual male desire, either by enacting prohibitive laws on other groups or by promoting social mores and cultural observances that tend to circumscribe the sexual desire of the others". (p. 774). When it comes to women sexual health there's no denying the fact that men and cultural matriarchs have always sought to control and mould what "good wife material" ought to be like. This is often done with the view of ensuring that such a character fit-

in nicely with men's preferences. Thus, ultimately the practice is benefiting men more than women. LME is prohibited according to WHO. It is classified under type IV FGM. It is incumbent on government to ensure that this practice is rooted out and those who are still subjecting young girls to this practice are prosecuted. With this many harmful effects of LME and little to no "tangible benefits", it is reasonable to enact a rule that prohibit this practice.

The next practice I will discuss is tattooing.

3.1.3. A rule utilitarian argument for why tattooing of children is morally wrong.

Since I seek to make a rule utilitarian argument against tattooing children under the age of 16, the question that needs to be asked is if there were a moral rule against such tattooing: would its consequences be more beneficial than harmful to society? If the answer to that question is yes, then the moral rule ought to be applied. Will children also benefit from enacting such a rule? How will children's wellbeing be affected? From a utility point of view, can this practice in children be justified? We have established that there is currently no legislation that prohibits tattooing in children, although there is a legislative framework that protects children from harmful traditional practices. Here I argue that there should be some sort of prohibition of this practice when it comes to children and that allowing the practice to persist in the current climate doesn't promote the overall well-being of children. I make a case that the overall outcomes of the practice will result in more harms than benefits to children. The rule prohibiting tattooing in children under 16 years from utility point of view is important to protect the children from harm and also to reduce the potential cost burdens on the health system that could result from treating many complications of this practice. The lack of enforceable legislation means that many of the tattoo parlours may not comply with infection control measures aimed at preventing the spread of blood-borne infections. Infections are not the only concern for this practice, as Vanston and

Scott (2008) noted from Stevenson (2004) that "patients with tattoos containing ferromagnetic components may not be permitted to do MRI examinations in some radiology departments due to fear of side effects like intense burning and pain during the procedure". (p. 224). This may cause the patients to not get this diagnostic procedure. MRI may lead to a timeous diagnosis following which a life-saving medical or surgical interventions may be made. Tattooing in this case may prejudice a child who did the procedure without proper understanding of the pros and cons of the practice.

It was noted from the Harris poll (2015) that more American men and women from a wide variety of socioeconomic status have tattoos and the trend is on the increase. This practice is also on the rise in South Africa as indicated earlier. (Lombard and Bergh, 2014). Currently this practice is no longer seen as a form of a defiant sub-culture as it was in the past. Lombard and Bergh, (2014) assert that tattooing is now part of a popular culture and many celebrities are seen displaying tattoos and invariably the youth are seen to be more and more attracted to this practices and thus following it. However, many complications of the procedure have been identified in chapter two and some of them may be fatal. In a study by Cegolon et al (2014) which was conducted in Italy at 6 public secondary schools from each of the 7 Provinces of the Veneto Region, among 4277 adolescents aged 14-22, it was found that more male respondents were less aware of the risks of infectious diseases that could arise and also were not aware of infection control measures that should be adhered to by the parlour when practicing body art. Furthermore, they were less likely to seek medical attention if they experience complications. (Cegolon et al, 2014). This lack of knowledge and understanding of the issues surrounding the practice is one that should concern us. It means that some can go on to experience severe complications before they can seek medical attention, thus morbidity and mortality may occur.

Moreover, they are likely to utilize the services of any tattoo parlour without making sure that it meets the necessary prerequisites.

I argue that children under 16 years are not of sufficient maturity to make such life-changing decisions about their lives. There are potential future negative ramifications that can result from decision taken out of naivety and impulsivity. Apart from the many complications that can occur from the practice there are also psychological complications that can occur as one may grow to regret the decision to have had a tattoo. Armstrong et al (2014) noted from previous studies by Armstrong et al (1996), Armstrong (2008) and Roberts et al (2008) that some of the motivation for tattoo removal are regret due to "impulsive decision making, maturing, employment and change in life factors". (p. 13). Regulating the practice will protect children from harm, by ensuring that they don't take decisions that they will live to regret. Armstrong et al (2014) further highlight that, "children and adolescents can exhibit immature coping responses and associated risky, impulsive decision making, so helping them delay their own immediate pleasures to make real-world decisions about their on-going care is important". (p. 14). I agree with these assertions as this will result in avoidance of potential harms that could result from both short-term and long term complications of the practice. Delaying the practice until children are a bit matured seems more beneficial than allowing the practice at any younger age. There are prohibitions against the sale of alcohol for minors. This is done to protect them against the harmful effects of alcohol, both physiological and psychological, thus benefiting children. There is a general understanding that they do not have the adequate emotional intelligence to drink responsibly. In the same token, I opine that the prohibitions against the practice of tattooing on minors will ultimately benefit them. There is more to gain from regulating the practice than what can be lost. Children need protection from themselves due to their immaturity, as Anderson (2015) indicated that

“psychiatrists noted the difference in brain development between children, adolescents and adults that affect judgement, behaviour, impulse control and decision making ability. They also point out that teens with their still maturing brains rely more on impulse than rational goal orientated thought” (p. 100). These differences in brain capacity warrants that measures be put in place to ensure that children are protected from harmful practices that have a potential of affecting them even in their adulthood. To support the observations made by psychiatrists we have seen that impulsive decision making was amongst the major reasons people decided to remove tattoos as mentioned earlier.

The theory of utility requires us to act so as to maximise well-being. Critics would argue that if a child desires to have a tattoo because he/she feels that it will bring happiness/pleasure to their lives then they should be allowed to do so, since it is their body. I argue that we are endeavouring to stop them from wanting to indulge in alcohol for reasons mentioned above. The short-term gratification impulse that exists within children is the reason for having restrictions. Children are even prohibited from acquiring driving licences, voting, getting married among others. I therefore argue that from a utility point of view we should make a moral rule that will regulate tattooing, thus prohibiting the practice for the under Sixteen years. Children will benefit from such regulations.

Finally, I look at the practice of body piercing from a rule utilitarian perspective.

3.1.4. A rule utilitarian argument for why body piercing of children is morally wrong.

Body piercing is one type of body art that is considered by many as being innocuous. It ranges from ear lobe piercing, to multiple piercings on the ear, to piercings on other parts of the body like the nave, genital areas to the extreme ones like lip piercing seen on mursi tribe of Ethiopia,

as alluded to in chapter 1. In the interest of maximising well-being, a utilitarian considers whether a rule allowing this will be to the overall benefit of children and society. Gabriel et al (2017) reported from a study done in 2015 in Nigeria (South West and North Central) , that 20.5 % of children whose ears were pierced experienced complications such as keloid, hypertrophic scars, infections, ear deformities and cleft earlobe. In another study by Bone *et al* (2008) conducted in all regions of England, it was shown that: "Overall, complications were reported is 533/1940 piercings, from these reported complications, 250/1940 were thought more serious to warrant medical attention'' (p. 4). Complications like pedunculated keloid formation can become a source of stigma. This has a potential to result in some psychological harm to the child affecting their self-confidence and self-perception. Children are forced to seek medical attention in order to correct the deformity, which is very difficult to correct and it may recur. The risks of complications plus the pains that children are subjected to should outweigh the potential "benefits" or any need for fulfilment of social, religious or cultural practice. I have listed some of the complications of this practice in chapter 2.

Next, let's take a rare systemic complication of this practice called infective endocarditis. It is defined as "is an endovascular infection of cardiovascular structure by micro-organisms" Senthilkumar, Menon and Subramanian (2010). Latif, Noor and Qazi (2021) reported in their study they isolated more of *Streptococcus Spp*, although *Staphylococcus aureus,* (the most common bacteria found on the human skin as part of the skin's normal flora) accounts for more cases in the western countries. Although it is rare in children, Latif, Noor and Qazi (2021) indicated that "infective endocarditis potentially carries high mortality and morbidity". (p. 196). Bringing this condition to the topic of body piercing, Ramage, Wilson and Thomson (1997) reported a case of a patient who had a nasal piercing and she needed 6 weeks of intravenous

antibiotics, and this patient ultimately had a mitral valve insufficiency. A condition this serious resulted from something which is considered to be innocuous. A six weeks medical therapy in a country like ours with a failing health system is a lot to bear especially on conditions that are preventable. National treasury in February 2021 reported a budget deficit of 14 per cent of the GDP (With health receiving just about R402.9 billion in the financial year 2020/2021). This meagre budget is insufficient to deal with all the health challenges the country is facing. It is therefore necessary that in areas where government should step in to regulate some of the practices that have a potential of escalating the burden on our already buckling health care system it does so without hesitancy. The seriousness of the potential harms that could occur as a result of things like body piercing on children need to be carefully weighed against the need to look pretty or to satisfy a particular culture or religion. Not only is the practice harmful to children's health and wellbeing, it also has an impact on those other members of society who may be in need of life saving procedures that are not of their own making as they have to share the meagre health care resources with them, and may possibly not get a hospital bed due to a long hospital stay needed to treat this condition. I argue that there seem to be more potential harms that may occur from this practice than there are overall benefits of the practice.

On the extreme side Griffith (2009) noted the death of a 39 years old woman who died of septicaemia following piercing as well as a young student who demised following a lip piercing in Sheffield. Other cases were cited by Vanston and Scott (2008) of a death of a 17-year-old girl from Newfoundland who died in 2006 after a nipple piercing which became infected with *Staphylococcus aureus* which complicated to Toxic Shock Syndrome, as well as another case of 17-year-old boy from the United Kingdom who had a lip piercing and succumbed to septicaemia. With this practice being associated with fatalities, is it not prudent that some sort of regulations

be enacted to ensure safety of children? I am of the view that it will benefit children and society at large if prohibition of body piercing for children under 16 years were to be made. Although the fatalities cited are of those who fall outside of the age category I'm advocating for, they serve as a reminder that this practice is not as harmless as we are made to believe. The decision to subject children to this practice should not be taken lightly given the potential of very serious complications that may occur. The purported benefits of the practice are negligible when compared to the potential of a loss of life. How can one justify the practice which has a potential for harm to children especially having recognized that children lack the mental capacity to make decisions on matters that may be fatal? The consequences of this practice continuing under the current unlegislated conditions may be direr for children who are subjected to the practice before they acquire the capacity to know the risks or benefits of it. Others would argue that children will benefit from the practice in terms of social inclusion, or cultural ones even some religious conformity, I argue that such should not come at the expense of the unsuspecting innocent children being subjected to potentially hazardous practices. I'm certain that all cultural and religious practices keep evolving to keep in times with the geopolitics and socioeconomic as well as technological advances of the 21st century. If they are conforming to the changes in the environment, then, it should also be possible to make changes in terms of the timing of this practice to allow for some bit of maturity on the children's part before they are subjected to the practice. That way parents will fulfil their cultural obligations and children will also be in a position to choose what to do with their bodies. If they are happy with the choice then all parties will benefit. In this section on Utilitarian perspective I have argued that all four types of NTBM under discussion in this report are not ethically justifiable, and now I will subject these four

practices to the theory of deontology, wherein I will be defending the claim that: Acts of NTBM in children fail the first formulation of Kant's "categorical imperative".

3.2. Kantian deontological arguments for why NTBMs are ethically unjustifiable

Deontology is from the Greek word for duty, "deon". (Alexander and Moore 2007). Thomas, (2015) writes that in deontology we are concerned with the justification of actions that conform to a set of duties: the consequences of the actions are immaterial. I find deontology to be very broad and diverse. For me that makes it one of the most attractive moral theories that may be used to shape public policy. With that being the case, there are many prominent contemporary deontologists, however, for the purpose of this research report I apply Kant's deontology to advance my arguments. Immanuel Kant is considered to be one of the most influential figures of the enlightenment and "arguably one of the greatest philosophers of all time". (Encyclopaedia Britannica, 2021). Kranak (2019) sees him as one of the most important proponents of deontological ethics. Although Kant was writing in the eighteenth-century, some of his revolutionary ideas such as the notion of "respect for persons" (autonomy) are still applicable to date and they form the most important concepts of modern bioethics. I therefore find it appropriate to use Kant's work in arguing my point in this section. Kant outlined three important formulations which he termed "Categorical Imperatives". Here I apply the second formulation of the categorical imperative. In one of his important works, *"Groundwork of the Metaphysic of Moral"*, Kant (1785) describes an imperative as an unconditional command and expresses it by the word ought (or shall). An imperative being that thing which ought to be done. It is not the thing that ought to be done because of a particular desire. Our actions should be guided by reason only, without being motivated by the expected consequences. This categorical imperative according to Kant is an action guiding principle of "all rational beings". This implies that for our

actions to be considered as 'good' (inherently good), they must be guided by pure reason. Thus, morality according to Kant (1785) must be guided by (or is a subject of) pure reason. Kant applied the formulae of the "categorical imperative" to determine morally right actions. . Thus all our actions should be guided by this notion of the "categorical imperative". For example, if I say: "we ought to respect other people", it will mean that the act of respecting other people is an act that is inherently good in itself. On the other hand if I say "we ought to respect other people so that they could respect us". Then it will mean that our actions are not inherently good. We will only be respecting others because we expect them to respect us in return, not because we think it's the right thing to do, hence we can't claim that our actions are guided by pure reason. The latter is an example of what Kant refers to as "hypothetical imperative". We act in a certain way because we desire to achieve a certain end.

Kant expressed the second formulation of the categorical imperative as follows: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only". (Kant 1785). This forms the backbone of the concept of "respect for persons". When dealing with human beings we should treat them with respect (because they are "rational beings"), we should not exploit, discriminate or subject them to any form of ill-treatment. This is because according to Kant, human beings have "intrinsic worth" and their worth is "above all other things". Using someone as a means to furthering my own interests is morally wrong. An analogous example to that given by Kant would be that: If I hire someone to clean my house and then not remunerate her as I am supposed to and she is expecting to, I shall have used her as a means to my end. I shall have exploited her into doing the job for me. However, if I were to remunerate her accordingly, I would not have used her as a means to my end only, because she would have also generated revenue from the work that she has done.

Although Kant views children as not being rational beings, it does not mean that he advocated for deeds that may harm the child. In so far as the protection of children from harm is concerned, Kant advocated for limitation of rights for children, but for their own protection. He also places the duty on parents to protect and educate children. This notion of "respect for persons" also finds expression in the Belmont report as a means to protect the vulnerable groups during research: "Respect for persons incorporates at least two ethical convictions: first, that individuals should be treated as autonomous agents, and second, that persons with diminished autonomy are entitled to protection. The principle of respect for persons thus divides into two separate moral requirements: the requirement to acknowledge autonomy and the requirement to protect those with diminished autonomy… [Not] every human being is capable of self-determination. The capacity for self-determination matures during an individual's life, and some individuals lose this capacity wholly or in part because of illness, mental disability, or circumstances that severely restrict liberty. Respect for the immature and the incapacitated may require protecting them as they mature or while they are incapacitated". (1979).

Children as a group that lack capacity also need to be protected by both our legal laws and the laws or morality. Although this report was drafted long after Kant's work was in circulation, its foundation rests on what Kant has long advocated for in the 18th century. Kant's views of children may seem to be diametrically opposed to each other. On one hand he does not view children as "rational beings", on the other hand they are part of humanity who should be treated with dignity. How do we reconcile the two seemingly opposing views? Kant has a way of dealing with both views: he says that: "…parents cannot regard their child as, in a manner, a *Thing* of their own making, for a being endowed with freedom cannot be so regarded". (Kant, 1887, p. 115). Here Kant is protecting children as members of a broader human family, thus

preventing anyone including parents from ill-treating or using them as mere things. On the other hand, he acknowledges their lack of maturity, which then confers the powers to parents to look after them until they are matured. He writes that: "Accordingly, children as persons, have, at the same time, an original congenital right distinguished from mere hereditary right to be reared by the care of their parents till they are capable of maintaining themselves: and this provision becomes immediately theirs by Law, without any particular juridical Act being required to determine it". (Kant 1887 p 114). During this period when they are under the care of their parents, Kant's view is that they should not be treated as mere things. Although parents have the authority of making decision on behalf of their children, they are precluded by the notion of "respect for persons" from treating them merely as means. The notion of "inherent dignity" of children is vital to Kant's view of morality.

It is against this background that I make the following claim:

3.2.1. Acts of Non-Therapeutic Body Modifications in children fail the test of "respect for persons" – the second formulation of Kant's Categorical Imperative.

Here I start by arguing how male circumcision fail the test of the second formulation of the "categorical imperative". The practice of male circumcision is performed for medical, religious, aesthetic (for hygiene) and cultural reasons in South Africa. It is prohibited for children under-16 years if not medically or religiously indicated and as part of Voluntary Medical Male Circumcision (VMMC) from 10 years. From 16 years and above circumcision is permissible so long as consent has been obtained as prescribed in the regulations. (Children's Act 2005 s12 (8). The subject of male circumcision may prove to be highly divisive and needs to be approached in an unbiased and cautious manner. For example, in Judaism male infants should undergo this ritual by day eight. (Genesis, chapter 17). Parents are subjecting infants to male circumcision so

that they (the parents) may meet their religious obligations. The question is: Are children not being used as a means towards fulfilment of the parent's religious ends? Infants have not given their consent to be mutilated. Yet it is done in line with their parent's religious convictions. The child is subjected to this practice purely because of an accident of birth –being born to parents who belong to a particular religion. Another question may be asked: Is it morally right to mutilate children's genitals? There are two dichotomous ways to answer this question. If the child has a medical condition that only circumcision can correct then it is acceptable. In other cases if a child has reached the age of maturity (16 years) and voluntarily consent to it because he believes he will benefit from it, yes it is morally acceptable. On the other hand if the child lacks maturity and capacity to consent to it, it is not acceptable. Those mutilating children to fulfil their own religious, cultural and aesthetic (for hygiene) are doing so for their own convenience. If we consider the notion of "respect for persons" as Kant understood it, we will appreciate that treating humanity as "an end in itself" means that we need to respect the children's right for autonomy. Children cannot be just as mere tools to achieve the purpose of cultural or religious obligations. If parents were asked to sacrifice their crops for religious purposes, Kant would not be opposed to such because crops are there to serve men. Children are human beings, thus they have "inherent dignity", hence they must be free from exploitation, abuse or any forms of ill-treatment. The notion of the worth of human beings from Kant's perspective is well articulated by Rachels and Rachels (2015) when they write: "When Kant said that human beings are valuable 'above all price' this was not a mere rhetoric. Kant meant that people are irreplaceable. If a child dies, this is a tragedy, and it remains tragic even if another child is born into the same family. On the other hand mere things are replaceable." (p. 137). From this passage it can be inferred that even children are worthy of being treated with respect.

With *respect* to infants and children who lack the capacity to make decisions about their well-beings, I argue that they still reserve the rights not to be exploited or harmed. The decision to undergo this practice should not rest on their parent's discretion because there is no urgency in performing this practice. Some may contend that denying parents the proxy to consent to this practice on behalf of their children will prejudice children from enjoying their right to cultural, religious and social inclusion. I will submit that, that will not be the case. I'll expatiate on this argument in chapter 4. Here it will suffice to say that the NTBM are a form of "harmful social, cultural and religious practices" that children should not be subjected to. Male circumcision under the current legislation largely fails the test of the second formulation of the "Categorical Imperative". Next, I'll discuss the practice of tattooing.

This practice is very popular and has now formed part of the popular culture with a lot of youths being attracted to it. (Lombard and Berg, 2014). With its popularity children may be the ones demanding this practice. In such cases it becomes our moral responsibility to educate them about the risks, benefits as well as social implications of this practice. This should be done so as to protect children in furthering their ends. Kant (1887) is not opposed to this type of measures to be taken as they will be done in the best interest of a child, to prevent children from self-harm. If a child is acting in a manner which does not serve him towards fulfilling his end, his liberties are restricted, thus he is then educated towards ensuring that he becomes more rational. (Kant, 1887). The limitations of his liberties are not aimed at using him as a mean, but they are aimed at ensuring that the child's ends are met. To the extent that such restrictions are to serve as a protective buffer for the child until he is rational, restricting such liberties will not be against

Kant's ethics. Allowing the child to have a tattoo before the recommended age (16 years) will however not be a good thing to do in furtherance of the child's well-being.

Conversely, if a parent seeks to subject a child to tattooing for social, cultural or religious reasons against the child's expressed wishes, then such a parent will not be in compliant with the notion of "respect for persons". Even in cases where parents have the authority to make decisions on behalf of their children, they are still morally wrong to force children into undergoing the practice. The child in this case will be a subject of a parent's need to fulfil their obligation, thus a child will be just a means to the parent's end of fulfilling their obligations. In the first example the child was the one who wanted a tattoo, while in the second case it is only the parent. Now we may have a situation where the child and the parent are happy to have the child get a tattoo. How do we then respond to this conundrum? On one hand the child believes he will be benefiting from it, while the parents will also be benefiting. One may be tempted to say that in this instance the child is not being used as a means. Moreover, the child has consented to the practice, (fulfilling the requirement of the notion of "respect for persons"). This problem can be addressed in a two-fold approach. First, from the Kantian approach, the child's lack of capacity yields their rights to autonomy to their parents. As such, their consent becomes invalid, their parents are the ones who will have the final say. This then leaves us with the consent by parents on behalf of a willing child. On the second approach, we have learned from Kant that humanity must be treated with dignity and that they must not be coerced, manipulated of be subjected to any form of ill-treatment. This then leaves the practice to be something that will be done to satisfy the parent's ends, since the consent of the child has fallen off because of immaturity. The consent of a parent in this case should be vetoed because the practice is non-essential and potentially harmful. Subjecting a child who lack maturity will be equivalent to manipulation, coercion and ill-

treatment, thus their dignity will be violated as they are not in a position to appreciate the "cultural, social, or religious implications" of the practice. Vetoing the rights of the parents is not something that Kant is opposed to as long as it serves the end of a child. He argued that: "The State has also a right to impose upon the people the duty of preserving children exposed from want or shame, and who would otherwise perish". (Kant, 1887, p. 187). Apart from potential medical complications that can result from tattooing, there may be social implications of tattooing that children may not be in the position to appreciate and may find themselves being a subject of some form of discrimination in society. The social implications are captured by Sagoe, Pallesen and Andreassen (2017) from various authors as follows: "Tattooing has also been linked to aggressive and violent behavior (Yen, Hsiao (2012) and Yen et al., 2012), incarceration, psychopathy and criminality (DeMello, 1993 and Hellard, Aitken and Hocking, 2007), risky sexual behaviors and promiscuity (King and Vidourek, 2013 and Koch, Roberts, Armstrong and Owen, 2007), substance use (Dukes, 2016 and King and Vidourek, 2013), as well as suicide ideation and attempt (Cardasis, Huth-Bocks & and Silk, 2008 and Carroll, Riffenburgh, Roberts and Myhre, 2002)". (p. 562). In the same systemic review they also show that those with "readily visible tattoos are subjected to discrimination and stigmatization". (Sagoe, Pallesen and Andreassen, 2017). These are serious social implications that a child opting for the practice may not fully appreciate, hence their consent to the practice may have to be nullified alongside their parent's consent in a bit to further the end of the child. This practice also fails the test as it results if the child's end not being realized. Next I deal with the practice that is closely related to tattooing- body piercing.

Piercing on various body sites is said to have been practiced for thousands of years. (Koening and Carnes, 1999). Griffith (2009) showed that: "Skin piercing, like tattooing, has evolved from

the rituals associated with religion and culture to become a modern fashion trend". (p. 293). Like tattooing it is attracting many young children. I have shown that infants are subjected to this practice in chapter 1. Rachels and Rachels (2015) show that according to Kant: "The only way that moral goodness can exist, is for rational creatures to act from a good will, that is, to apprehend what they should do and act from a sense of duty". When parents are subjecting children to this practice, they will be acting from a sense of duty, believing that they are acting in the best interest of the child. However, when you look deeper into the real motivation of why children are subjected to this practice you will discover that, the practice is there to primarily gratify parental preferences. The notion of "respect for persons" rests on our ability to treat humanity as rational agents with dignity. There is an expectation from us to avoid treating even children as *mere things*, thus their avoiding ill-treatment and exploitation. Parents have a goal to fulfil their cultural, religious or social convictions by subjecting children to the practice, in turn children do not understand the rational of the practice nor are they even consenting to it. This then is equal to manipulation because children are not treated as the end in themselves. Their inherent dignity is not respected because their bodies are pierced without their consent, knowledge and not to their benefit. Once again it can be argued that because children are incapable of making rational decisions, they should not be subjected to this practice until they acquire the capacity to comprehend it. By doing so, we will be acting in-line with the notion of "respect for persons". In this case children are denied the opportunity to make decisions about their bodies. Kant emphasize that parents have a duty to educate their children to further their (children's) end. This point is somewhat shown by Armstrong et al (2014) when they noted from Armstrong et al (1995) that: "Effective educational information increases health knowledge as well as pique attitudes toward healthier behavior, whether realistically the student's decision is

dissuasion, postponement, or information to decrease their procurement risks". (p. 14). Here I must add that this education should start from home to ensure that the message is consistent throughout the course of the childhood. By providing this useful education we will be furthering the child's end. Like in tattooing, there are instances where children will be the ones demanding to have a piercing. In such cases, when we apply this notion of the "categorical imperative" we are able to prohibit them from obtaining the piercing. The dangers of this practice cannot be no emphasized, as I have already showed them in the section above. Body piercing this fail the notion of the "Categorical imperative". Lastly, I deal with Labia Minora Elongation (LME).

WHO classified LME as one the harmful traditional practices under type IV Female Genital Mutilation and it is thus prohibited. (2008). Being that as it may the practice is still continuing unabated in the sub-Saharan Africa. (Bagnol and Mariano, 2012). In a study by Perez (2016) amongst Zambian migrants in Cape Town, South Africa, it was found that pulling was a painful experience and that women were driven to engage in labia minora elongation because they fear that they could fail to get married. Furthermore, their in-laws could send them back home if they didn't undergo labia minora elongation. Another factor that they fear is that, their husbands may not be faithful. There is also a fear of embarrassment and discrimination by other community members. (Perez 2016 p.170). These findings prove that there is indoctrination, coercion and manipulation of young girls to ensure that they agree to the practice. The fear of being ostracized by fellow community members may serve as a very strong deterrent against those parents and children who may be considering opting-out of the practice. It would also seem that the defenders and perpetuators of this practice are matriarchal beneficiaries. The matriarchs are at the forefront of advocating for the practice and are subjecting these young women to such pain

for the purposes of "benefiting" some men in the distant future, paradoxically their actions become worse than the traditional chauvinistic and patriarchal views held by society. It is an idea born from the notion that women exist for the sole purpose of satisfying men. This notion is almost always propagated using cultural connotations. As humanity evolves it has been proven that some cultural practices are obsolete. The fear of being ostracized may consequently result in them performing the practice. It is evident that the poor girls were forced to endure pain during the process of labia minora elongation because they fear shame and stigma. Kant's view is that human beings should not be manipulated. Here we see young girls being manipulated into undergoing this practice, we see their bodies being modified against their will. The notion of "respect for persons" as espoused by Kant is not realized by these young girls. It is not treating young girls with dignity if we force them to disfigure their genitals to gratify the lucid nature of pervasive men. Rachels and Rachels (2015) further explained what Kant means by "treating people as an end". They espoused that: "treating people *as and end* means on the superficial level, treating them well. We must promote their wellbeing, respect their welfare, respect their rights, avoid harming them, and generally *endeavor, so far as we can, to further the ends of others*". (p. 139). Are we promoting children's well-being when we subject them to harmful practices that have been classified by WHO as harmful? Absolutely not. Instead we are failing to treat them as an end in themselves. The welfare of girl-children is served by educating them so that they can become self-sufficient and not be subjected to these obnoxious practices in a quest to gratify men. Their right to autonomy is not served by being coerced into performing this practice. It could be served if they are allowed to be more matured enough to decide if they want to participate in this illegal harmful practice. To endeavor to further their ends is only possible if we strongly condemn the practice entirely. The LME apologist may also need to be thoroughly

engaged as they may be the once fueling the practice, by claiming that children prefer to have their labia stretched. This practice fails the test of Kant's "categorical Imperative" and should not continue. Having argued from a morality's point of view, I now look at the legality of these practices.

CHAPTER 4

4. HOW THE SOUTH AFRICAN LEGISLATION FAILS TO FULLY PROTECT THE RIGHTS OF CHILDREN AGAINST NTBM PRACTICES.

In this section I will look at the Constitution of South Africa (1996), herein referred to as the Constitution, Children's Act 38 of 2005, herein referred to as Children's Act and the African Charter on the Rights and Welfare of the Child of 1990 (of which South Africa became a Signatory in 2000). I will dissect how each of them impact on the rights of children pertaining to NTBM. I will be defending the four claims mentioned above in the introduction chapter to argue that the legal framework on NTBM in children should be brought into proper alignment to fully protect children. I strongly believe that the current legislation needs some amendments. These reforms should be aimed at bringing alignment between the Constitution and Children's Act. The rights enshrined in chapter two of the Constitution needs to be clearly protected in the Children's Act. I opine that there are some discrepancies and lack of alignment between the two, as I will show later.

Before delving into the crux of the arguments, I need to define certain terms/notions that are central to this section. The first term is "child". According to the Constitution of South Africa (1996), Children's Act 38 of 2005 and the African Charter on the Rights and Welfare of the Child (1990) a child is everyone below the age of 18 years. The second notion is a "natural person", which according to Collier-Reed and Lehmann refers to "all human beings: thus all human beings became persons in the eyes of the law at the moment of their birth and cease to be persons at the moment of death". (2010, p. 27). Lastly I want to highlight the notion of "exploitation". Exploitation in relation to children, as defined in the Children's Act 38 of 2005

"includes the removal of body parts". Having gotten clarity on the three notions, I will now articulate four claims that I will defend in the following sections. Firstly, I claim that when children are subjected to NTBM their right to equality as enshrined in the constitution is not fully realized. Secondly, their right to "freedom and security of the person" as stipulated in section 12 of the Constitution is violated. Thirdly, in terms of what is currently the case with NTBM the rights of parents/guardians to "freedom of religion, belief and opinion" seem to unjustifiably reign supreme over the rights of children not to be subjected to "harmful religious practices". Lastly, the four types of NTBM are often not in the best interest of the child.

Of the four types of NTBM referred to in this report, only one (male circumcision) is referred to directly in Children's Act. In so far as the other three (body piercing, labia minora elongation and tattooing) are concerned, they should be classified as part of "detrimental social, cultural and religious practices" referred to in section (12) of Children's Act and be regulated.

4.1. When children are subjected to NTBM their right to equality as enshrined in the constitution is not fully realized.

According to section 2 of the South African Constitution (1996), the Constitution is said to be the "supreme law of the Republic: law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". (1996). It implies that all acts should be in line with the Constitution. The rights enshrined in the Constitution are applicable to all people. This is made clear by section 7 (1) and (2) which states that: "This Bill of Rights (BOR) is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". (1996) Note that it says all people: meaning that children are included. Their rights should carry the same weight as those of adults, when coming to things like NTBM. Furthermore, section 9 (1) of the bill of rights guarantees

that “everyone is equal before the law and has the right to equal protection and benefit of the law.” Article 3 of the African Charter on the Rights and Welfare of the Child (1990) affirms that children should not be discriminated against on any grounds. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines discrimination as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds”. From the above citations it has been established that the rights in the Constitution, the Children’s Act and the African Charter on the Rights and Welfare of the Child are applicable to all persons, children included. Whereas I have made this arguments based on the equality clause, I also acknowledge that there are instances whereby discrimination of children based solely on their age and level of maturity may be deemed fair. On the other hand, there are also instances where discrimination based on age may be deemed unfair. It is worth noting that minors are allowed to consent to procedures and other social engagements. This is done by taking into consideration the importance of the procedure and the nature of the procedure. The extent to which if the right to consent is withheld, the child may be prejudiced. Children may be reluctant to access certain medical amenities if such can only be provided for with the consent of parents. They may also fear their parents and not undergo medical interventions that could have otherwise benefited them. All these were taken into consideration to ensure that the ultimate beneficiary is the child. Although 12 years is still way below the age of maturity, this age was chosen to avoid potentially delaying important life-saving medical interventions that could otherwise safe the child.

Children below the age of 12 years may also consent for medical procedures. A good example would be of a child of any age who may fall pregnant and want to terminate her pregnancy

without the knowledge or sometimes the consent of her parents. Such medical intervention will be conducted at the request of the child according to Section 5 of the Choice on Termination of Pregnancy Act 92 of 1996. The seriousness of the situation dictates that the age restrictions be waivered because of the long term negative inevitable complications that the child will suffer. This is something that can't be postponed until the child reaches 18 years. It must happen within the shortest possible time. Any delays may prejudice the child. Here I can cite some of the examples of different ages for legal age restrictions and legal ages permitting certain acts: 1. According to Section 46(1) I of the constitution the minimum age for voting is 18 years: 2. Section 129(2) of the Children's Act only gives children of 12 years and above the right to consent for medical and surgical treatment if they have the capacity to understand the ''benefits, risks, social and other implications of the treatment'' and are supposed to be assisted: 3. The age of sexual consent is outlined in section (1), (15), (16) and (57) of the Sexual Offences and Related Matters Act 32 of 2007 as 16 years: 4. Children's Act 38, 2005 section 129(5), gives parents/guardians the authority to consent for medical and surgical treatment for children below 12 years who lack the mental capacity to consent. All these were done after recognizing that children lack the mental capacity to comprehend the complexity and the intricacy of other situations. Their lack of capacity may be fair base to not allow them to consent to certain acts.

However, I argue that these NTBM are not so essential that they could not be deferred until such a time that children acquire the capacity to decide for themselves whether to do them or not. The age restrictions that I'm advocating for are aimed at protecting the child against the potential harms that are associated with this practices, most of which have been outlined in chapter 2. Life-saving medical interventions cannot be evaluated on the same scale as NTBM which have also been shown to carry potential morbidity and mortality in some cases. I disagree with Bates

et al (2013) when they equate vaccination with infant male circumcision. They argued that: "Vaccination is a minor medical procedure and is one that most parents choose for their children. Since the benefits of this intervention outweigh the risks and similarly failure to circumcise boys in a population will create a risk for future sexual partners, the vaccination of minors would appear to us to be analogous to the issue of the circumcision of boys". (p. 4). I find this argument to be absurd and lacking substance. First, vaccination protects the child himself against the disease. There is enough empirical data which shows that it does work. Secondly, it is presumptuous to subject children to a so called "preventative procedure" where there is no eminent threat to their lives. Thirdly, vaccination protects children against common childhood illness, hence it can't be deferred. Lastly, they say that boys should be circumcised to protect their "future sexual partners". The male infant is being mutilated to "protect" an unknown somebody in a distant future. In fact Weiss et al (2010) have shown there is no *direct* benefit linking male circumcision to reduction in HIV transmission to females. Imagine if it was to be said that female infants must have their clitoris hood cut to ensure that they don't infect their partners in the future or to ensure fidelity to their partners. The whole world will be up in arms to prevent such a move. But when it comes to a male infant, there is not enough outcry from the so called Human rights activists and children's rights activist. Where is equality between the two genders in terms of section 9 (3) of the Constitution? Svoboda, Adler and Van Howe (2016) noted from Cold and Taylor (1999) that "the female counterpart of the male foreskin is the clitoral hood". (p. 264). Surprisingly removal of the clitoris hood is classified by WHO as part of FGM and it is thus prohibited. To recap Type I FGM "is the partial or total removal of the clitoris (a small, sensitive, and erectile part of the female genitals) or, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris)". (WHO, 2008). Those who are practicing

Type I FGM are not tolerated. It is criminalized, whether it is done as part of culture or religion. If a girl child can make a claim that by denying her to undergo Type I FGM we are denying her to practice her religion or culture, what will the advocates of male circumcision say? She can claim that she's prejudiced by the system by being denied the practice that will benefit her in terms of social inclusion and access to the spiritual well-being. Will that claim be deemed legitimate? Even if that child is sixteen years or younger: will she be granted her wishes? The argument that if we prohibit male circumcision for children below 16 years we will be denying them their rights to practice their religion or culture is weak. If we are denying a girl child to practice FGM as part religious or cultural requirements by citing the issue of it being harmful, we can equally prohibit male infants and children circumcision on the same grounds because the part being cut is from the same embryological origin.

Now, as adults we are certainly protected against anybody who may want to attempt any NTBM on us against our will and wishes. In fact Coetzee &Strauss (2008) pointed out that a person can be charged with assault or *crimen injuria* with intend to cause grievous bodily harm should that person attempt that against my will (as an adult). The charges could stand in court and we could get recourse for whatever harm has befallen us. Yet, children are subjected to NTBM without their consent, consultation or knowledge in some cases. This is beside the fact that chapter two of the constitution, section 28 (1) (d), stating that "a child has a right to be protected from maltreatment, neglect, abuse or degradation". (1996). Subjecting children to these procedures is surely a form of maltreatment, abuse and degradation as they result in the breach of the child's bodily integrity and may even be fatal in other instances. Given their non-therapeutic nature, such breaches of children's "bodily integrity" are unwarranted. Their right to "human dignity, equality and freedom" is not protected simply because they are children. Children can be

dragged to perform any of the NTBM and there will be no recourse that they will get even if such is performed against their expressed wishes. I contend that children are not afforded the same protection under the law as it is supposed to be. Although the Children's Act, the African Charter on the Rights and Welfare of the Child and the Constitution has non-discriminatory clauses, children continue to suffer discrimination on the bases of their age. Section 9(3) of the Constitution is clear that discrimination based on age is unconstitutional. I find it rather odd that as adults we have a right not to be subjected to any procedure without our consent, yet children as subjected to NTBM without their consent. Is this right age dependent? Children's rights to not to be subjected to unfair-discrimination are waivered in favour of parental preferences. Section 9 (5) of the Constitution says that "discrimination on one or more grounds of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair". (1996). I couldn't find any legal bases that could justify discrimination against children on the bases of their age in relation to NTBM. Section 14 (2) I of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 places a requirement that in proving that the discrimination is fair we must take into account "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned". Here we determine whether there are other children who are not forced by culture or religion to undergo NTBM without their consent. Or we could determine if all children belonging to a particular religion or culture are always subjected to NTBM at the same age without their consent. De Waal and Cambron-McCabe (2013) noted the constitutional court ruling on the matter of *Pillay CC* whether she was entitled to practice her culture at school by wearing her nose studs that: "the court went on to caution that culture is not a unified entity, but differs from person to person. That is, individuals will adhere to selected aspects of their culture:

not everyone will conform to the same practices." Because people may pick and choose aspects of culture that they want to practice, it is reasonable to submit that, those NTBM cultural practices that infringes on the bodily integrity of children be deferred until children reach 16 years. There are nine factors that should be considered when determining fair discrimination according to Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The most crucial one to this case is in section 14 (3) (h) which requires that we should determine "whether there are less restrictive and less disadvantageous means to achieve the purpose". NTBM can be deferred or avoided until such a time when the child is matured, that way we could avert trampling over the child's right to autonomy and to equality. As noted from the assertions of the Constitutional court on the Pillay matter, these practices are not mandatory.

However, it is sometimes justifiable to override the child's autonomy in cases where such is done to save their lives: for instance, if a child is refusing a lifesaving intervention. It is another thing to override the child's autonomy for a non-therapeutic practice that carries significant morbidity and possible mortality. I'm not oblivious of section 36 of the Constitution which deals with "limitations of rights". I will address the issue of the limitation of these rights as well as the rights of parents adequately towards the end of this chapter.

If my parents can cut my foreskin at the age of 2 weeks without my consent or knowledge for religious reasons, why are they prohibited from doing so without my consent at the age of fifteen years and eleven months for similar reasons? What will stop them from cutting my leg for the same reasons? Although this may sound like a sliding slope argument, it is evident that the law fails to protect children from potential harm that may be caused by NTBM. The reason is simple, by virtue of being young, innocent and defenceless at 2 weeks, I'm a just a tool. There's nothing a 2weeks old can do or say to express his/her wishes. This is argued eloquently by Hellsten

(2004) that "…if we allow parents' rights to override children's rights, we could not then forbid them from making any other physical and spiritual sacrifices, (such as 'cannibalism' or 'human sacrifice' as extreme examples)…" (p. 249). Maybe, it is time for legislators and society in general to reflect on the cases of NTBM in children to ensure that children are protected adequately and that, their constitutional rights are dully protected and respected. So far there is no doubt that NTBM poses many dangers to children. With that being an undisputed fact, I can find no justifiable reason to allow NTBM to be practiced unabated under the current "regulations".

4.2. Children's right to "freedom and security of the person" as stipulated in section 12 of the Constitution is violated

Section 12(2) *(b) (c)* of the Constitution stipulates that: "everyone has the right to bodily and psychological integrity" which includes "security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent". Although this section is giving provision to "security in and control over their bodies", it was shown earlier that in practice parents often seem to be the sole custodians when it pertains to what happens to the bodies of the children. The bodies of children can be pierced, cut, stretched or marked in any way to please their parents. In instances of NTBM, children don't have an option to choose whether they should undergo them or not. NTBM are also practiced against the provisions of Children'sact. Considering the definition of abuse according to the Children's act 38 (2005) chapter 1 *s* (1) *(a)*, which defines abuse in relation to a child as "any form of harm or ill-treatment deliberately inflicted on a child and includes, assaulting a child or inflicting any other form of deliberate injury to a child". For me this definition has two key operational words,

"deliberate" and "harm". The act of performing NTBM in children is almost always deliberate. It's not accidental. Having already addressed the issue of harm that children are subjected to earlier in this research report, it is reasonable to assert that NTBM are a form of harm that is prohibited by this Act, yet the practices are continuing unabated. These practices tamper with one of the most fundamental rights of children, the umbrella right to "bodily and psychological integrity", to the extent that children's bodies are permanently physically and psychologically scarred. Alkhenizan and Elabd (2016) highlighted that:

"The only court to ban infant male circumcision was in Cologne in 2012, which resulted in a very strong reaction within Germany and all over the world. The District Court of Cologne held that the circumcision of a four-year old Muslim boy was unlawful mainly because of the violation of bodily integrity and due to the lack of consent from the child". (p. 944).

This was criticized by a lot of people in Germany and other regions of the world, until the German government enacted a law allowing infant male circumcision. (Alkhenizan and Elabd 2016). I find that the district court made a correct decision as it sought to provide protection to the child based on the notion of the right to "bodily integrity". I submit that this right is so fundamental that is cannot be superseded by other competing rights except in instances where bridging the bodily integrity of the child is an essential necessity for saving the child's life. An operation to remove a ruptured appendix will be a practical example of a life-saving procedure that cannot be avoided. However, what is even more puzzling is that of Common law case which "considered circumcision lawful despite the fact that it involves violation of bodily integrity as indicated in R v Brown" (Alkhenizan and Elabd, 2016). However the proponents of this practice NTBM justify them by equating them to extreme sport. Alkhenizan and Elabd (2016) quoted from where Lord Templeman said:

"Surgery involves intentional violence resulting in actual or sometimes serious bodily harm, but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing, and violent sports, including boxing are lawful activities" (p. 944).

This shows that the legal fraternity seems divided on the issue of male circumcision. There is an admission that there is serious bodily harm to children, yet the German government turned a blind eye to it when it enacted the legislation which allowed it. It's not the German government alone, even here in South Africa our legislation allows for male circumcision for infants as long as it's done for religious reasons, as per section 12(8)(a) of the Children's Act. Male circumcision in general seems to be tolerated more than other practices which are equally as harmful. Take the case of tattooing: wherein even in cases where children have given consent for practice, those responsible for tattooing children may be prosecuted. Griffith (2009) noted from a case in 1966 of Burrell *v* Harmer (1966) wherein "the court convicted a man for tattooing two 12-year-old boys. The court held that the boys were unable to appreciate the nature of the act and so their apparent consent was irrelevant". (p. 296). The notion of the lack of appreciation of the practice is paramount in cases where children are subjected to NTBM. It is the cornerstone of what should stand on the way of those practicing NTBM on children. Noting that in the Cologne case the doctor was acquitted based on what was termed "an unavoidable mistake of the law due to the lack of unanimous opinion on this issue". (Alkhenizan and Elabd, 2016). On the other case of Burrell v Harmer, a tattoo artist was convicted. If these two cases were judged from the same scale I opine that in the Cologne case the doctor should have been convicted because, a 4 year old lack capacity to consent, whereas a 12 years old could have a bit of capacity to consent as per

the Children's Act and that a tattoo artist stood a relatively better chance of acquittal than a doctor in Cologne if the law was applied in an unbiased manner.

This judgment should have served as a good precedence on all cases of NTBM to protect children. Coetzee and Strauss (2008) submit that the right to "security in respect of and control over one's body is closely linked to the doctor's duty to obtain an informed consent before performing any medical intervention". (p. 3). This right is so vital that even doctors in their quest to save a child's life need to obtain informed consent before commencement of any procedure. Unless in cases of emergency, section 129(6) (a) and(b) of the Children's Act grants the powers of consent to the hospital superintendent or the person in charge of the hospital to give consent in order to preserve life. This should be done if waiting for consent may endanger the child's life. Deferring consent by parents/guardians to medical treatment or surgical procedures will be lawful. Section 129(7) gives the minister powers to give consent on behalf of a child if parents unreasonably refuse to give consent to a treatment or surgical procedure or if they can't be traced or have demised and the child is also incapable of giving consent. Furthermore, subsection (8) enables the minister to consent on behalf of a child who unreasonably refuses to grant consent. Finally, the High court or the children's court, in terms of subsection (9) may grant consent for medical treatment or surgical procedures in all cases whenever the person responsible is unable to do so or is refusing to grant such consent. It is only under these exceptional circumstances that informed consent can be deferred. Although in medical settings these procedures are therapeutic in nature, and could be life-saving, there are stringent measures in place to ensure that they are not performed willy-nilly. Whereas it is undesirable for the state to be seen to be interfering in the rearing of children, the interference in the form that protects the fundamental rights of children like, "the right to psychological and bodily integrity" will be justifiable. The state has

the responsibility to protect the weak and vulnerable members of our society, whenever there are practices that prejudices them. Coetzee and Strauss (2005) asserted that "in the absence of an overriding social interest such as immunization of patients in order to protect the community against a threatening epidemic, a doctor is not entitled to treat a patient against his will". (p. 55). Whenever there is going to be an intrusion into the integrity of someone's body and that person's security in his/her body will be breached, there need to be proper checks and balances in place to ensure that the actions are warranted. Du Plessis, van der Walt and Govindjee (2014) note that "the provisions of Children's Act aim to provide SA's children with the necessary protection and safeguards that will ensure that their constitutional rights are being upheld, and that their overall wellbeing and protection is being protected as well" (p. 6). These assertions are a clear indication that the drafters of this legislation had the child's best interest at heart, however, I contend that there is an error in law that resulted in its failure to make the provisions of this act more stringent to ensure that the rights of children to "psychological and bodily integrity" are not subverted by their parents whenever they (parents) practice their constitutional rights. This very vital umbrella right is the essence of the beginning of protection of children against any form of abuse. If this right is respected and upheld, we will not experience any form of child abuse that is not punishable in law. All forms of potential abuses under the pretext of religion, culture or any social norms will therefore be met with necessary punitive measures by law.

The language of Children's Act is of a nature which put more emphasis on responsibilities of parents more than their rights. What is important is the parents' responsibilities towards the children more than the parents' rights over their children. Chapter 3 of the Children's Act's heading is "Parental Responsibilities and Rights", which puts responsibilities ahead of rights. Section 18(2) (a) (b) (c) and (d) indicates that parents must first claim responsibilities to wards

children, their rights will be secondary. As such, the religious rights of parents cannot supersede the rights of children not to be subjected to practices that bridges children's rights to "psychological and bodily integrity". This point was shown by Robinson (2003) when citing the constitutional court (Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC) judgement brought be parents of independent schools who wanted their children to be subjected to corporal punishment after it was outlawed. The ruling of the constitutional court demonstrated that the rights of parents to practice their religion can be limited, if it encroaches on the fundamental rights of the child. In this case: "The applicant challenged the constitutionality of the South African Schools Act 84 of 1996. It sought to have the Act declared unconstitutional and invalid to the extent that it was applicable to the independent schools whose parents or guardians have consented to corporal punishment being imposed. The court decided that the constitutional right of persons belonging to cultural or religious communities to enjoy their culture and to practice their religion could not be used to shield practices which offended the Bill of Rights".

This ruling is a clear example of the importance of the rights of children over those of parents when it comes to religious matters. Although parents could consent to corporal punishment over their children on religious grounds, the Court was clear that such rights cannot supersede the rights of children enshrined in the Bill of rights. The court did not prohibit the rights of parents to practice their religion, instead it limited aspects of the religion that "offended the Bill of Rights". In general, the Court's view was that by prohibiting teachers to practice corporal punishment, it is not denying parents their rights to practice their religion. In this research report I am equally not advocating for prohibitions of parents from practicing their culture, religion or social norms, I am simply pointing out some of the practices (NTBM) that I believe are non-essential and

potentially dangerous to be deferred until children are matured enough to decide whether or not to participate in such practices. It would be counterintuitive to argue against parent's rights to raise their children according to their religion. That way I would be denying children their right to social, religious or cultural inclusion. The issue of contention is not whether parents should or should not raise their children according to their preferred norms and standards. The issue is specific practices that are encapsulated in the broader settings of each social, religious and cultural norms.

From these submissions I argue that NTBM are an extreme form of the violation of the constitution since they are generally performed without any legally justifiable reason.

4.3.The current practice with respect to NTBM appears to favour the rights of parents/guardians to "freedom of religion, belief and opinion" over the rights of children not to be subjected to "harmful religious practices"

Article 21 of the African Charter on the Rights and Welfare of the Child speaks about the ''protection against harmful social and cultural practices''. (1990). The Constitution in section 15 also speaks to the issues of "fr**e**edom of religion, belief and opinion." I argue below that this right should be limited if it prejudices the well-being of children. I am not saying people should be prohibited from practicing their religions and cultures. Cultural practices form an integral part of society. However, in-cases where these practices are harmful, they should be deemed illegal. Sloth-Nielson & Mezmur (2007) wrote that: "cultures should be protected however *it* should not be relied on as a bases for diminishing protected rights. Where positive, culture should be harnessed for advancement of children's rights". (p.349). Noting from these assertions, it is therefore important for us as society to re-visit our value systems. These value systems should be such that they prioritize the wellbeing of the child rather than the cultural practices.

In pursuit of one's cultural practice, it shouldn't be done at the expense of harming children. If a cultural practice is wrong it must be condemned without fearing to offend those aligned to that practice. In this case the four types of NTBM are harmful to children hence I submit that they should not be imposed on children under 16 years. Rachels & Rachels (2015) identified five major arguments commonly used by cultural relativist to defend their practices. The most pronounced one being the second claim which says that: "right and wrong are determined by norms of society". (Rachels & Rachels, 2015, p. 18). For example, if it is correct for a Jewish male infant to be circumcised for his religious observance, it should be considered morally right for a Xhosa infant to be amputated the ring or little finger (a practice called ingqithi in Xhosa vernacular) as part of their culture[3]. Both these practices involve blood-letting and are deemed very significant in their respective contexts. One cannot be deemed as barbaric while the other is acceptable. This point is again elucidate further by Rachels & Rachels (2015) when they show that this second claim of Cultural Relativism is in conflict with the fifth claim, which they phrased as follows: "It is arrogant for us to judge other cultures. We should always be tolerant of them". (p. 18). If we are not allowed to judge those deforming little penises, then we equally can't judge those amputating fingers. We should tolerate both of them. Otherwise we will be saying the moral standard of one group is higher than that of the other group. I argue that both these practices are harmful to children, as such they should be prohibited for children under-16 years. At the extreme there used to be Suttee or Sati which was practiced in India for over 2000

[3]"ingqithi is An ancient Xhosa custom of amputating the joint of the little finger, or of the ring finger on babies is seen by many as an act of cruelty and torture.
On the day of the surgery a child is taken outside to the kraal and tied carefully. Then a black cloth is tied around the face to cover his or her eyes. A specialist surgeon different from the one who circumcises boys comes with a very sharp knife and performs the surgery on the infant. After that soil taken from a mole-hill is put on the wound. Other families put fresh cow dung on the wound and it is supposed to heal over a period of three to five weeks". (Dayimani, 2012)

years until the nineteenth century. (Rezkalla 2019).[4] Although this practice lasted over two millennia, was is morally right to expect women to die in such crude and cruel manner? I think we can all agree that, that practice's morality and legality could be called into question even if it was part of culture. Some actions may still be wrong whether they are sanctioned by culture, religion or social conformation.

There is no denying the fact that these four NTBM are harmful to children. Section 12 (1) of the Children's Act 38 of 2005 states that: "Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being". It is unfortunate that this section is overlooked when it comes to NTBM. This section was supposed to provide protection for children who are the most vulnerable members of our society from any form of exploitation (exploitation in relation to the child include cutting their bodies as indicated earlier). The conflicting rights of parents and children are not adequately balanced. The protection of children against "harmful religious and cultural practices" and the protection of the rights of parents to practice their cultures and religions are incongruent with each other. The law should be crafted in such a way that the more fundamental rights that protect the children should take precedence over the one of religious or cultural practices in a secular country.

Parents are empowered by section 15 of the constitution to practice their culture, religion or tradition, not to make children to practice them. The rights belong to the parent, children should partake on their own accord when they are matured to do so. As adults, our religious or cultural norms and practices should remain just that. They should be ours. These practices should not be

[4] "The practice of burning a widow on her husband's funeral pyre, known as suttee or sati, was commonplace in parts of India until the nineteenth century. To allow the dead man's possessions and property to pass back into the hands of his family, his widow was expected to commit suicide and fulfill her duty of chastity by immolating herself on his funeral pyre". (Rezkalla, 2019 p. 8)

arbitrarily imposed on children especially when it relates to those that violate the "bodily integrity" of the child. It should also be noted that the Charter doesn't prohibit parent/guardians from practicing their cultures. Article 9 of the African Charter on the Rights and Welfare of the Child (1990) is explicit in the responsibilities of the parents and their role in ensuring that children have "freedom of thought, conscience and religion". It stipulates that: "parents and guardians should provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child" (1990). The responsibilities of parents/guardians is to guide the children. Parents/guardians play a central role in the rearing of a child. Guidance is not equivalent to modifying the bodies. It doesn't involve the harming of children by cutting their body parts, piercing their bodies, drawing them or stretching their genitalia. The charter mentions the phrase "having regard to the evolving capacities" of the child. Meaning that children should be guided in accordance with their ability to have capacity and majority to the extent that their views and interest should be central to any decisions taken regarding their wellbeing. The decision for a child to join or participate in a religious or cultural practice should be their own. They should be allowed to participate at their own accord. Although the Constitution gives the provision to "freedom of conscience, religion, thought, believe and opinion", children are not given the opportunity to enjoy this right on their own volition. This is because they are subjected to many of these practices before they can have any form of capacity or knowledge of these practices. Most parents/guardians may obviously argue that, the child does not have the *locus standi* as such it is the responsibility of the parent to look out for her religious, cultural and social interests. Just as we immunize children every day without their consent, invariably, mothers can just pierce their children's ears. It should not be a big deal. My counter argument is that immunization will benefit the child more than from ear

piercing. It is possible that the child might grow up and not even want to put on the earrings. However, she will still have to live with holes in her ears that don't benefit her. The rights to practice one's culture and the protection of children from harm should be well balanced. This point is clearly articulated by Behrens (2014) when he asserts that: "all things considered, our obligation to prevent serious harm outweighs the rights of people to cultural practice". (p. 16). Here I'm not trying to dictate to parents or lecture them on the ways for rearing their children; my point is that children's wellbeing should be prioritized over cultural, social or religious obligations, particularly if in fulfilling such, there are potential harms to the child.

Noting from section 28 (2) *(d)* of the constitution which states that "a child has a right to be protected from maltreatment, neglect, abuse or degradation". I argue that this provision is far from being realized by the majority of the children of this country who are subjected to NTBM from a very tender age. The protection that should be offered by this section of the constitution is deliberately ignored to advance the rights of parents enshrined in section 15 ("freedom of religion, belief and opinion"). Whenever these rights of parents are fulfilled, those of children are invariably trampled upon, but not the other way around. A clear example of this is seen on the issue of male circumcision which is allowed on male children under 16 years for religious reasons as per the provisions of Children's act 38 of 2005 section 12 (8) *(a)*. I find this section to be problematic because it strips a male child of the right not to be subjected to "harmful cultural and religious practices", while the rights of parents are realized as enshrined in section 15 of the constitution. This section is giving a free pass for religious relativist to practice male circumcision without any prohibition. The only requirement is that male circumcision should be done according to the religious conviction. You only need to invoke religion in order to justify practicing male circumcision in children. On the contrary, cultural considerations are restricted

below the age of 16 on the same act. I find this to be very absurd. Are religious considerations above cultural ones? That is the question to ponder under different settings as it's not the question under my current enquiry. Hellsten (2004) argues that:

"From a human rights perspective both male and female genital mutilation, particularly when performed on infants or defenceless small children, and for non-therapeutic reasons can be clearly condemned as a violation of children's rights whether or not they cause direct pain. Parents' rights cannot override children's rights". (p. 249).

I agree with Hellsten on this view because for me children as a vulnerable group in our society deserve more protection than the protection of religious or cultural practice of parents. It is sad to notice that this section (Section 15) is effectively used to supersede section 12 of the constitution. The right of a child to "psychological and bodily integrity" suffers. We should also not forget that a child under 16 years could be a neonate, an infant, a toddler, scholar or an adolescent. What strikes me as odd are section 9*(a) (b) (c)* and (10) of the Children's Act 38 of 2005, which state that:

"Circumcision of male children older than 16 may only be performed, if the child has given consent to the circumcision in the prescribed manner; after proper counselling of the child; and in the manner prescribed. Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision". (Children's Act 38, 2005).

A child over 16 is supposed to give consent and counselled before the procedure. Meanwhile, the other categories of children may just be circumcised with no counselling or consent. Parent/guardians take advantage of the provisions of Children's act 38 of 2005 section 12 (8) *(a)* because it gives them license to practice their religion without any prohibition. It is said that a

male child has a right to refuse male circumcision according to section 10 of the Children's Act. However, I find that this section (10) of the act is vague and fails to protect a child. It leaves much more room for parents to manoeuver their way into forcing children into the procedure. Firstly, which age will be a cut-off for children to be eligible to refuse male circumcision? Secondly, what is the level of maturity and who will determine that maturity? Lastly, which criteria will be used for the determination of stage of development of a specific child? All these parameters are not clearly defined. This is due to the fact that this practice holds such a huge social, religious and cultural significance, hence, I concur with the analysis by Goldman (2004) that:

"Social influence can alter scientific inquiry. For example, if circumcision were introduced today, proponents would have the burden of proving that it is safe and effective. Although policy committees agree that this burden has not been satisfied, circumcision is evaluated as a long-standing practice and, as such, it is viewed differently than a new practice. Due to social and professional entrenchment, the burden of proof has shifted to the shoulders of critics. It therefore will be up to the parent/guardian to determine whether to overrule the child's refusal of not". (p. 361).

Even in the presence of scientific evidence lawmakers may still resist any meaningful change to the legislation that could potentially benefit the child. The act makes it easy for parents to override children's refusal because there are no clear parameters that prohibits them from doing so. The right to practice religion or culture or any social conformity should not supersede the right of the child not to be subjected to practices that are harmful. Male circumcision seems to be accepted at any age when performed for religious reasons. (TLRI, 2012). The fact that religion seem to be above all other considerations when coming to male circumcision is very worrying to

me. All legal and moral frameworks are deferred to accommodate religious convictions. Even medical associations go out of their way to accommodate religious convictions when coming to this practice. Religion seems to unjustifiably supersede all other convictions even in the some of the most secular societies. The absurdity of it all is that even some ethicists are bowing down to religious zealots when they make their recommendations about male circumcision. Goldman (2004) continue to criticized the law makers in the English speaking world for being seen to be lax and more accommodating to male circumcision for fear of offending the religious community and he further wrote that:

"There are many examples were authorities in English-speaking countries who appear to allow religious circumcision practice to inhibit them from taking a more progressive position on this issue. This tendency seems to result in a policy stance that is less evidence-based. Sensitivity to confronting the religious issue is understandable, but it may undermine the core values (e.g., the health of the patient is paramount) and ethics (e.g., first, do no harm) that drive medical decision-making". (Goldman, 2004, p. 632)

I concur with his observations and will hasten to add that they mirror the situation here in the Southern tip of Africa where the authorities are more accommodating to religious convictions than any other forms of social or cultural ones. Generally, children are indoctrinated into their parent's religion. Why can't children be allowed to make up their minds about religious matters at a mature age? I opine that this cannot be done even in the most secular societies because religious zealots are the ones who are seemingly occupying the most influential positions in strategic sectors society. From politics, businesses, sports, science and social formations. It makes it difficult but not impossible for legislation to change in order to accommodate values that are not legally and morally informed by religion. The legislation should change to be more

secular and not depend on religion. The drafters of the South African constitution and Children's Act seem to have tiptoed around this issues to accommodate religious and cultural relativists, which is legally unjustifiable as that is prejudicial to children.

4.4.These four types of NTBM are not in the best interest of the child

Section (28) (2) of the Constitution states that: "a child's best interests are of paramount importance in every matter concerning the child". We have already established that NTBM are performed on children in any setting for a plethora of reasons and that they are harmful in a variety of ways. It is abundantly clear that these practices are not anywhere close to being in the interest let alone "best interest" of the child. This section of the constitution is in line with the African Charter on the Rights and Welfare of the Child. Article 4 of this Charter (1990) put emphasis on the child on all matters concerning the child. Section 7 (1)para*(l)(i)(ii)* of Children's Act 38 of 2005 provides a clear description of the factors that need to be considered when apply the best interest of the child standard:

"Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely …..the need to protect the child from any physical or psychological harm that may be caused by; -subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person". (Children's Act 2005)

Here also there is an emphasis on "best interest" of the child. Yet I fail to see how NTBM are performed in the "best interest" of the child. This act goes as far as making a provision for protecting children from witnessing "harmful behaviour towards other person". Thus, Children's Act analogously will require that children should be protected from witnessing another child undergoing body piercing, tattooing, labia minora elongation or male circumcision, yet when these same harmful acts are performed on children, these children are not protected by South African law from the related harms. Whenever a 6weeks old or 6 months old baby's ears are pierced, whose interests are served? The parent's interests are the only ones that are served. The pain the child is enduring at the time isn't considered nor thought of in most instances. They think that they are acting in the best interest of the child while in-reality their actions are motivated by self-interest. This practice has been so normalized to the extent that it is viewed as an anomaly when a girl child doesn't have an ear piercing.

Our actions need to be guided by the standard of the child's best interests and the factors to be considered as outlined in Section 7 of Children's Act and discussed above. If it is agreed that NTBM are harmful to the child both physically and psychologically, then we can conclude that they are not in the "best interest" of the child. Hellsten (2004) asserts that:

"it is disturbing that even within the Western medical community, there is evidently still a wide consensus on such an intrusive and violent procedure as male circumcision, albeit that this consensus is evidently based on very different ''moral'' justifications, which vary from public health, to scientific proof, to religion and to a diversity of Western values". (p. 248).

Although many agree that this practice is harmful, Hellsten (2004) notes it is difficult to understand how it continues to be recommended on infants. Indeed if the medical fraternity is in agreement that this practice is harmful, why is it not discouraged? Is it because of the cultural

bias that Frisch et al has identified? On the other hand, some may hold a view that these modifications allow children to access social, spiritual and religious inclusion into their "mainstream" society. That is a valid point, but I argue that children should be of sufficient maturity to make an informed decision and not be coerced in a decision to assent. If these modifications were not causing any form of harm to children, being it psychological or physiological, then maybe it could be said that they are justifiable. But we know that these modifications are harmful. Should we risk children losing their lives for the sake of culture, religion or social conformity? I think that the life is more precious than any other thing and should be safeguarded.

According to section 6 (1*) (a) (b) (c)* of the Children's Act 38 of 2005:

"All proceedings, actions or decisions in a matter concerning a child must- respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section **7** and the rights and principles set out in this Act, subject to any lawful limitation; must respect the child's inherent dignity; and treat the child fairly and equitably".

This act is beautifully and elegantly written, however, it fails to live up to expectations as it pertains to the daily realities of our children. For the children who are subjected to NTBM daily, the rights and privileges of this act remain just but a dream. It was made apparent that children's rights constantly take a back seat whenever NTBM rears its ugly head, yet society and legislators are turning a blind eye on these injustices. What the Children's Act says, and the actual practice is, are seemingly on the opposite ends and it doesn't need a scientist to figure them out. Our inherent biases make it difficult for us to step in the shoes of children to witness our wrongful actions. The decisions taken to subject 2 years old to NTBM are not taken in a manner that "respect, protect, promote and fulfil the child's rights" set out in the bill of right. It seems that

below a certain age, children's rights are put in abeyance, then, are resuscitated from a certain age. Meanwhile, as we deliberately chose to suspend the rights of children gross injustices and inequalities prevail. The children's right to equality cannot be fully realized unless there are amendments in Children's Act that will make it difficult for adults to subject children to NTBM.

I conclude this chapter by dealing with the "limitation clause" of the Constitution. Section 36 of the constitution speaks to the limitation of rights clause. Here I am defending the rights of children under 16 years not to be subjected to NTBM. In some instances Children under 16 years are the ones who may demand to have the practice, while in other instances it is parents who may be forcing, coercing or manipulating children to undergo NTBM. This needs thorough consideration to the rights of parents and those of children while at the same time also looking at the child's best interest. Professor Robinson (2003) noted from the constitutional court judgement *S v Makwanyane and Another* (1995 3 SA 391 (CC) at par 104) that:

"The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality: the purpose for which the right is limited and the importance of that purpose to such a society: the extent of the limitation, its

efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." (p. 8).

In this judgement there is emphasis on freedom and equality. The rights of children to equality may not be limited by the need to have NTBM. In balancing the interests of the child and that of the parents to fulfil the religious or cultural requirements, we must consider if the religious or cultural requirements is more important, such that the child's right to bodily integrity can be limited. For me this right cannot be limited for social, religious or cultural reasons. Now this judgement also shows that if there are other means to be used than limiting the rights, then it should be the case. When it comes to NTBM limiting children's rights to equality, bodily and psychological integrity, is not legally sound to do so. It also should be reasonable to limit the right. Given the non-therapeutic nature of these practices, it is reasonable to limit the right to practice them until the age of 16 years. On the other hand, for example: if a minor is demanding to have a tattoo because his older brother has it, then we can limit her right to equality. It would be reasonable to do so because she would not be at a mature age to make that decision. Also, a tattoo in not essential, such that not having it may harm a child. It can be deferred the same way I am arguing for the deferring of male circumcision. The extent to which the limitation will harm the child is also vital. It would not harm the child if we prohibit her from having a tattoo at the age of 12. But it will harm her if we deny her contraceptives to protect her from sexually transmitted diseases and unwanted pregnancy. There is no blanket approach, cases are considered on a case by case bases. When is it fair to limit the right to have NTBM when it is demanded by a child, and when is it fair to limit the right of the parent to impose their religious practices on a child. The constitutional court was very diligent here when deliberating on the issue of limitation of rights.

Conversely, parents may contend that they have a right to raise their children according to their religion, culture or social norms. That's undisputed. This is supported by the fact that parents are the primary custodians of their children as Robinson (2003) pointed out that:

"The interest of children in maintaining their own autonomy must therefore be seen in the context of the relationship of dependence that of necessity exists between child and parent. The responsibilities of care and support a parent has towards a child, and the rights and powers a parent can exercise toward a child in order to meet those responsibilities, limit the extent to which a child can lay claim to his or her self-determination". (p. 16 and 17). Here it is clear that children cannot readily claim self-determination from their parents due to the relationship that exist between the two. That does not translate to parents having unlimited powers over children. There are instances where parents may not be allowed to make certain decisions on behalf of their children. For example, if a parent is refusing to consent for a child to have a life-saving blood transfusion on religious grounds, such a refusal may be vetoed by somebody acting on the authority of the state. The best interest of the child supersede the right of parents to religious, cultural or social practices. Not circumcising a child will not prohibit the parents from meeting their parental responsibilities. Protecting the child from engaging in any form of NTBM is in fact a sign of good parenting as it safe guard the children from practices that may cause harm to their bodily and psychological integrity. I argue that these interests of the child should be extended to protecting children under 16 years from NTBM. A child is better alive than dead over some culture or religion. From my assessment of the legal parameters of NTBM, I can conclude that these practices cannot be legally defensible.

5. CONCLUSION

In this research report I have argued that non-therapeutic body modifications (NTBM) in children are morally and legally indefensible. In chapter 1 I have laid the foundation of my arguments by first briefly describing each practice. I have argued that the age of 16 years is a reasonable age to consent for these NTBM because it is also in-line with the consent for virginity testing and male circumcision in the Children's Act and that nothing is lost by deferring these practices until this age. Chapter 2 provided a background literature of each practice. This literature provided an overview of the trends, complications, benefits and factors responsible for each practice to persist in their current form. I have found that some of NTBM hold very deeply seated cultural and religious significance. It is therefore going to be difficult to convince society and lawmakers to have a different perspective on how and when to perform NTBM in children. In chapter 3 I argued that NTBM cannot be morally justifiable using utilitarian and Kant's deontological approach. On the utilitarian front I argued that the overall "benefits" of these practices are far outweighed by their potential harms. Thus I argued for the rule utilitarian which showed that these practices cannot be morally justifiable. Enacting the moral rules that prohibit these practices, I argued, is in the best interest of the child. From utility point of view I was able to show that it is fair to defer these practices until the age of 16. Kant's "Categorical Imperative" provided an argument that assisted my moral arguments with the notion of "respect for persons". Here I made a claim that these practices fail the second formulation of the "categorical imperative" because they are predominantly practiced in a manner that only uses a child as a mere *means*. I have shown that from Kant's way of thinking, NTBM are not done in a way that treat children as *an end* in themselves. They violated the "inherent dignity" of human beings that Kant hold dearly. On the legal arguments I found that the misalignment of the Constitutional

provisions and that of Children's Act makes it difficult to protect some of the fundamental rights of children. Their right to equality, "psychological and bodily integrity" and their right not to be subjected to "detrimental traditional, cultural and religious practices" are not properly protected. Furthermore the notion of the best interest of a child is not realised when performing the four NTBM under discussion in this research report. The question of the timing of NTBM like male circumcision will continue to be a contentious one and may need more scholarly examination particularly in a multicultural and multi-religious society of South Africa. I however acknowledge that there is a strong case to be made on religious and cultural grounds for some of these practices to continue. I have also argued that the limitation clause in the constitution should not be used to supersede the fundamental rights of children in favour of the rights of parents to practice their religion, culture and social practices. Being that as it may, I find that children also need to be allowed to reach a more mature age before they are subjected to some of these practices. I therefore would submit that NTBM should be prohibited below the age of 16 unless there are serious medical indications (e.g. Concealing surgical scars by tattooing, male circumcision for para-phimosis or phimosis not responding to steroid treatment among others). I strongly believe that much more research is needed in South Africa on this subject of NTBM to assist in promulgation of regulations that will govern these practices.

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