

**NON-THERAPEUTIC MALE CIRCUMCISION OF INFANTS: A GROSS VIOLATION OF
THE INFANT'S BODILY INTEGRITY AND NOT IN HIS BEST INTEREST.**

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Declaration

I Mosito Jonas Seabela declare that this Research Report is my own, unaided work. It is being submitted for the Degree of Masters of Science in Medicine in Bioethics and Health Law at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other University.

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a long horizontal line extending to the right.

(Signature of candidate)

2ND day of SEPTEMBER 2020

Dedications

First, I would like to thank God for his continued protection and for blessing with this opportunity and strength to continue pushing even in the most difficult of times. I would also like to thank my supervisor, Dr Jillian Gardner, for her relentless guidance, supervision, and constructive criticism. To my mom and dad, thank you for affording me the opportunity to go to school and sacrificing both emotionally and financially to ensure that I get the best education you can afford. Most importantly I would like to thank my family, my wife Rudzani for her motivation and support both emotionally and financially, for listening to my ideas even in the oddest of times. Thank you Rudzani for taking care of the family in my absence while I was away attending classes or occupied with this research. And to my kids, Lefa, Theto, and Letago thank you for understanding that daddy is not always available due to his studies and giving the motivation and time to work my degree. To my little girl Letago, I am sorry I was not always there when you needed me the most and may your precious little soul rest in eternal peace, I will always love you and carry you in my heart .

Abstract

The practise of non-therapeutic infant male circumcision (NTIMC) is a violation of the infant's right to bodily integrity and is against his best interests. The Children's Act as the primary legislation aimed at protecting the child's best interests from harmful practices like (NTIMC) is very ambiguous thus proving to be very inefficient. For the Act to be more efficient some of its sections ought to be amended to better protect male infants from this practise. This research project aims to defend the view that NTIMC should be banned in South Africa. I make the argument that surrogate informed consent for NTIMC by parents is not in the child's best interest and it deprives the future adult of his autonomy, self-determination, and ownership and therefore the practise should be prohibited. Since the project is philosophical in nature it was strictly literature-based and therefore ethical theories and principles were employed to defend the thesis.

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Chapter 1: Introduction

1. Introduction

The acquired immunodeficiency syndrome (AIDS) epidemic has struck the African continent quite severely, which makes Africa account for nearly three-quarters of the world's human immunodeficiency virus (HIV) infections, even though it only accounts for an eighth of the world population (Wendell *et al.*, 2009). South Africa is a leading contributor to the global population of people living with HIV, with a prevalence of 17% nationally amongst the adult population (Spyrelis *et al.*, 2013). Great efforts have been made to reduce the HIV prevalence rates, primarily through accelerating the initiation and free access to antiretroviral treatment to those who test positive for HIV and intensive health awareness and education programmes which have been relatively unsuccessful in reducing the prevalence rates (Spyrelis *et al.*, 2013). Through studies conducted in Southern Africa, male circumcision has been shown to have a 60% reduction in the probability of getting infected with HIV in heterosexual men (Camargo, Perrey, and Giami, 2013). This makes male circumcision an effective strategy in containing this epidemic, particularly in lowering HIV transmission risk among men who have vaginal sex (Govender *et al.*, 2013). Not only has this procedure been associated with decreased risk of HIV transmission but it has also been shown to reduce the risk of acquiring human papillomavirus, syphilis, and urinary tract infection (Ganczak and Korze, 2017).

1.1. Background literature analysis and critique

According to the World Health Organization (WHO), “male circumcision (MC) is one of the oldest surgical procedures in history which is performed for various reasons including religion and traditional rites or medical reasons” (World Health Organization, 2007, p. 3). Circumcision is “the amputation of the male foreskin (prepuce) from the rest of the penis, resulting in permanent alteration to anatomy, histology, and function of the penis” (Van Howe *et al.*, 1999, p. 1).

1.1.1. History and determinants of male circumcision

The earliest records of MC dates back to 2300 BC in Egypt seen on tomb work and rock art depicting adult males being circumcised (World Health Organization, 2007). This practice is universal, and prevalent among Jews and Muslims for religious reasons (World Health Organization, 2007).

In a number of African countries, male circumcision is performed primarily for traditional reasons, as initiation and rite of passage into manhood (World Health Organization, 2009). Most African countries that still practice this custom are not doing it for just the health benefits but because for one to be regarded as a man in some communities they need to have been initiated into manhood. Traditionally during the rite of passage, the initiates will not only be circumcised but they will be taught how to be responsible men in their community which in current times also includes learning about HIV/AIDS (World Health Organization, 2009). The practice of traditional male circumcision (TMC) has been under scrutiny over recent decades due to the fatalities associated with the practice which resulted in its regulation by health and traditional authorities coupled with training on safer procedures and medical support where needed. According to WHO (2009) countries like Kenya and Lesotho are trying to combine TMC with voluntary male medical circumcision (VMMC) as a way of reducing, the fatalities and genital mutilation associated with this practice. Currently, 15 sub-Saharan countries including South Africa are expanding access to VMMC to reduce HIV transmission in Africa (Male Circumcision Consortium, 2014). This service is offered for free in South Africa. According to the Male Circumcision Consortium (MCC) (2011) after achieving the target of getting 80% of males who fall within the 15 to 49 years age group circumcised, these Sub-Saharan countries are likely to shift to infant male circumcision (IMC) (Male Circumcision Consortium, 2014).

Besides cultural and religious reasons, IMC is practised for the perceived medical benefits to the infant which could either be therapeutic or prophylactic. According to the Australian Safety and Efficacy Register of New Interventional Procedures-Surgical (ASERNIP-S) the therapeutic reasons that require male circumcision include recurrent inflammation of the foreskin and the entrapment of foreskin behind the gland (Department of Health Australian Government, no date). Some of the prophylactic reasons include the prevention of urinary tract infections (UTI), reduction in inflammation of the foreskin, prevention of foreskin injuries, and the risk reduction of contracting HIV when the boy later becomes sexually active (Eromon, 2018). Other reasons that have been given for IMC is that “because the foreskin is less developed and thinner suturing is not often required, fewer complications like bleeding due to less vasculature and post-surgical inflammation that occur mostly in teens or adult males and the healing time is also shorter” (Weiss, 2010).

Just as infants, adult males can also develop some of the conditions that may require circumcision as therapy or prophylaxis but some of these conditions are less common in adulthood. UTI is one of the conditions that are common across all age groups but is less severe in adults (Eromon, 2018). In addition to reducing HIV transmission risk in heterosexual adult

males, MC has been linked to reducing the vulnerability to the carriage of viruses like the human papillomavirus (HPV) which causes cervical cancer in women (Eromon, 2018), and thus providing some protection to women who have sex with circumcised men. Over and above these therapeutic and prophylactic benefits associated with MC, some teens and adults are circumcised as a cultural or religious requirement.

Religion is a leading reason why parents subject their male infants to circumcision as the practice is often mandated by their religion.

1.1.1.1. Male circumcision in Judaism

Circumcision is an ancient sacred practise among Jewish communities, which date back to the times before Christ. This practise was started because of the covenant Abraham made with God in the book of Genesis chapter 17 from verse 10 to 12. (10) “This is my covenant, which ye shall keep, between me and you and thy seed and after thee: every male among you shall be circumcised; (11) And ye shall be circumcised in the flesh of your foreskin: and it shall be a token of a covenant between me and you; (12) And he that is eight days old shall be circumcised among you, every male through your generations” (Genesis 17:10-12).

To date Jewish communities still view this covenant in a serious light, hence they have been practising it for over two thousand years (Greenfield, 2012). This is why around 99% of Jewish men living in the United Kingdom, Great Britain and Northern Island have been circumcised in their infancy while about 98% of Jewish men living in the United States of America are circumcised (World Health Organization, 2007). The circumcision ritual is done in three steps by a mohel who is a Jewish male trained in performing Brit Milah or simply translated as covenant circumcisions (Glass, 1999). In the first step, “the foreskin is cut, the second step involves ripping off the membrane with a fingernail and lastly sucking blood from the wound” (Greenfield, 2012).

1.1.1.2. Male Circumcision in Islam

Even though there is no explicit reference of circumcision in the *Qur'an*, Muslims remain the largest religious group that practices male circumcision as a confirmation of their relationship with God as part of their Abrahamic faith (Greenfield, 2012). According to Islamic laws recorded in the *Sunna*, the ritual dates back to Prophet Muhammad who was born without a foreskin, thus his followers went for circumcision as a symbol of their covenant to the prophet (Greenfield, 2012). Since circumcision does not appear anywhere in the Holy *Qur'an*, there is no prescribed age for circumcising (Merkel and Putzke, 2013). Due to this lack of prescription,

Some Muslim families circumcise their male infants seven days after birth while others prefer to delay circumcision until the boy can recite the entire *Qur'an* because in Islam there is no Mohel equivalence the procedure is often performed in a health facility by a medical professional who is usually the Obstetrician (Greenfield, 2012).

1.1.2. The global prevalence of infant male circumcision

On a global scale, the United States of America has the highest prevalence rate of infant male circumcision among industrialized English speaking countries with prevalence rates ranging from 60% to 90% depending on the region (WHO, 2010). A study conducted in eleven African countries revealed that Ethiopia has the highest prevalence of male infant circumcision with about 70% followed by Zambia with about 40%, then Tanzania and Lesotho with 30 and 20% respectively (Lau, Jayakumar and Sgaier, 2015). A 2010 report from WHO suggests that Ghana and Nigeria are also among the African countries with high prevalence rates ranging from 60-80% for both countries (WHO, 2010). Data from other African countries like South Africa and Botswana were unavailable either due to information restrictions or questionnaires from these countries that were not made available to the researchers (Lau, Jayakumar and Sgaier, 2015). The figures from the two countries would have been very helpful in this project especially the South African statistics because that is the country of interest. The data obtained from the cited reports above does not distinguish between therapeutic and non-therapeutic circumcisions, but it appears religion may be the leading reason for infant circumcision on the African continent as well primarily because the two countries (Nigeria and Ghana) with the highest infant circumcision prevalence rates are countries with the highest Muslim populations in the study by Lau et.al (2015). Nigeria's population is estimated to be 44.56% Muslim with Ghana at 15.89% (Kettani, 2020).

1.1.3. Reasons why parents choose to circumcise their male infants

Over and above the medical and religious justification for circumcising male infants' parents often have their views about the practice. It is important to explore these views primarily because parents are the ones who decide whether their male infants will be circumcised. One study that was looking into the factors that affect the parental decision in the circumcision of infants revealed an overwhelming 44 % of women decided before they even conceived, while only 7 % of these women make the decision based on the advice of a healthcare practitioner (Tiemstra, 1999). It is apparent that parents do not base their decision to circumcise their children solely for the health benefit of their sons, but they have their personal preferences in the matter. Tiemstra (1999) reported that about 67 % of parents choose to circumcise their

infants because they thought it is easier to keep the penis clean, about 63 % based their decision on the assumption that it is easier when the child is still young than when older, with 41 % opting for the procedure because of the perceived medical benefits, an alarming 37 % based their decision on the grounds that the infant's father is circumcised and about 13 and 11 % based their decision on the recommendation by a physician or for religious reasons irrespectively. Appearance, culture, family pressure and the father's insistence were some of the reasons given in the study though reported in lesser frequencies (Tiemstra, 1999). Another study conducted in 2013 that also looked into the parental rationale for male circumcision reported that about 61.9 % of parents opted for the procedure for hygiene reasons, 44.8 % for disease prevention and 40.9 % choose to circumcise their children because the fathers were circumcised (Rediger and Muller, 2014). A similar study conducted in the year 2011 in Saskatoon Canada revealed that about 60,9% of parents supported infant circumcision because of it hygiene benefits, with 44,8% supporting it for cancer prevention and 40,9% supported the procedure because the child's father was circumcised, with only 3,5% of those parents preferring neonatal circumcision because of their Doctor's advice. (Rediger and Muller, 2013). Considering that hygiene is often reported as the primary reason why parents decide to circumcise their infants it is evident how misunderstood the foreskin is in relation to penile health and hygiene.

1.1.4. Anatomy and function of the foreskin

It is deserving that the structure and function of the foreskin be discussed because it is obviously misunderstood and underrated. The foreskin or prepuce is an anatomical structure that forms part of the male external reproductive system which is the equivalent of the female clitoral prepuce (Dinneen, Bunker, and Dinneen, 2013). Structurally the foreskin appears as a fold of skin that covers the penile glans (Hegazy and Alrukban, 2012). It has evolved over 65 million years as an integral part of the reproductive system of mammals (Dinneen, Bunker, and Dinneen, 2013). The foreskin starts from the pubic mounds and runs along the entire length of the shaft and covering the glans and extends a few millimetres beyond the tip of the glans (Taylor, 2009). The foreskin is not just a simple layer of skin, the outside layer of skin prevents foreign material from entering the urethra with the inside layer being covered with a mucosal layer which keeps the glans moist (WHO, 2010). Infants are always in diapers and their genitals are always exposed to skin irritating urine and faecal matter which can make cause irritation of the glans or make entry into the urethra which may cause sepsis. The foreskin is not just an extra piece of skin attached to the penis, "it contains blood vessels, highly enervated and has a thin layer of muscle" (Tasmania Law Reform Institute, 2012, p. 13). Though there is no clear

consensus among scholars when it comes to the function of the foreskin, a few of them agree that there could possibly be some immunological function attached to the foreskin because of the mucosal layer it possesses. Some scholars postulate that cutting off the foreskin has the potential to reduce the sensation of the glans thus reducing pleasure during sexual intercourse because of the nerves located in it.

1.1.5. Context of the study

Infant male circumcision is not particularly a new practice for example, Jewish communities have been practising this for non-therapeutic purposes for centuries. It should be noted that in South Africa, an infant is defined as a child from birth to 1 year (The South African Department of Health, 2012). The circumcision of infants for non-therapeutic reasons is one of the most commonly practised surgical procedures in the United States of America (Sardi, 2011). Non-therapeutic male circumcision (NTMC) is “the circumcision of a male for any reason other than current physical clinical need” (British Medical Association, 2019, p. 3). Furthermore, the USA has by far the highest prevalence of NTMC of infants which ranges from 60-90% (WHO, 2010). NTMC of infants is not only a common and acceptable practice in the United States but in some communities in South Africa as well. A study on the acceptability of infant NTMC in Soweto and Orange Farm revealed that about 68% of mothers and 67% of fathers indicated that they find the procedure acceptable and would consider circumcising their infants (Spyrelis *et al.*, 2013).

Although the debate around the acceptability of non-therapeutic infant male circumcision (NTIMC) has been going on for years, it was not until early 2000 when this practice attracted medico-legal attention with the debates being published in the *Journal of Medical Ethics* and *American Journal of Bioethics* (Fox and Thomson, 2005), where experts in the medical ethics field were divided about whether this practice is in the child’s best interest or not. The circumcision proponents within the medical ethics field hold a view that because circumcision has some prophylactic benefits attached to it if a parent consents to the procedure it would be in the child’s best interest to be circumcised and be protected from diseases while the opponents are of a view that it is immoral to expose infants to a harmful and risky procedure all in the name of preventing mostly treatable conditions which are normally not life-threatening (Fox and Thomson, 2005).

Amid this debate, the American Academy of Paediatrics (AAP) made their stance on the matter very clear, when in 2012 they released a technical report and policy statement about the practice where they claim “the potential benefits of the procedure outweigh the potential risks and costs”

(Earp, 2013). The AAP suggested that their recommendations on early circumcision can be used to justify why parents choose to circumcise their autonomously incapable children (Earp, 2013).

1.2.The rationale for the study

A study conducted in all nine provinces in South Africa in 2008 reported that about 16.9% of male infants have been medically circumcised (Peltzer *et al.*, 2014). There is a possibility that the prevalence of infant circumcision may increase because King Goodwill Zwelithini introduced a programme to revive the practice of male circumcision in KwaZulu-Natal as part of the fading Zulu tradition and also to aid the reduction of the high HIV rates in the province which he proposed should also include the circumcision of infants (McQuoid-Mason, 2013).

These figures from Peltzer *et al* (2014) and the call by King Goodwill Zwelithini are concerning because the Children's Act 38 of 2005- hereafter referred to as the Act only permits the circumcision of male minors under 2 conditions. Chapter 2 section 12 (8) of the Act states that: "circumcision of male children under the age of 16 years is prohibited, except (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner" (Children's Act 38, 2005).

Section 12 (8) (a) appears to be vague because it permits the circumcision of male minors including infants "for religious reasons if the procedure is performed in accordance with the religion and in the manner prescribed by the religion" but does not indicate who is permitted or authorized to perform such procedures. For instance, in Islam there is no equivalent of a Jewish mohel hence the procedure is often performed in health facilities by a trained medical practitioner who is often an obstetrician and the religion has no prescribed age when the procedure is to be performed. It becomes difficult to determine if the procedure is in accordance with the religion or not as there are no clear guidelines relating to this ritual. Given that in Islam the circumciser is normally a medical practitioner it raises the question as to whether the doctor is still within his scope of practice as a medical doctor performing ritualistic circumcisions for religious reasons.

1.3.Research question

Should the practise of NTIMC be prohibited in South Africa unless performed exclusively for religious purposes by a trained religious leader?

1.4.Thesis

I will argue that the practise of NTIMC should be prohibited in South Africa unless performed exclusively for religious purposes by a trained religious leader.

Aim and objectives

The study aims to defend the view that NTIMC should be prohibited in South Africa unless performed exclusively for religious purposes by a trained religious leader.

The objectives of this study are to:

- To describe the social and legal context of NTIMC.
- To provide ethical arguments against NTIMC using ethical principles, duty and the child's best interest principle.
- To ethically evaluate the arguments in support of NTIMC.

1.5. Study design

This project is philosophical in nature; thus, it is strictly a literature-based study where different articles were analysed and critiqued. Since the project aims to argue what we ought to do and not to do in relation to non-therapeutic infant male circumcision, it took a normative approach. Normative ethics is regarded as a branch of philosophical inquiry that sets out to answer questions like what ought to be done or not to be done. What kind of person ought we to be? And to justify the answers to these questions (Sugarman and Sulmasy, 2001).

2. Research method

Since this research project takes a purely normative approach, there was no empirical data to analyse and interpret which is usual for philosophical research projects which rather employ an argumentative strategy in defence of the thesis.

To defend the thesis that s12(8) (a) and (b) of the Children's Act should be amended for the child's best interest. The first objective is to give an account of what the child's best interest means and how the practice of non-therapeutic infant male circumcision (NTIMC) affects the child's best interest and wellbeing. The main point of the argument is that religious and non-therapeutic medical circumcision may have limited social and prophylactic benefits to the infant, but it is harmful, risky, unnecessary and irreversible. The second argument will be made through the employment of the harm principle where I argue that the procedure is harmful both psychologically and physically to the infant and the future adult he will become because it is painful, causes bleeding and there is a risk of penile amputation or death that is associated with the procedure. Evidence from the literature will be presented and used to defend the argument that non-therapeutic circumcision is harmful and risky.

Through the application of ethical principlism, I will argue that NTIMC is a violation of beneficence and non-maleficence ethical principles which are some of the most fundamental ethical principles for health care practitioners in clinical practice. Arguments proving that NTIMC has more risk than benefit for the infant will be presented to show how this practice violates beneficence and non-maleficence ethical theories. Not only does this practice violate these two principles but I will also present the argument that it erodes the autonomy of these infants because it is irreversible. Because everyone is afforded the right to participate in the decision-making process in all matters relating to their health, the argument that circumcising infants without any medical need is while the procedure can be delayed until he is old enough to make the decision himself is unfair and contradictory to the justice principle.

Children are incapable of protecting their interests and exercising some of their rights, hence certain members in society have been given a duty to protect these rights and interests. Using duty theory, I will, therefore, raise the argument that state, parents, and health care practitioners are not executing their duties accordingly as they have failed in protecting these rights and interests in matters relating to NTIMC.

Ethics

The study received an ethics waiver from the University of Witwatersrand Human Research Ethics Committee (medical), with clearance number W-CBP-200529-01 (attached as Appendix A).

3. Chapter outline

In chapter 1 I introduce the topic and present the background literature analysis and critique. I also give an account of the history and reasons for circumcision which also explores the conception of the practice from two major religions namely Judaism and Islam. The global prevalence of non-therapeutic infant male circumcision (NTIMC) is presented further extending into the reasons why parents opt to circumcise their male infants even in the absence of pre-existing medical conditions. The anatomy and function of the foreskin are also discussed to highlight the significant role the foreskin plays in male sexual health and function. Lastly, the rationale aims and objectives, study design, and methodology used are presented.

In chapter 2 international policy guidance on infant circumcision is analysed and critiqued, and a descriptive analysis of laws and treaties that South Africa is bound by are presented and interrogated as they apply to infant male circumcision.

Chapter 3 is a presentation of the arguments in defence of the thesis. I apply Ethical principlism which makes use of principles like beneficence, non-maleficence, autonomy and justice. I also present arguments using the child's best interest principle, and the harm principle defence of my thesis. I conclude that s12 (8) (a) and (b) of the Children's Act be amended to prohibit the circumcision of infants for religious reasons where the religion has no clear guidelines and to prohibit medical practitioners from performing circumcision for religious reasons and prophylactic purposes because such practices are not always in the child's best interest.

Chapter 4 is a presentation of the possible counterarguments to my position which are sourced from literature published by the proponents of the practice some of which are from religious groups, medical fraternity, and policymakers. After the presentation of each argument, I will present my response and, in my response,, I will identify the inadequacies in the arguments of those who support NTIMC.

Chapter 5 is my conclusion and recommendations, in the first section will be a summary of arguments in defence of the thesis and recommendations on what should be done to curb the practice of NTIMC.

CHAPTER 2: Policy guidance relating to the practice of infant circumcision

1. Introduction

Infant circumcision has often been labelled as a human rights violation because of its apparent violation of the infant's right to bodily integrity (Svoboda, 2013). Children's rights are easily violated because they lack the ability to protect their interests and exercise most of their rights hence, they require protection through laws and policies. Intergovernmental organizations like the United Nations have instituted agreements for State parties to protect the rights of children, among these rights is the right to bodily integrity which circumcision is thought to violate (Svoboda, 2013). The focus of this chapter is to present and analyse intergovernmental agreements that South Africa has entered and local laws or policies that relate to the practice of infant male circumcision. I will first present the agreements, laws and policy guidelines that are related to infant male circumcision and following the presentation of each policy or law guidance will be its brief analysis and critique and at the end of the chapter will be a conclusion.

2. International policies or law guidance regulating NTIMC

The United Nations and the African Union have drafted agreements to protect the rights and wellbeing of individuals who live within its State parties. In this section, I will only present the agreements that in my view are related to the practice of infant male circumcision or those that can help regulate this practice. The first one will be the United Nations Convention on the Rights of the Child, which will be followed by the African Charter on Human and Peoples Rights, both to which South Africa has ratified and assented.

2.1. Articles related to the practice of infant circumcision in the United Nations Convention on the Rights of the Child

Among these treaties, is the Convention on the Rights of the Child (CRC) which was introduced in 1990 and was signed by 194 countries (state parties), of which South Africa is a signatory, therefore bound by it. Article 3 (1) states that "in all actions concerning children, whether performed by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (United Nations, 1990). The article is an agreement between state parties to ensure that in all of the laws, policies and programmes that involve or have an impact on child they ensure that the child's best interests are protected. The aim behind the best interest of the child standard is to ensure that children fully enjoy all the rights provided in the Convention and to promote their overall wellbeing (United Nations, 2013). The United Nations has released on commentary on

article 3 of the CRC where a legal analysis of the best interest of the child analysis from here forth known as “the commentary”. In chapter IV of the General Comment No. 14 (2013) on the right of the child to “have his or her best interests taken as a primary consideration” (art. 3, para A.) Legal analysis of article 3, paragraph 1 as presented in the commentary.

1. **“in all actions concerning children”**

(a) **“in all actions”**

Paragraph 17 of the commentary states that “Article 3, paragraph 1 seeks to ensure that the rights are guaranteed in all decisions and actions concerning children, meaning that all actions relating to children have to take into account their best interests as a primary consideration”(United Nations, 2013). According to the commentary, the word “action” is not only limited to “decisions but also acts, conduct, proposal, services, procedures and other measures” (United Nations, 2013).

(b) **“concerning”**

Paragraph 19 of the commentary says the term concerning refers to “ first of all, the measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure” (United Nations, 2013).

(c) **“children”**

According to paragraph 21 of the commentary the word children in Article 3, paragraph 1 means “any persons under the age of 18 within the jurisdiction of a State Party, without discrimination of any kind, in line with article 1 and 2 of the Convention”(United Nations, 2013).

2. **“By public or private social welfare institutions, courts of law, administrative authority or legislative bodies”**

(a) **“public or private social welfare institutions”**

In paragraph 26 of the commentary, it is provided that “the terms should not be narrowly construed or limited to social institutions, but should be understood to mean all institutions whose work and decisions impact on children’s realizations of their rights to including care, health, environment and education” (United Nations, 2013). Though Article 3 makes no mention of parents and their obligation to make decisions in their children’s best interests, Article 19 paragraph 1 of the Convention states that: “ parents or, as the case may be, legal guardians, have the primary

responsibility for the upbringing and development of the child, therefore the best interest of the child will be their basic concern” (United Nations, 1990).

(b) **“courts”**

On paragraph 27 of the commentary, it is highlighted that courts refer to “all judicial proceedings, in all instances-whether staffed by professional judges or laypersons- and all relevant procedures concerning children, without restrictions” (United Nations, 2013).

(c) **“administrative authority”**

The commentary in paragraph 30 makes emphasis on the “broad scope of decisions made by administrative authorities at all levels which cover decisions concerning education, care, health, environment, living conditions and protection amongst others” (United Nations, 2013).

(d) **“legislative bodies”**

Paragraph 31 of the commentary suggests to State parties that “the adoption of any law or regulation as well as collective agreements- such as a bilateral or multilateral trade or peace treaties which affect children- should be governed by the best interest of the child and that the right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation, but not only in laws that specifically concern children” (United Nations, 2013).

3. **“the best interest of the child”**

The commentary acknowledges the complexity of determining the best interest of the child thus in paragraph 32 it suggests that “content must be made on a case-by-case basis and that it should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs” (United Nations, 2013).

Paragraph 34 of the commentary warns of the possibility of abuse or manipulation of the Convention brought about by the flexibility of the principle by acknowledging that “the Convention has been abused by Governments and other State authorities to justify racist policies and by parents to defend their interests in custody disputes”(United Nations, 2013).

4. **“Shall be a primary consideration”**

Paragraph 36 of the commentary provides that “the word shall be places a strong legal obligation on States and means that states may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary

consideration in any action undertaken” (United Nations, 2013). Governments agreed to ensure an assessment of the child’s best interest in all matters that affect children either directly or indirectly without any discrimination.

Besides article 3 there are other articles in the Convention which can be applied to protect the infants’ right to bodily integrity and by extension from NTIMC.

Article 24 (3) states that “state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of the children” (United Nations, 1990). In this article, State parties have agreed to take effective action to protect children from harmful traditional practices that violate the rights of children recognized by the Convention, by mean of policy, laws and guidelines. Normally parents or legal guardians are the ones that expose the male infant to harm by requesting that they get circumcised even though circumcision is not required. The Convention does offer some form of protection for infants within the State parties through article 19 (1) where it speaks of state parties “taking appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child” (United Nations, 1990).

In Article 37 of the CRC, state parties have agreed that (a) “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment” (United Nations, 1990).

Article 16 (1) of the CRC protects provides that: “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, nor unlawful attacks on his or her honour and reputation” (United Nations, 1990).

2.2. Analysis of the UNCRC relevant articles

Taking article 3 (1) into consideration, it can be argued that allowing either private or public health facilities to continue circumcision male infants with no immediate medical conditions that require the procedure is against the best interest of the child because the foreskin does have a protective role that it plays in early childhood and its removal may expose the infant’s urinary tract to infections (WHO, 2010). Having a foreskin is in the infant’s best interest as it serves an irreplaceable vital role, so for State parties that have signed and assented to this treaty to allow such a practice to continue means, they are failing to protect the best interest of their future generations. I acknowledge that deciding what the child’s best interests are in any given

situation is complex and requires extensive deliberation which will be done in the subsequent chapter (chapter 3).

Some countries like South Africa are incompliant with article 24 (3) by allowing the circumcision of male infants when it is performed for religious reasons because their constitutions prescribe that different religions and their practices be respected. It very bizarre that almost all countries are against female genital alteration or mutilation for the same religious reasons and have gone as far as criminalizing its practice but would allow the unnecessary alteration and mutilation of the genitals of male infants even though both practices are regarded as a religious rite of passage in some cultures. The practice of non-therapeutic infant male circumcision is an unlawful interference with the infant's privacy because circumcision is a very private sexual health matter and any decision concerning this matter should be left to the individual to decide autonomously in line with article 16 paragraph 1 which prohibits the unlawful interference of the child's privacy. Having one's genitals unnecessarily touched or altered without their consent is the greatest violation of their privacy can eventually degrade their autonomy and self-esteem. Subjecting children to this procedure so early in life without cause can scar them for life. These scars are not only physical but emotional as well. Having their genitals altered at such a young age may have negative effects on their confidence with their body image particularly if they grow up to live in societies where circumcision is not a norm and may eventually affect their sex lives as adults.

There is no sense of urgency in NTIMC hence it should be delayed until the infant is old enough to personally and autonomously give consent. In cases where infants are circumcised without any pre-existing medical conditions that can only be treated by circumcision, performing this procedure should be deemed as inhumane and cruel which is a contradiction of article 37 because it offers the child protection against cruel and inhumane practices. The infant will be exposed to an unnecessarily harmful procedure that is risky for something that may or may not happen or worse as a way for his parents to honour their religious obligations. It is degrading to the infants to have their sexual integrity violated for no reason other besides that, their parents felt it is within their rights to do so. The child will have to live with the scars of his parents' ill-formed decisions all his life. Subjecting infants to NTIMC poses harm not only to the infant's physical wellbeing but to his psychological well-being as well (Bollinger, 2014).

2.3. Articles related to the practice of infant circumcision in the African Charter on Human and Peoples Rights

In addition to the Convention on the Right of the Child treaty, South Africa has signed and assented to the African Charter on Human and Peoples Rights, which from now on will be referred to as the Charter. Article 3 of the Charter stipulates that every individual is deserving of equal protection of the law (African Union, 1986). Through this article, governments are urged to ensure that all individuals within their jurisdictions enjoy the full legal protection of their rights provided by the constitution.

Article 6 protects the individual's "right to liberty and the protection of his person" (African Union, 1986). The word liberty synonymously referred to as freedom means, "the power to do as one wants" (Facchini, 2016, p. 1). The right to liberty would imply the power to speak or act as you want but within the confines of the law. The concept of liberty can be thought to comprise of two poles namely: negative and positive liberty (Coser, 2014). Negative liberty "has to do with the sphere where citizens are free of any kind of interference from other individuals or collective subjects" and positive liberty "involves the idea of citizens taking action for their reasons and not from external causes" (Coser, 2014, p. 42). Therefore, the right to liberty means having the right or power to freely make decisions for yourself without any kind of interference from individuals or organizations.

Article 16 of the charter, states that "every individual shall have the right to enjoy the best attainable state of physical and mental health" (African Union, 1986). This could be interpreted to mean that governments should take the necessary steps to ensure that all individual within their jurisdiction achieves a sense of physical and mental wellbeing.

2.4. Analysis of the African Charter on Human and Peoples Rights

If indeed all individuals are protected equally by the law and are deserving of equal protection of the law as stated in Article 3 of the charter, then the circumcision of male infants should be taken as seriously as female genital mutilation through laws that prohibit the practice. Laws have been imposed on communities who practice female genital mutilation as an integral part of their traditions but when it comes to male infant circumcision lawmakers allow themselves to be distracted by debates around the right of the child and the parents' right to religious freedom. South Africa has also imposed a ban on this practice, s12 (3) of the Children's Act prohibits the circumcision or genital mutilation of female children (South African Government, 1996). Female genital mutilation can never be entertained no matter the reasons or how minor

the procedure will be, but now countries find themselves having to decide whether the parents' religious rights are more important than the child's right to bodily integrity.

Since NTIMC can be delayed until the boy is old enough to consent to the procedure the insistence of permanently altering his genitals this early in life is a violation of his liberty which is protected and recognized by article 6 of the charter. NTIMC violates article 16 of the charter because removing the foreskin means removing the protective barrier of the infant's urethra thus making him prone to urinary tract infections which will compromise his physical wellbeing (Boyle, 2015).

3. Local laws regulating NTIMC

Considering that one of the motives behind this project is to argue that NTIMC is against the child's best interests it is only fitting that attention is given to the local laws, policies and guidelines that are related to the child's best interests. It will also be helpful to assess how the country has managed to incorporate into their laws the intergovernmental agreements they have assented to. As a foundation of all the laws in the country, the first presentation will be of the constitution which will be followed by the Children's Act. Under the presentation of both legislations will be a brief analysis and critique.

3.1. Constitutional sections relevant to infant circumcision

Chapter 2 (Bill of Rights) of the South African Constitution in s28 (2) provides that "a child's best interest is of paramount importance in every matter concerning the child" (South African Government, 1996). According to this provision, when making decisions that have a potential impact on the wellbeing of a child it is not enough to just assess the child's best interests and include them among other deciding factors, but these interests should be the only factor in the decision-making process. Besides the special rights afforded to children's like the best interest right, children are also bearers of other rights afforded to everyone like the right to bodily integrity. Chapter 2 s12 (2) provides that "everyone has the right to bodily and psychological integrity, which includes the right to (b) security in and control over their bodies" (South African Government, 1996).

3.2. Analysis of the Constitutional sections relevant to infant circumcision

Countries that entered into the CRC treaty agreement have agreed to ensure that they introduce relevant legislation to ensure the protection and realization of the children's rights recognized in the treaty. Concerning the best interests of the child standard as recognized by the CRC, South Africa has done exceptionally well incorporating it in its laws. s28 (2) of the constitution

affords children the right to have their best interests taken as of paramount importance in all matters involving children, there is a slight difference between how the Constitution and the CRC address the best interest of the child. The CRC treaty requires that the child's best interest be of "primary consideration" while the Constitution requires that they be of "paramount importance", the Constitution offers better protection to the child's best interests because it directs that this interest be the deciding factor in all matters involving children as opposed to being among the deciding factors.

Considering that part of the aim of this project is to argue that NTIMC is a violation of the infant's right to bodily integrity as it is provided by s12 (2) of the Constitution, so it dictates that the description of what the right bodily integrity means and what would constitute a violation of this right. For one to claim that their bodily integrity has been violated they would have to prove that another person has without their consent penetrated into any of their bodily orifices, breaking or removal of any tissue or made any alterations to their physical structure (Earp, 2019). The right to bodily integrity means having the right to physical autonomy and self-determination (Harshu, 2017). The two descriptions from Earp (2019) and Harshu (2017) jointly suggest that any act of penetration into one's bodily orifices, cutting off any tissue from their body or altering their physical appearance in any way without their expressed consent is a violation of their right to bodily integrity as they would not have free consented to such actions. Non-therapeutic infant male circumcision (NTIMC) is a violation of the infant's right to bodily integrity on two grounds: the first one is that by removing healthy functional tissue from these infants without any need thus altering their physical appearance is a violation of their right to bodily integrity. The second being that, because NTIMC can be delayed until the infant is old enough to give consent, it deprives him of the opportunity to determine for himself whether he wants to be circumcised or not, therefore meaning NTIMC is a violation of the infant's right to self-control or determination which.

3.3.Sections in the Children's Act regulating the circumcision of infants

The best interest of the child is further protected by the Children's Act No. 38. Circumcision of male infants in South Africa is also regulated by this act as it affects the child's interests, this Act is not very explicit on the matter. For instance, s12 (8) of the Act addresses circumcision under social, cultural and religious practices and "prohibits the circumcision of male children below the age of 16 years, except cases where the procedure is performed for religious reasons or upon recommendation of a medical practitioner" (Children's Act, 2005). Section 12 (8) (a) permits the circumcision of male minors (infants included) provided the practice is performed for religious purposes and according to the practices of that religion (Children's Act, 2005).

While s12 (8) (b) permits the circumcision of children is performed on the recommendation of a medical practitioner for medical reasons (Children's Act, 2005).

3.4. Analysis of sections in the Children's Act regulating infant circumcision

There seems to be a huge loophole in the Children's Act, which may be the reason why the practice persists. The first challenge with s12 (8) (a) is that it does not give guidance as to who is authorized to perform religious circumcisions which is a concern because unlike the Jewish faith other religions like Islam do not have religious circumcisers who are trained and authorised by the religion, it is therefore not clear whether the act permits medical doctors to perform circumcision for religious purpose particularly for parents who are part of religions without their circumcisers. The second issue with the provision is that it is also not clear about whether it permits the circumcision of minors (infant in particular) for religious purposes where the religion has no prescribed age for the ritual.

The main challenge with this provision is that whenever parents decide they want to have their infant son circumcised it is going to be difficult to distinguish if this decision is based on faith or merely their preference, partly because there are many religions in South Africa and one religion may have different customs depending on area and culture of the followers, for example in the Islam faith there is no prescribed age for circumcision which means various communities have different preferences with regards to the best suitable time for circumcision.

Under the same section 12 subsection 8 (b) the Act permits the circumcision of male infants if it is recommended by a medical practitioner. A notable concern about this provision is that it is not very explicit on which grounds medical practitioners can recommend circumcision or rather what constitutes medical reasons. First, there is no guidance as to what the medical reasons are, for instance, it is not clear whether it only permits circumcision that is required to treat a pre-existing medical condition (which is a therapeutic reason) or for the prevention of diseases (which is a prophylactic reason), and if the act accommodates prophylactic reasons as medical reasons does it only allow it for the prevention of life-threatening diseases which are difficult to treat and very common in infancy or any disease that can be prevented by circumcision? Or does it allow circumcision for both therapeutic and prophylactic reasons?

The overall concern with s12 (8) (a) and (b) is with regards to consent, there is no indication of circumstances that would nullify proxy consent for infants to be circumcised or even how this consent should be obtained and by whom particularly for religious reasons.

4. Concluding remarks

Intergovernmental organizations like the United Nations and African Union through their human rights instruments like treaties and charters have provided a solid foundation for state parties to introduce legislation to protect the rights and interests of children. However, it remains apparent that the Children's Act aimed at protecting the rights and interests of children introduced by South Africa has proven to be vague and ambiguous thus making application and enforcement difficult. Legislations that are riddled with loophole are prone to exploitation and abuse leaving those they were supposed to protect with little to no protection. The ambiguity of the Children's Act exposes the child's right to bodily integrity and self-control to abuse particularly at the hands of their parents because s12 (8) (a) is not clear on who should be circumcising minors for religious reasons and when this should be done. If the religion has not set these guidelines, then it will be left to the parents' discretion to decide when they want to have their son circumcised and by whom which to me defeats the purpose of this provision. Section 12 (8) (b) is also prone to abuse but in this case by medical practitioners because seemingly it does not prohibit them from circumcising children for religious reasons and it is not clear on which grounds, they can recommend infant circumcision. It is for this reason that I maintain the view that both s12 (8) (a) and (b) of the Children's Act be amended.

Chapter 3: Arguments in defence of a ban on NTIMC

1. Introduction

In this chapter, I present arguments in defence of my thesis that s12 (8) (a) and (b) of the Children's Act be amended to firstly, prohibit the circumcision of infants for religious reasons where the religion has no clear guidelines, and secondly, to prohibit medical practitioners from performing circumcision for religious reasons and therapeutic purposes because such practices are not always in the child's best interest. Before these arguments are presented a historical development and application of the best interest of the child will be presented to give the arguments context, then I will defend my thesis by using the best interest of the child principle, and harm principle to show that NTIMC is harmful to infants and against their best interest which is also a violation of ethical principles like autonomy, beneficence, non-maleficence and justice. Through the application of duty theory, I will establish the argument that parents, health practitioners and government are neglecting their duties to protect the male infant's interests and rights by allowing him to be circumcised without morally justifiable reasons.

1. The historical account of the best interest of the child principle

Historically in child custody disputes the father was normally awarded custody of the children because of the dominant paternal dominance in legislations that afforded fathers dominant rights in all family matters (Elstert, 1987). As slaves were emancipated and the practice of slavery abolished in the United States of America in the late 19th century so was child slavery (Van Deusen, 1991). Due to this paradigm shift from children being perceived as chattels to them being regarded as human beings with equal rights as adults but with limited autonomy the world saw the introduction of the best interest of the child being introduced in the early 20s to help courts to make rulings in child-centred cases (Carbone, 2014). The best interest of the child principle has since become a core principle in the protection of children's constitutional rights particularly in family dispute cases where the child's custody is contested (Degol and Dinku, 1999). Over and above child custody cases, intergovernmental organization have incorporated this principle in their human rights instruments. The Geneva Declaration on the Rights of the Child was the first to explicitly incorporate this principle in their guidelines on human rights in 1924, followed by United Nation Declaration on the Right of the Child in 1989 and the African Charter on the Rights and Welfare of the Child in 1990 (Degol and Dinku, 1999). Even though the principle has been enjoying a widespread application by the courts over the years it has not gone uncriticised, to this day this principle is still being used by many courts around the world despite its widespread criticism which began in 1975 when Mnookin pointed out the complexity

of deciding what is in the child's best interest (Bonthuys, 2015). A clear interpretation and application of the principle is essential to help assess whether the decisions taken by decision-makers are in the best of the incompetent individuals they are deciding for, and how such decisions are likely to affect them. It is therefore required that scholarly description and application of the principle be presented.

2. Paramountcy of the child's best interest

The South African Constitution makes reference to this principle in Chapter s28 (2) where it says "a child's best interest are of paramount importance in every matter concerning the child"(South African Government, 1996). There is a clear distinction between the Convention on the Rights of the Child (CRC) provision of the child's best interest to that mentioned in the South African Constitution. The main difference between the two is that the CRC advises that child's best interest be of primary consideration in all matters involving children while the Constitution prescribes that these interests be of paramount importance. The major distinction in this case being "paramount". It is for this reason that the word paramount is defined and its implication to the children's interest principle be presented.

According to the Oxford dictionary, "the word paramount means more important than anything else" (Oxford Dictionary, 2020). This implies that not only should the child's best interest be considered when making decisions that affect him or her but that these interests should be given preference over everything else. This is often challenging to fulfil particularly because children are part of families with parents and often have siblings in addition to being members of a community, therefore, it is common that the child's best interest be limited by those of the people around him particularly in "communitarian societies" (Moyo, 2012). The paramountcy principle used in deciding a child's best interest may at times prove to be narrow and very individualistic, which may be problematic in religious circumcision as this practice is very communitarian and by nature involves not only the child and the parents but the religious community as a whole as it serves to integrate the child in the community. To apply the best interest of a child in broader perspective would entail taking into how the child's best interests are likely to affect those around him as his wellbeing is dependent on them (Crowe and Toohey, 2006). The wider application of the principle is challenging when dealing with human rights in this instance the right to bodily integrity and to have the best of the child being of paramount importance in all matters relating to the child. The problem will arise from the individualistic nature of human rights, particularly because the human rights doctrine applies a very western approach of liberalism with two basic principles: the first being that the individual is the most basic moral unit, and the second is that all people are morally equal (Freeman, 1992). Taking

the liberal approach to deduce whether NTIMC is a violation the male infant's rights requires that we narrowly consider how it affects him as an individual through a wider approach to the problem may yield overall wellbeing for everyone involved it still compromises the best interests of the child to accommodate or to be accommodated by those around him. For the purpose of this paper child's best interest will be very narrow and individualistic as the aim is to advocate for the male infant's constitutional right to bodily integrity.

3. NTIMC as a violation of the best interest of the child principle

Deciding what is in the child's best interest is a very difficult and complex process because infants have not as yet developed as autonomous agents with wills and wishes and they have not as yet developed any personal interests. Unlike adults who have suddenly become non-autonomous due to incapacitation, this particular case is different because the adult was once an autonomous agent and may have expressed his interest before he became incapacitated. In this instance, a surrogate will be making decisions on behalf of the patient with the assumption that they know what the patient's interests were before they became incapacitated and therefore the surrogate will be expressing these interests on the patient's behalf. The challenge with deciding what is in the child's best interests is that decisions are made for someone who has never been autonomous and will not be for a few years, it then becomes impossible to know what the child wants to do or how they would want to live once they are become autonomous and can express their wishes. As difficult as it is to decide what is in the child's best interest, parents are faced with the mammoth task of making such decisions from the day the child is born until the child becomes independent. In the late 1990s, Kopelman introduced a system coined "The best-interest standard" which is used to facilitate decision making for the child's best interest. This system has three categories namely: ideal, threshold, and constraints (Kopelman, 2015).

3.1. Ideal

Under this category Kopelman proposes that the surrogate decision-maker should assess the incapacitated or non-autonomous individual's immediate and long-term interests and select the best option, the option should maximize the individual's overall good and minimize the individual's overall risks or harm (Kopelman, 2015). This category has three requirements which must be fulfilled when deciding what a child's best interests are; the first is to assess the immediate and long-term interests. Taking this category into cognisance, non-therapeutic infant male circumcision (NTIMC) does not provide any immediate benefits to the infant and since the foreskin is a protective barrier for the urinary tract removing it may have serious medical

consequences in the long-term particularly if there were complications like accidental amputation. The second requirement is that the decision taken on behalf of an incompetent person must maximize the person's overall good while minimizing overall risk or harm, given that circumcision is not risk-free by circumcising infants without any pre-existing medical conditions would be exposing them to harm with an attempt to prevent medical conditions that may not even present in infancy.

3.2.Threshold

Kopelman (2015 p.12) suggests that “if higher duties conflict with the goal stated in the ideal category, decision-makers should, at minimum, make choices for the incompetent or incapacitated person that provide what a reasonable and informed person of goodwill would regard to be good care, were they in the person's circumstances”. Religion is usually revered as a higher duty and honouring all religious requirements is a must for most religious people. When parents are faced with deciding whether to preserve their infant's bodily integrity or have him circumcised as a fulfilment of their religious requirement it is often common that religion will be given precedence because it is a higher duty of all believers to obey God's commands.

This category advises decision-makers (parents and guardians) to put themselves in the position of those they are deciding for and ask whether they would be pleased if another person was to make such decisions for them and to also ask if any other reasonable person would make the same decision if they were faced with the very same situation. A person who is well informed about the benefits and risks of NTIMC would be able to make a sound decision that would be in the child's best interest and would be able to weigh that against the parents' religious obligations and personal preferences.

3.3. Constraints

In this last category Kopelman (2015 p. 12) proposes that “constraints exist such that decision-makers should, at minimum, make choices compatible with rights of or duties to the incompetent or incapacitated individual”. Circumcision of children without medical need is against the child's right to bodily integrity and right to security and control over his body which are enshrined in the Bill of Rights in the South Africa constitution. The only decision that is compatible with the child's rights in NTIMC would delay the procedure until he is old enough to decide for himself whether he wants to be circumcised or not; this will be respecting his right to security and control over his body and will help preserve his bodily integrity during infancy. Because parents have a duty to protect their children from harm, circumcising infants would be a complete betrayal of this duty.

4. Duty theory

Duty is defined as “what a person is obliged or required to do and these duties can be moral, legal, parental or occupational” (Audi, 1999, p. 248). Duty theory falls within the deontological tradition better described as duty-based ethics (Iacovino, 2013). According to duty-based ethics, we have an obligation to treat others with dignity and to do them right irrespective of what the outcome of that action is. In this section, I will use duty theory to argue that parents, health care practitioners and government all have duties to protect children from harmful practices like NTIMC. I will also argue that all these three parties have neglected their duties towards male infants by allowing the practice of NTIMC to continue.

4.1. Health care practitioners’ duty towards their patients

Health care practitioners in South Africa and around the world are guided by ethical guidelines and principles which have been put in place to protect the rights of patients and also to protect practitioners. These guidelines serve as a reminder to health care practitioners that they have a duty towards their patients, communities and to themselves. In booklet 1 paragraph 4.1 of the Health Professions Council of South Africa (HPCSA), a duty is defined as “an obligation to do or not to do something” (HPCSA, 2016). In all relationships each party has responsibilities or obligations to fulfil, the clinician-patient relationship is no different.

When a health care practitioner is treating a child, he needs to distinguish who the patient is between the parent and the child. By so doing he will be able to honour his duties towards his patient. In paragraph 5.1.1 of the HPCSA booklet 1, health care professionals are urged mandated to “always regard concerns for the best interests or well-being of their patients as their primary professional duty” (HPCSA, 2016). Given that amputating the foreskin in infants for prophylactic or religious reasons is not medically beneficial but rather exposes them to harm is against the best interests of the child as a patient and practitioners who perform such procedures are in violation of their professional duties towards their patients. Respect for patients is one of the most important duties health care practitioners have toward their patients. In paragraph 5..2.5 of the HPCSA booklet 1 health care practitioners are advised to “guard against human rights violations of patients, and not to allow, participate in or condone any actions that lead to violations of the rights of patients” (HPCSA, 2016). In chapter 2 section 12 (2) of the South African constitution states that “everyone has a right to bodily integrity and psychological integrity, which includes the right to (b) security in and control of their body” (South African Government, 1996). Whenever health care practitioners allow themselves to be manipulated into performing non-therapeutic circumcisions on male infants they are violating

these infants' right to bodily and psychological integrity which is contrary to section 12(2) of the Bill of Rights and in violation of the professional duty as outlined in the HPCSA guidelines booklet 1 paragraph 2.3.4. where health care practitioners are urged to recognize their patient's human rights (HPCSA, 2016). The physician's duty should be solely towards his patient and the decisions he makes should be in the interest of the patient. Removing healthy functional tissue from infants without cause can never be in their best interest (Svoboda, 2017). Health care practitioners are obliged by the ethical guidelines and the law to give sound clinical advice to patients and surrogates to aid them in making the best decision for themselves or the patients they are representing. My argument in this matter is that the health care practitioner should refrain from using emotions in guiding parents in their decision-making process regarding the circumcision of infants. They must explain the medical condition that requires circumcision as part of their treatment, how the procedure is performed, and the risks attached to the procedure. Because circumcision does not benefit infants who do not have any pre-existing condition that can only be treated by circumcising, medical practitioners have a duty to advise parents that their children do not need to be circumcised and their consent in the matter is not valid because the procedure is cosmetic and they should rather wait for their children mature enough so they can make the decision for themselves.

Performing medical tests or treatments on a patient without their valid informed consent constitutes assault because parents can only consent to procedures that are for therapeutic purposes to treat immediate medical conditions. They cannot ethically consent to procedures that are not beneficial to their children. Medical practitioners who perform this procedure without valid informed consent are just like hired agents who are procured to assault infants and violate their rights.

4.2. State's duty in protecting infants

It is not only the health care professionals who have a duty or obligation to ensure that infants' right to bodily and psychological integrity is protected from NTIMC, but the government has a huge responsibility in this matter because they have a legal duty to ensure that all citizens are afforded the opportunity to enjoy their rights within the constraints of the law. There is a doctrine in law called *parens patriae*, which is "a mechanism by which the state exercises plenary custodial authority in the welfare and developmental interests of the children and other legally incompetent individuals within its territorial jurisdiction"(Blokhuis, 2009). My understanding with this doctrine is that the state has a responsibility to protect the rights and interests of children because by virtue of one being a child, they are incapable of protecting their interests and rights. Under ordinary circumstances, this responsibility is afforded to

parents in the case of children, but in this instance, because the parent is both the protector and transgressor of the child's rights that responsibility should, therefore, be passed to the state because the parents are conflicted in the matter. Having assented and ratified both the African Charter on Human and Peoples Rights and the Convention on the Rights of the Child, South Africa has vowed to take legislative action to ensure that children, in particular, are protected and able to enjoy their rights to the fullest. The state has a legal obligation to ensure that they introduce legislation that will prevent health care practitioners from violating the right of vulnerable populations in society on grounds that they received consent from their surrogates. They also have a bigger responsibility in educating the public on the rights children have and also make them aware of their responsibility and duties towards their children. The state also has a duty to raise awareness on the risks and legal implications of early circumcision and options that parents have in the matter. The Children's Act does not provide enough protection to children because there are a lot of grey areas in the Act which are being exploited by both religious and medical practitioners. It is because of this grey area that NTIMC is perceived as a legal practice in South Africa primarily because such cases are never brought before the courts of law.

4.3. Parents' duty towards their children

The best interests of the child are often overshadowed by parental rights where the child's rights are often suppressed because of his inability to exercise or protect them. Parental rights are "special legal powers of parents to control major aspects of their children's lives" (Godwin, 2015). Child-rearing has always been paternalistic throughout history which was protected by law and therefore resulted in the treatment of children as their parents' property. We now know that this perception is flawed as one cannot claim ownership of another individual who lives in a civilized and liberal society; which is why the old Roman *patria potestas* doctrine has been abandoned decades ago. *Patria potestas* means "parental power or the power of the father"; this power bestowed upon the father or parent gave him the authority to decide everything concerning his children including whether they lived or died (Stevenson, 2013). As laws evolved so has the rights parents have over their children. Recently parenting is perceived not only as a right but as a duty in itself (Woodhouse, 1995). Parents have a greater duty in protecting their children's best interests because by law they are the children's guardians; this responsibility has been bestowed upon them with the notion that they will always act in their children's best interest and will protect them at all costs.

Considering that the parent's primary duty in raising their children is to ensure they protect the child from harm and make decisions in his best interest until he is old enough to

independently make such decisions for himself, parents should not allow their interests to overshadow this great responsibility entrusted upon them. I concede that parents do have legal rights to raise their children in the religion of their choice and also teach them the religion's customs and traditions as they so wish. My contention with this is the manner in which most parents exercise this right. Parents cannot serve as reliable agents in protecting the child's best interests while they have their interests that conflict with those of the child (Godwin, 2015). It is in the child's best interest that he be protected from harm, which is why I still maintain that forcing male infants to undergo such a painful and risky surgical procedure that very limited prophylactic benefit at his current age is exposing him to harm, not only that but the child is a victim of abuse at the hands of his parents.

5. Harm principle

Following harm principle, "the only purpose for which power can be rightfully exercised over another member of a civilised community, against his will, is to prevent harm to others" (Holtug, 2017). Leaving male infants uncircumcised until they are old enough to decide for themselves will not pose any harm to them or any member of society. Arguments have been made that uncircumcised men are at a greater risk for HIV transmission than circumcised men and therefore it would be better to circumcise boys before they acquire HIV (Rennie, 2007). My argument is this matter is simple; the HIV risk reduction applies to sexually active heterosexual males and not to infants. Infants are not sexual beings and no lives will be at risk if they are to be left uncircumcised until they are mature and competent enough to make the decision themselves, and the other issue is the assumption that they will grow up to be sexually irresponsible to contract HIV and then spread it around.

Some of the justifications parents and medical practitioners give for supporting non-therapeutic infant circumcision is that it is less painful to perform the procedure on the infant than it is for older children. My argument is not about the degree of pain that each of these two children will experience but rather that the procedure is not devoid of pain and thus these infants are subjected to unnecessary pain during a procedure that is not going to benefit them in their infancy stage.

The pain caused by infant circumcision is one that lasts for a lifetime in some men. The physical scars may heal with time, but the practice has left most men emotionally and psychologically scarred for life. Over the years there has been an increase in the number of men who have been reporting having being physically harmed and have expressed their resentment with having their body parts amputated without their consent (Svoboda and Adler, 2019).

Prohibiting infant circumcision even for religious reasons may seem like the state exercising its power over members of a civilized society as it is contrary to the harm principle. In this instance, the exercising of power by the state over parents who opt to have their male infants circumcised is justified because their religious practices are harmful and detrimental to the health of their male infant. Adults should be permitted to practice their religions as long as they do not pose harm to anyone (Millum, 2018). In this particular matter, the state does have reasonable grounds to exercise its power over the parents by limiting their right to practice their religion if it is harmful to their child.

In 2005 a South African high court judge ruled in favour of Dr. Hay, a paediatrician, who was treating a child of a Jehovah's witness couple that was refusing a blood transfusion for their child citing religious reasons and risk of infection (McQuoid-mason, 2005). In this case, the judge ruled against the parents because their religious belief was depriving the child of a life-saving transfusion which was needed at the time and was in the child's best interest as it protected their right to life as enshrined in the South African constitution (McQuoid-Mason, 2005). This ruling is pivotal for my thesis because it is evidence that in the South African Constitution the parent's right religious freedom is limited by a child's by the child's best interests and the state has the powers to override the parent's decision in this regard if such decision proves harmful or life-threatening to the child.

Non-therapeutic infant male circumcision can never fulfil the best interest of the child principle, primarily because the benefits attached to the procedure rarely apply to infants with minimal or no scientific evidence to support some of the reported benefits (Di Pietro *et al.*, 2017). NTIMC deprives infants of the protective benefit associated with having a foreskin and it has a very limited prophylactic benefit for infants and is not risk-free. Reasons like urinary tract infection prevention have been cited by most infant circumcision proponents as a justification for this barbaric practice, which for two reasons is a weak justification. The first being that only 1 % of male infants will experience a urinary tract infection in their first year of life and secondly most of the prophylactic benefits that are linked to the procedure do not apply to infants (Di Pietro *et al.*, 2017). Considering that most of the prophylactic benefits linked to infant male circumcision do not apply to infants and those that do apply to infants are only useful in preventing very minor medical conditions that are easily treatable subjecting infants to this procedure for prophylactic reasons is a violation of their right to self-determination and control (autonomy) which is unjust because the South African constitution affords everyone the right to self-determination.

6. Ethical principlism

The practice of medicine has always been plagued with ethical dilemmas which made it difficult for practitioners to make a sound clinical judgement. Before the 1970s there were no formal ethical principles in place to aid the health practitioners in their decision-making processes during patient management this does not imply that there was no appetite for practitioners and researchers to have a set of moral values in dealing with their patients (Beauchamp and DeGrazia, 2004). Lack of discussions around the ethical dilemmas faced by health practitioners created a stumbling block for such principles to be developed because of the narrow perspective that the practitioner's primary obligation was to minimize the risk of harm and maximize medical benefit (Beauchamp and DeGrazia, 2004). After the historical atrocities in medical research, principles were introduced to protect research participants and patients in clinical care. This led to the introduction of three fundamental principles in medical ethics, which are: Respect for persons or autonomy, beneficence, justice and non-maleficence.

7.1. Autonomy

The word autonomy is of Greek origin which is composed of two words: autos which mean self and nomos meaning rule, governance or law combined the two words mean self-rule, governance or law (Agich, 2014). The principle of autonomy has become a very important principle in medical ethics which resulted in the shift from a paternalistic approach to patient care to a more patient-centred approach where the patient is treated as an autonomous agent. The South African Constitution also embraces the principle of autonomy as it is included in the Bill of Rights. Chapter 2 s12 (2) (b) affords every individual in the country the right to security in and control over their body (South African Government, 1996).

Circumcision of infants this early in life will eventually erode the autonomy of the adult they will grow to become and thus deprive them of the opportunity to determine for themselves whether they would want to be circumcised or not. Circumcision that is devoid of medical conditions is involuntary, meaning the infants are forced into undergoing procedures that can and should be delayed until the infant is grown enough to make the decision on his own and give consent for the procedure to be done. Informed consent is required for medical and surgical treatment to preserve the autonomy of the patient and protect them from unnecessary, aggressive and risky medical interventions (Svoboda, 2013). Because circumcision can be delayed until the boy is competent enough to give his informed consent for the procedure, then the parents' consent for their male infant to undergo non-therapeutic circumcision becomes

invalid, meaning that the medical practitioner has performed a surgical procedure on an infant without consent. In 2012 a Cologne court in Germany found a medical practitioner guilty of assault and performing a surgical procedure on an infant without valid informed consent from the patient (Svoboda, 2013). The most fascinating aspect from this judgement is that the physician was charged with performing a surgical procedure on a patient without the patient's consent, in normal circumstances where a minor has to undergo any medical procedure the legal guardian would be the one to consent to the procedure on the patient's behalf. In this case, the judge ruled that the parent's consent was invalid and therefore the patient had to be the one personally consenting to the procedure. Naturally, infants are non-autonomous beings and therefore this particular patient would have been incapable for personally consenting to the procedure, meaning the only logical thing to do would be to allow him to mature to an age where he would personally be able to give consent thus delaying the procedure until the infant is old enough to make that decision himself.

From the principle of the child's right to an open future, it is evident that individuals can be deprived of their right to self-determination and governance as a result of decisions made for them by their parents while they were still children. There is always a debate when it comes to the state intervening in parenting rights in the child's best interest; some people have the misconception that parents have absolute rights over their children. This is wrong because as much as the state is bound to respect the parents' rights, these rights are not limitless or free of responsibilities. It is upon the parents to ensure that the decisions they make in raising their children do not carry any unnecessary harm to the children and the future adults they will become. The state has a responsibility to intervene in situations where there is a suspicion that the parents are making decisions that could potentially limit the children's possibility of an open future (Davis, 1997). Limiting the children's possibility to an open future for religious reasons has been one of the most debated topics in medical ethics where the state had to intervene in parenting rights because parents were using religion to deprive their children of their fundamental human rights. An example would be in the case where Jehovah's Witnesses parents are refusing a lifesaving blood transfusion for their child because it is against their religion, or where Amish parents are denying their child education for the same reason. In both cases, the state had to intervene in the children's interest over respecting the parents' right to religious freedom. The decision to intervene derives from the understanding that the parents' choices do not only deprive the children of their rights, but they are limiting their future options.

The right to bodily integrity including sexual integrity is a right afforded to everyone, and for parents to decide to have their infants circumcised without any probable cause is malicious

because they are depriving their child of the opportunity to personally decide whether he wants to be circumcised or not leaving him with no option besides what has already been decided for him. In a way, the parents' are violating their child's right to self-determination in advance because during infancy he is incapable of exercising this right (Darby, 2013).

There are suggestions that since early circumcision is easier, with fewer risks and that healing is faster, then its practice is in the child's best interest as it is protecting from more severe pain and prolonged wound healing should he be circumcised when he is older. As convincing as this sound, one can never justify performing a cosmetic or prophylactic surgery on an individual without their consent (Svoboda, 2017).

7.2. Beneficence and non-maleficence

Beneficence speaks to the responsibility health care practitioners have in promoting the well-being of their patients and making decisions in the best interest of their patients, and non-maleficence alludes to the responsibility that health practitioners have to ensure that they do not bring harm to their patients (Singh, 2017). During clinical practice, decisions are made using the risk-benefit assessment, where the risks of the intended intervention are weighed up against the potential benefits and if the benefits are expected to be greater than the risk then the procedure or intervention is ethically justifiable. Even though the procedure may yield greater results than the risk it carries, inflicting unnecessary pain on patients is prohibited following the non-maleficence principle (Svoboda, 2017).

7.3. Physical harm of circumcision

In previous sections, I have mentioned a few times that non-therapeutic infant male circumcision has very minimal benefits to infants because it prevents easily treatable non-life-threatening conditions in infancy while the greatest benefits are enjoyed by older males. So, it is only logical that the risks and benefits of this practice are weighed against each. No matter how minor this procedure may be, it is still a surgical procedure and with any surgery, there is a slight possibility of complications no matter how rare they are. As with many other surgical amputations, there is bleeding, swelling, pain, in this instance incomplete foreskin removal may require corrective surgery and in severe cases, death has resulted from the said procedure (Yavuz, Demir and Dogangun, 2011). The wrong perception that infants do not feel pain during circumcision has been proven to be a fallacy by researchers like Di Pietro *et al.* (2017) who reported that in the absence of anaesthesia the infants do experience pain which is evidenced by a modified heartbeat and crying during and after the procedure and after the anaesthesia wears off the infant does feel some level of which is why anti-pain medications are prescribed

(Di Pietro *et al.*, 2017). Since the skin serves as a barrier that protects foreign matter including pathogens from entering the body, cutting it may expose the infant to infection during wound healing.

One retrospective study conducted in Iran in 2011 has suggested that there could be as many as 38 deaths over ten years which resulted from circumcision complications in boys 4 days to 5 years (Di Pietro *et al.*, 2017). This number seems like a drop in the ocean, but because these deaths may have resulted from a surgical procedure that was not required or beneficial to the patient it remains unacceptable and immoral. Some of the infants who are fortunate enough to survive death are forced to live with the horrible often life-lasting complications. Some infants developed stenosis of the urethral meatus, which is the narrowing of the urethral opening (Kaplan and Tasem, 1953). Kaplan and Tasem (1953) have also explained the impact that the stenosis may have on the kidney, where the narrowing of the urethra causes an obstruction of urine from exiting thus causing reflux into the upper urinary tract which may eventually lead to the dilation of the ureters and if not resolved may lead to swelling of the kidney which may cause permanent damage should treatment be delayed. An observational study has reported 27 cases or 20% of children in their study have developed kidney disease after being circumcised (Di Pietro *et al.*, 2017). The genitals are still underdeveloped in infancy with the foreskin still adhering to the underdeveloped penis which increases the risk of amputating the glans accidentally (Boyle, 2015).

7.4. Psychosocial harm of circumcision

Infant circumcision may have long-lasting psychological effects on the victims which are primarily due to the pain and trauma associated with the procedure. Not every child will experience trauma after circumcision, but some individuals are especially psychologically vulnerable making them very susceptible to trauma (Boyle, 2015). The early exposure of infants to traumatic events can make them prone to developing major depressive disorders in addition to post-traumatic stress disorders (Boyle, 2015). There have been claims that circumcision decreases sensation and thus reduces sexual pleasure in men. One study reports that a greater number of men with intact genitals have reported experiencing more sexual pleasure than their circumcised counterparts (Boyle and Bensley, 2001). Most circumcised men have reported difficulty in achieving orgasms and unusual sensations during sex like burning, itching prickling and numbness of the penile shaft (Bronselaer *et al.*, 2013).

As mentioned in the previous section dealing with physical harms of circumcision, there is a possibility of accidentally amputating the penis during the procedure. Should this happen the

victim will most probably experience severe psychological trauma lasting a lifetime or at least until they undergo corrective surgery. Botched circumcision may cause grief because of the deformity which may be accompanied by “anxiety, depression, denial, sexual problems, and obsessive preoccupation with the loss”(Bollinger, 2014 p.2). Subjecting infants to an unnecessary surgical procedure with long-lasting complications is unjust not only to him as an infant but to the adult he will grow up to be.

7.5.Justice

In a just society males and females should be afforded the same protection of their rights. Given that female genital mutilation has been outlawed by international courts and is generally frowned upon by most communities while male children are left unprotected from the same treatment is beyond comprehension. Female genital alteration in females is given a gruesome name to make it sound barbaric no matter how minor it is, while male debates around male genital mutilation are often boiled down to the potential benefits the procedures bares and that it is line with certain religions and tradition. Given that the parents’ consent for their infants to undergo non-therapeutic circumcision is not valid, medical practitioners that perform this procedure are guilty of assault and should be charged. Unless in medical emergencies, doctors have to obtain the patient’s full informed consent to justify the violent nature of the procedure performed on the patient (Svoboda, 2013). Without informed consent, violence can and should be regarded as a crime. Justice means fairness, thus assault on infants by doctors on the orders of their parents should be treated just as it would if one was to hire another individual to assault someone else. In both instances, someone procured services from a professional to assault another individual, and both cases should be dealt with as criminal cases.

A legal philosopher name Joel Feinberg introduced “The principle of the child’s right to an open future” wherein he suggests that there four main types of rights. The first type of rights are those that both children and adults have like the right to life and basic health care, the second are rights only possessed by children or incapacitated individuals who depend on others for food, protection, and shelter called dependency rights (Darby, 2013). The third type of rights are rights that can only be exercised by adults or young adults like the right to religion while children have their special inherent rights called “rights in trust-rights” which they are unable to exercise in their childhood but will only be able to do so when they mature (Darby, 2013). This principle makes the proposition that children are born with rights that protect their scope of life as adults and that parents should take precautions that they do not make any decisions that will permanently deprive their children of the opportunity to decide what they want for their lives as adults (Darby, 2013). This implies that parents should refrain or delay making

decisions for their children that are irreversible and have the potential to affect the child's choices post-childhood. Given that circumcision does not possess any immediate benefits for infants and is irreversible, it is only logical that such a decision is delayed until the child is old enough to personally make the choice and is of legal age to consent to the procedure. Assuming that an infant is circumcised for religious reasons then once he reaches adulthood decides he doesn't want to be a member of his parents' religion and does not believe in circumcision there is very little he can do in this regard. The choice to be circumcised has already been made for him and he is deprived of the opportunity to choose his path in life. One could also argue that parents abuse the power they have concerning their child, and the power differential makes it unfair for them to choose as they do.

8. Concluding remarks

The purpose of this chapter was to present arguments in defence of the thesis that s12 (8) (a) and (b) of the Children's Act should be amended to prohibit the circumcision of male infants for religious reason where the religion has no clear guidelines for the ritual and to prohibit health care professionals from performing circumcisions for religious reasons or therapeutic reasons respectively. The amendment will serve to protect the male infant's right to bodily integrity and best interests. I maintain that subjecting male infants to a risky surgical procedure with very limited prophylactic benefits for infants is morally unjustifiable primarily because the procedure can be delayed to when the infant is mature enough to autonomously make the decision himself and can enjoy most of the prophylactic benefits that come with being circumcised like HIV risk reduction, reduced chances of being a human papillomavirus carrier which can cause cervical cancer if passed on to his female sexual partner (Ganczak and Korze, 2017). Failure to wait for the infant to grow old enough to decide whether he prefers to be circumcised or remain intact is a violation of his right to self-determination or control over his body and bodily integrity which all contribute to an erosion of his autonomy because he would be subjected to a permanent alteration of his genitals without his expressed consent and will be forced to live with the effects.

I am of the view that parental proxy consent for NTIMC should be invalidated because for proxy consent to be valid it has to fulfil at least one of the following requirements: the proxy decision-maker should make use of the knowledge they have of the patient to decide for them in a manner that the patient would decide if he was competent to do so or to make an assessment of the patient's best interests and decide in favour of those interests (Wrigley, 2007). The first requirement is inapplicable in this case because no one knows what the infant's preference in the matter would be if he was competent to make the decision himself, so the only way for

proxy consent to be validated in infant circumcision is to prove that it is done in the infant's best interests which according to the arguments presented are: to be protected from the harm (physical, emotional and psychosocial) harm that comes with circumcision, to have his right to bodily integrity and self-determination respected and protected and not to be stripped off the protective benefits of having a foreskin for very limited prophylactic benefits for easily treatable non-life threatening medical conditions he may not even acquire. Because NTIMC goes against all these interests it is unjust to accept proxy consent to have infants violated in this manner, it is worth noting that not everyone will agree with these arguments thus there are some counterarguments I anticipate will be raised to nullify my arguments.

Chapter 4: Arguments in support of NTIMC

1. Introduction

In this chapter, I present the arguments from proponents of infant circumcision which are published in the literature. I give a presentation of the arguments that religious and medical proponents of the practice are raising in its defence. After the presentation of each argument, I will present my response and, in my response,, I will identify the inadequacies in the arguments of those who support NTIMC.

2. Religious arguments in favour of NTIMC

Religious liberty concerning parenting rights is one of the most common arguments in defence of non-therapeutic infant male circumcision (NTIMC) because most constitutions in the world protect religious rights and afford parents the liberty to raise their children under the religion of their choice and to make decisions on their behalf taking the child's best interest in mind (Short, 2004). There are concerns from various religious groups that practice circumcision, that should they be forced by law to delay the ritual until the boy is mature to make the decision himself, he may not be accepted by his religious community. Short (2004) also argued that delaying the ritual makes it lose its religious significance. For the Jewish community, it is a must for male infants to be circumcised on the eight-day of life following their religion as stipulated in the book of Genesis and failure to do this would be breaking the covenant they have with God which was established during Abraham's time. Abraham's interactions and relationship with God is the very foundation of the Jewish faith (Behrns, 2013). Forcing the Jews to abandon this practice would be the same as the annihilation of their religion and therefore would be an impediment of their rights to religious freedom. Though circumcision is not mentioned in the Holy *Qur'an*, it is mentioned in the Islam law book called the Torah (Glass, 1999). To the Islamic faith, circumcision is a law they must follow as a resemblance of Prophet Muhammad. In the Torah, the prophet Muhammed instructs his followers to have their male infants circumcised on their seventh day of life. Though the stipulated age in the Torah is seven days there are variations in the timing of the ritual with some communities delaying it until the boy turns ten years old (Gatrad, Sheikh and Jacks, 2002). As different as the timing may be the common factor in all communities is that this procedure should be conducted no later than ten years (Gatrad, Sheikh and Jacks, 2002). The right to religious freedom would to trampled upon should the law force the Muslims to wait until the boy is 12 years or older in order for him to

be circumcised, and this will deprive him of the sense of belonging as his community would not fully embrace and welcome him until he is circumcised.

Given that the Islamic and Jewish religions regard circumcision as an integral part and sacred part of their religion, interference by the state in the matter would mean that the parents' right to educate their children under their religion will be undermined (Heimbach-steins, 2013). This may eventually drive some religious practices to extinction in desperate hopes to save and revive their religions and traditions, communities may resort to extreme measures like practising some of their customs behind closed doors with attempts to evade the law. This gives an opening to untrained practitioners in the circumcision arena who are offering their services to desperate communities which may cause more harm than good and will endanger the lives of children.

2.1. Response to the religious arguments

I agree with the notion that religion is an integral part of child-rearing and that parents should be afforded the privilege to educate their children about the family's religious practices and customs. What I disagree with is the use of children by parents as sacrifices to appease their God. The argument that circumcision is required to make a covenant with God is questionable because if parents are the ones who are offering their children for circumcision before the age of consent I take it that they are forcing the children into this covenant. Religion teaches that; people are created by God and if God created man it means he is the one who gave him the foreskin. One can't help but question why God would create male with foreskins to later subject them to the pain and trauma of having it amputated and why would people want to alter or correct God's creation? If God had intended on males losing or shedding their foreskins in any point in their lives, he would have designed them such that when the time comes that the foreskin is no longer required it sheds just as children are born without teeth and later they grow teeth as they are about to start utilising them to eat solid food.

As much as circumcision may be a part of some religions and the precepts of the said religions call for boys to be circumcised in their infancy I still maintain that the bodily integrity of boys should be preserved and their right to self-determination and security of persons respected and they be allowed to grow to a stage where they are capable of making this decision for themselves. Before that parents should continue teaching their children about their religions which can include the value of circumcision in their religion.

Not all children will grow up to join the religions they were raised under. Some choose their paths in life which is why I think circumcising children as a way of integrating them into a

certain religion is problematic. As stated previously, parents should not make decisions that restrict or closes future options for the child leaving them with an already decided future. An adult who was circumcised in his infancy for religious reasons may grow up to later to decide he does not believe in the religion he was raised under and therefore does not agree with the practice of circumcision. Unfortunately, the decision would have already been made for him and this would leave him with very limited options. He may grow up with resentments toward his parents and the religion for making an irreversible alteration to his genitals without his consent.

Chapter 2 verse 256 of the Quran prescribes that “there shall be no compulsion in religion” (Quran, 2009), if there is no compulsion in religion why are infants forced into circumcision for religious purposes instead of waiting for them to grow to an age where they can freely give consent, it is my understanding most religions preach tolerance and acceptance. If indeed religion teaches people to accept and be tolerant of each other, I don’t see why they would fail to accept and embrace children who have not been circumcised yet.

3. Medical arguments in favour of NTIMC

An uncircumcised penis is perceived to be unhygienic because it makes difficult to properly clean the penis and serves as a risk for infections. If the foreskin is removed early, it becomes a lot easier to clean the penis when bathing the infant and this helps protect him urinary tract infections. Not only is it hygienic to circumcise infants but this helps reduce the likelihood of developing penile cancer or becoming a carrier for the Human papillomavirus which causes cervical cancer in women (Tiemstra, 1999). Circumcision not only protects against infections for the infant from his infancy and through his adulthood but it also protects his future sexual partners from cervical cancer (Ganczak and Korze, 2017). Results from studies conducted in Sub-Saharan Africa have suggested circumcision to help reduce the risk of heterosexual males who have vaginal sex from acquiring HIV, so the decision to circumcise boys in their infancy will protect them HIV when they become sexually active later in life (Spyrelis *et al.*, 2013). This is particularly important because there is no way of knowing when he will become sexually active, which may happen long before sex education is provided, and he can decide whether he wants to be circumcised or not. Waiting for him to be mature enough to make the decision may already be too late. Not only are uncircumcised men at risk of acquiring HIV but they are a risk of acquiring other sexually transmitted infections. Chlamydia is highest among women who have sex with uncircumcised men (Schoen, 2007). Sexually transmitted diseases are not the only risk that comes with being uncircumcised, there is also a risk of developing genital cancer which is common among uncircumcised men and women who have sex with uncircumcised

men (Schoen, 2007). Schoen (2007) argues that circumcision has serious health benefits because it reduces the risk of developing penile cancer which is almost exclusively seen in uncircumcised men.

3.1. Response to the medical arguments in favour of NTIMC

It is undeniable that circumcision has numerous health benefits for older males. The concern is using these associated benefits which are mostly enjoyed by older sexually active males to justify the violation of children's rights. In Africa, HIV risk reduction is often given to justify this practice which I completely disagree with because this benefit is only enjoyed by sexually active males. The first issue here is that infants are not sexual beings, so they are not at risk of contracting HIV via this mode. The other issue is the assumption that when these children grow up, they may not practice safe sex. There are various methods that are not as invasive or controversial used to prevent HIV transmissions such as condom use and pre-exposure prophylaxis. When children are about to enter puberty, they should be given sex education and these methods explained to them. The assumption that they will grow up to become irresponsible is malicious. With proper information and guidance, they should be able to make informed choices. To prevent other sexually transmitted infections condoms remain the best option because just like in HIV circumcision has a partial protective effect, so there is absolutely no need to subject infants to this painful procedure while they will only get a minimal prophylactic benefit from the procedure while can use condoms when they become sexually active which will have a better protective effect.

When it comes to the use of infant circumcision to reduce the chances of one becoming a carrier of human papillomavirus which causes cervical cancer in women, I find it quite bizarre. It is bizarre because everyone would agree that amputating the breasts of children and women who are at risk of developing breast cancer is unacceptable and would be torturing without cause. Then why are people so willing to accept the torturing and violations of male infants for the same reason. Why must boys be the ones to suffer while women are the ones who are the most affected by human papillomavirus? In South Africa, there are programs where the department of health visits schools to vaccinate girls between the ages of 9 and 14 years against the virus. Surely this should be intervention to protect the girls against this virus and therefore making it unnecessary to amputate healthy functional tissues from infants who are not going to benefit from the procedure. The cost argument is just absurd because if the cost is such an important factor in health it would be only logical that children with a strong family history of breast cancer undergo total mastectomies. After all, it will be cheaper than months or even years of chemotherapy or radiation therapy to treat cancer.

Infant circumcision as prevention for urinary tract infections (UTI) and penile cancer is taking extreme measure for the prevention of very rare conditions in infancy. The UTI risk for children below ten years is very rare, which is about 1-2% (Welch, 2019). While the risk of developing penile is even rarer with a frequency of about 0.58 in 1000, 000 men per year (Welch, 2019). These conditions are both very rare particularly in infants which makes raises the question of why anyone would think amputating healthy functional tissue from infants without their consent for these reasons is their best interests.

Male circumcision for hygiene purposes is almost as old as the religious circumcision practice (Sardi, 2011). This argument may suffice for male teenagers and adults because their foreskins are retractable which makes it possible for them to be pulled back exposing the glans for a rinse. The other reason for this is that teenagers or adult males may need to clean the penis because of the accumulation of pre-seminal and seminal fluid inside the foreskin which can potentially lead to infections. With infants, this is not required because the foreskin is still adhering to the penile shaft which makes it intractable and should not be pulled back by force as that may cause tearing to the foreskin. The second thing is that infants are incapable of producing the pre-seminal or seminal fluid which means it is not that critical to expose the glans and wash it. There is no special treatment required when bathing an uncircumcised infant; the penis should be cleaned with warm water and soap just like the rest of the body and caution should be taken not to forcibly retract the foreskin (Neese, 2016). The hygiene argument is not sound because during infancy there is no need to clean the glans and even if one wanted to the physiologic structure of the penis does not allow it, this should be a sign from nature that there is no need to clean the glans and the separation of the foreskin from the penis should serve as a sign that now the glans requires cleaning as the foreskin will be retractable then.

When it comes to prevention of foreskin conditions like phimosis and paraphimosis circumcision should be performed to treat these conditions rather than as prevention even though circumcision may not be the only treatment its use can be justified.

4. Psychosocial arguments in favour of NTIMC

“Circumcision is one of the most common surgical procedures” which means in some communities there are more circumcised men than uncircumcised which presents the perception that circumcised penises without foreskins are normal and that is the way they should look (Spyrelis *et al.*, 2013). Some parents think that because they live in communities where circumcision is the norm leaving their sons uncircumcised may expose them to mocking and discrimination by their peers which may make them feel like social outcasts and may eventually

cause them depression (Narulla, 2007). Some mothers prefer to have their sons circumcised because their partners are circumcised and therefore feel it is only natural for the son to resemble his father (Spyrelis *et al.*, 2013). There is a notion that because circumcised penises are regarded as a norm women find them attractive and therefore if boys are not circumcised early should they start dating before being circumcised this may make them sexually unattractive to women if it does happen that the uncircumcised man gets married his wife can withhold sex as a way of coercing him to get circumcised (Osaki *et al.*, 2015). Other women have a notion that circumcised penises are sexually more pleasing than uncircumcised ones and therefore circumcising boys early means they will be able to satisfy their partners when they become sexually active (Bossio, Pukall and Bartley, 2015).

Early infant circumcision is thought to be painless or less painful than it is in older males so circumcising infants reduces the amount of pain they feel and some older males are afraid of going for circumcision because of the pain associated with the procedure. So when infants are circumcised there is no worry of them resisting because they cannot as yet comprehend what is happening to them and they will forget the pain they felt when they grow reducing chances of post-surgical trauma (Spyrelis *et al.*, 2013). If the child grows up to adulthood uncircumcised because he is afraid of the associated pain, the community may still treat him like a child no matter how old he is (Mavundla *et al.*, 2010). Being treated like a child may mean the adult male is not allowed to take part in any activities that are reserved for men and he may not be allowed to marry within his community.

4.1. Response to the psychosocial arguments in favour of NTIMC

For one to know that a child or any male is not circumcised they would have to see their penis, fully clothed people cannot tell who is circumcised and who is not. Parents can opt to perform all the traditional necessities required to integrate the child in the community without performing the circumcision and then wait for him to grow up to decide if he wants to be circumcised. If the child grows up and decides he does not want to get circumcised is entirely his choice at least he would have made that decision without coercion. Should the community reject him or treat him like a child even during adulthood because he is uncircumcised, the choice remains his to make. If he feels the pressure that comes with being uncircumcised is too much for him to bare or he insists on marrying within the community, then he can make take the decision to get circumcised then. This way the decision would have been taken autonomously therefore his right to self-determination and bodily integrity would have been respected.

5. Concluding remarks

The purpose of this chapter was to present the possible counter-arguments to my thesis defence arguments. I presented arguments from religious, medical and psychosocial viewpoints. Beneath each of the arguments, I presented my response to discredit their validity. After going through these counter-arguments I am less convinced that non-therapeutic infant male circumcision for any reason is justifiable. Adults in communities must realize that children are also deserving of rights and in respect of these rights they should allow the children to a point where they are old enough to make the informed choice whether they want to be circumcised or not. The perceived medical, religious and psychosocial benefits of NTIMC are not worth the risk that comes with the procedure. Most of the claimed medical benefits associated with the practice are inapplicable to infants and a few of those applications are for the prevention of very rare and often easily treatable conditions, hence I still maintain that this practice is morally unjustifiable. Circumcising infants to treat already existing medical conditions is worth the surgical risk and is justifiable.

Chapter 5: Conclusion and recommendations

The purpose of this research report was to argue that the practice of non-therapeutic infant male circumcision is not in the child's best interest and is a violation of his right to bodily integrity. I also argued that it is required that s12 (8) of the Children's Act be amended to prohibit the circumcision of male infants (a) for religious reasons where the religion has no existing clear guideline on when the procedure should be performed and by who and (b) by medical for religious and prophylaxis of non-life threatening rare and easily treatable conditions practitioner. At the beginning of the project, a few goals were set aimed at facilitating a clear and concise defence of my thesis. The first goal was to give a historical account of non-therapeutic infant male circumcision and reasons why this procedure is performed, the second goal was to give a descriptive analysis and critique of the laws and policies that are related to the child's best interests and right to bodily integrity. Given the ambiguity of the child's best interest principle/standard as my third goal, I saw it fitting that I present its historical overview and application. The arguments raised in defence of my thesis are summarised below.

In chapter 3 I argued that circumcising male infants for non-therapeutic reasons for its perceived prophylactic benefits is morally unjustifiable for two reasons. Firstly, most of the perceived prophylactic benefits do not apply to children and the very few of those benefits that apply to children are for the prevention of very rare and often non-life-threatening conditions which are easily treatable. Secondly, the risks associated with the procedure far exceed any perceived benefit. I also argued that because NTIMC is performed without the consent of the child it is legally unjustifiable because the procedure can be delayed until the child is old enough to freely give consent thus failure to wait until such time means a permanent alteration to his genitals is made without his consent, therefore, violating his right to bodily integrity.

Taking the risk-benefit assessment, I argued that the limited and unnecessary benefits associated with NTIMC are not worth the risk, meaning these infants are exposed to unnecessary risk by removing a healthy and functional tissue for little to no benefit. Just as with any surgical procedure there are risks attached to circumcision, penile amputation is one of those risks. If the penis is accidentally amputated during the procedure or had to be amputated post the procedure due to complication this can have very devastating effects on the child. An argument that early circumcision can cause physical and psychological harm to the child which can extend to his adulthood has been raised.

In chapter 3 I also raised the argument that parents, health professionals and government have a *prima facie* moral obligation to protect children from harm and to refrain from causing them

harm. I suggested that parents have a huge role to play in protecting the infant from the harm of NTIMC because they are the ones requesting that their children are circumcised and if they refrain from doing so this practice may stop entirely. I also argued that health care professionals have a duty to act in their patient's best interests and not in the interests of their patient's parents because circumcising infants just because it is requested by parents even when there is no medical need for it is unethical. Under prima facie duties, I also argued that the government has a duty to ensure that children are protected from harm at the hands of their parents and health care practitioners.

Considering that the practice of NTIMC is perpetuated by the gaps in the current version of the Children's Act, my recommendations on how I think the practice of NTIMC can be curbed obviously requires legislative change. When it comes to circumcision, the Children's Act does not protect the infant's best interests because of its ambiguity. I propose that s12 (8) (a) should prohibit the circumcision of minors the religious reasons where the religion has no pre-existing guidelines on when the procedure should be performed and who should perform it. I acknowledge that amending this section of the Act will still permit the circumcision of infants for religious reasons. I am of the view that it may prove even more difficult to completely prohibit this practice because the Constitution does protect religious rights. I propose an opt-in system where religious groups that wish to continue with the practice will make an application to the relevant authority like the justice department to protect their right to continue with the practice. During the opt-in process, the religious group should be able to provide the regulatory authority with their guidelines on when the procedure is to be performed, how it is to be performed and by who.

I also propose the amendment of s12 (8) (b) to prohibit medical practitioners from recommending and performing circumcision for prophylactic purposes particularly for conditions that are very rare, non-life threatening and easy to treat, medical practitioners should also be prohibited from performing religious circumcisions because they are not trained and accredited to do this meaning they are acting outside their scope of practice.

Health professions' councils should introduce guidelines that prohibit their members from performing religious circumcisions and medical circumcisions for prophylactic purposes particularly as prevention for rare and easily treatable conditions. They should also introduce punitive measures for any of their members who are found to have violated any of these guidelines.

Law reform is one aspect that must be addressed. However, laws on their own do not change behaviour and must be coupled with public education. There has to be aggressive public education programmes that are aimed at educating parents about the purpose of a foreskin in children and the dangers of early circumcision. The reason why I think this programmes should be aimed at educating parents primarily is that they are the ones who procure the services of health professionals to circumcise their infants, but even if a health professional is to be barred from circumcising infants, parents who strongly believe in infant circumcision may resort to seeking this services from untrained and unregulated practitioners. This can only be resolved if parents are also criminally charged for requesting that their male infants be circumcised regardless of whether the practitioner was registered or not. Subjecting children to circumcisions by untrained and unregulated practitioners may prove to be even more dangerous because the lives of these infants will be more at risk. Every parent who gives birth to male infants should be taught how to care for and clean their infant’s genitals and when it would be safe for them to consider circumcision.

Regarding the calls for the expansion of the male circumcision programme in the fight against HIV to include infant circumcision, I think public health policymakers and lawmakers should not condone this. The focus should rather be on health education and increasing access to HIV prophylaxis to those at risk and reducing the anti-retroviral therapy defaulter rate.

Summary of recommendations

Recommendation 1	S12 (8)(a) should be amended to prohibit religious circumcision of minors where no pre-existing guidelines have been established by the religion.
Recommendation 2	S12 (8)(b) should be amended to prohibit the recommendation and performance of prophylactic and religious circumcision of minors by medical practitioners.
Recommendation 3	Health professions’ councils should introduce guidelines that prohibits the religious and prophylactic circumcision of minors.
Recommendation 4	Aggressive public education programmes to educate the public about penile care for minors and risks associated with early circumcision.

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Appendix A: Waiver approval

UNIVERSITY OF THE
WITWATERSRAND,
JOHANNESBURG



HUMAN RESEARCH ETHICS COMMITTEE
(MEDICAL)

Human Research Ethics Committee (Medical)

Research Office Secretariat:
Faculty of Health Sciences, Phillip Tobias Health Sciences Building, 3rd Floor, Office 301/2/4, 29 Princess of Wales Terrace, Parktown, 2193
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Ref: W-CBP-200529-01

29/05/2020

TO WHOM IT MAY CONCERN:

Waiver: This certifies that the following research does not require clearance from the Human Research Ethics Committee (Medical)

Investigator: Mr Mosito Jonas Seabela

Supervisor: Dr Jillian Gardner

Department: Steve Biko Centre for Bioethics

Project title: Non-Therapeutic Infant Male Circumcision: A Gross Violation of the Infant's Bodily Integrity and Not His Best Interest

Reason: Study will be Literature-Based. No human participants, human data or human tissues will be involved.

A handwritten signature in black ink, appearing to read 'CB Penny', written over a horizontal line.

Dr CB Penny

Chairperson: Human Research Ethics Committee (Medical)

Copy – HREC (Medical) Secretariat: Ms Zanele Ndlovu, Ms Mapula Ramaila and Mr Rhulani Mkansi

Annexure B: Turnitin report