SOUTH AFRICA’s POST-1994 TRANSFORMATIVE CONSTITUTION AND ITS HUMAN RIGHTS NARRATIVE: A VIEW ON PERFECTING TRADITIONAL MALE CIRCUMCISION

Transformativni ustav Južne Afrike posle 1994 i njegov izveštaj o ljudskim pravima: viđenje o usavršavanju tradicionalnog procesa obrezivanja muškaraca

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Abstract

This article analyses the significance of South Africa’s human rights narrative towards bettering the practice of Traditional Male Circumcision (TMC). It is considerate of the fact that socio-economic and cultural rights have been entrenched in the Constitution, 1996 as justiciable and enforceable rights under transformative constitutionalism. TMC is a cultural ritual which, notwithstanding its pervasive challenges, remain a widespread practice in South Africa because of its heritage status. Thus, this article illustrates how the post-1994 democratic dispensation integrated such ancient traditional rites into its normative value system founded on the supremacy of the Constitution. This is crucial because human rights philosophy is at the core of South Africa’s social and legal order, which is founded on safeguarding people’s welfare, human dignity, and right to life, fundamental freedoms and preserving humanity. It is asserted state need to accelerate human rights education across all sectors of society which shall empower populace to balance between desirable traditional rituals and human rights imperatives.

Keywords: Traditional male circumcision, Socio-economic development, Culture and heritage, Human rights

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1. Introduction

The 1994 advent of democracy can best be described as a unique transition which ushered in a new terrain of never ending successes and challenges in South Africa’s legal culture, democratic governance, traditional rule, and most importantly, social integration at large. It is at this point that society is capacitated to discern the place of Traditional Male Circumcision under the new democratic dispensation. Social integration and human rights philosophy come across as fundamental issues in society, which continue to confront South Africans in their quest for sustainable social and economic development (Iya, 1998), meaningful attainment of freedoms, equality and dignity of persons. Thus, matters of human rights, social integration and multiculturalism found express recognition in the post-1994 transformation agenda. This enabled Traditional Male Circumcision (TMC) to retain its long-standing status in history, as a reputable heritage among notable rites of passage that have existed and defined South Africa’s social structures for decades. It is for this reason that TMC is a well-known traditional practice across various spectrums of society. Therefore, the post-1994 dispensation has had to integrate this practice into a newly founded society grounded in law. This entailed that government would be expected to pro-actively play a fundamental role in governance and regulation of TMC, and other traditionally ordained initiation rites taking place in both public and private spheres of society. This meant that government would be anticipated to set guidelines in terms of which TMC should conform to in order that human rights narratives are not trampled upon. This found proponent from the epilogue to the 1993 Constitution which posited transformation as the cornerstone of South Africa’s democracy.

Subsequently, this subscribed South Africa to the theory of transformative constitutionalism which would essentially be premised on transforming the nation from a deeply divided past, a society which was characterized by strife, conflict, untold sufferings and injustices, into a nation grounded on democratic values, social justice, peace, protection of fundamental human rights (Small and Grant, 2000), and that society which values its people and their cultures indiscriminately.

2. Rationale and methodology

Because cultural rights form an integral part of South Africa’s constitutional democracy and its freedoms, it is crucial to continuously engage this area so as to know the impact of culture on development and how law infuses into traditional affairs. It is worth noting that the post-1994 regime has had to entrench mechanisms of regulating society’s human behavior and that relating to cultural and traditional practices as that would impact on effective governance and realization of both social and legal order. Hence, at the center of attention in this article is the phenomenon of regulating and bettering Traditional Male Circumcision. This is considerate of critical challenges and the rising tension in society arising out of this practice, which has been given added impetus by processes of modernization and globalization. This tension is widely associated with the three interrelated problems of death, contagious diseases and indescribable injuries on initiates who go through this traditional ritual. According to Kepe (2010), this should be described as a ‘health crisis’. This article considers South Africa’s post 1994 transformation agenda which has largely been propagated through the human rights philosophy, and its impact on TMC. The human rights philosophy is
recognized as a tool to be utilized in the preservation of human worth. It is therefore considered to be advancing humanitarian values. This article seeks to illustrate that regulating traditional rites of passage is often a complex phenomenon. This is so necessarily because often these practices are filled with extreme sense of secrecy and privacy, ideals which to a large extent form an integral part of the Bill of Rights. Therefore, in their quest to advancing noble democratic transformation agenda, state functionaries often find themselves having to balance individual or group rights against holding onto well-founded norms premised on ethos of public law and order.

The main objective of this study is thus, to illustrate the importance of law on TMC in a modern multicultural society. The article unpacks how state should emphasize on human rights philosophy to effectuate proper governance and regulation of traditional and cultural practices without eroding or seeming to erode long-standing heritage of certain groups of people in society. Therefore, the article is premised on illustrating the strengths of human rights narratives in preserving human worth. This considers both individualistic and communal perspectives on human rights. It begins by unearthing the meaning of TMC, which is followed by a reflection of theoretical understanding of TMC, drawing from scholarship which posited implicit legal regulation in post-apartheid South Africa. Thereafter, a description of South Africa’s transformation agenda, its human rights narrative and challenges on TMC are considered.

This article adapts to qualitative style of research. Reliance was essentially placed on literature derived from written texts which includes statutes, policies, international instruments and scholarly publications. This includes primary and secondary sources detailing knowledge pertaining to the post-1994 governance and regulation of TMC. The author also relied on his experience (as a former initiate), and insights obtained from interacting with people from villages around Ga-Mamabolo and Ga-Molepo, in Capricorn District, Limpopo Province.

3. What is Traditional Male Circumcision?

For government to effectuate better regulation of TMC, the starting point should be focused at obtaining a clearer understanding on the meaning and underpinnings of TMC itself. It has been observed that majority of scholarship dealing with this subject often place emphasis on a single aspect of TMC, the circumcision part of it, carelessly neglecting an all-encompassing meaning which should in fact be constructed in a general socio-cultural context. This has a potential to effectively prejudice accurate meaning of TMC, our understanding of it and in the extreme, the sustenance of one of people’s cherished heritage. Ntombana (2011) succinctly lamented scholarly works that reduced TMC to a mere cutting of the foreskin (circumcision) which is in fact only a component of traditional rite of TMC. TMC should not be misconstrued as being similar to Medical Male Circumcision (MMC), which is indeed only concerned with the cutting of the foreskin. There is more to TMC, than just the cutting of foreskin.

Indeed, a more dependable connotation of TMC derives strength from social and cultural realm. In this regard, the most important aspect to note is that TMC is a cultural or traditional rite which is being practiced from an African perspective mostly by population groups of African descends throughout South Africa. There is widespread anecdotal evidence that this practice is common in both African and Muslim communities as part of sacred initiation which is intended to prepare initiates for transition into manhood (Momoti, 2002; Vincent, 2008; Howard et al, 2010; Deacon
and Thompson, 2012; Behrens, 2014). It also serves the purpose of marking and retaining a cultural and tribal social identity and social capital (Kang’ethe, 2013).

Historically, TMC took the form of initiation schools taking place in destined areas, mostly away from homes, where the initiates spend weeks in secluded mountains. These initiations schools are headed by a recognized traditional healer or traditional surgeon (ngaka), often assisted by other elderly men caring for the initiates. It was preferred that initiation schools should be attended by boys in the early stages of their youthfulness (teenagers), but modern experiences have shown that men of varying ages have been going through this ritual. At these schools, initiates are taken through various rites geared towards inculcating a culture of good morals and preparing them to be better and responsible adults. It is for this reason that TMC is recognized as a custom which contributes in providing indigenous education with regards to social responsibility, family custodianship and marriage practices among growing young men (Mbiti, 1986; Meintjies, 1998; Ntombana, 2011). It is seen as an essential social device that provides some training and preparations required to enable a shift from childhood mentality to a more complex behavior associated with being an adult. It takes place mostly during winter/cold season (June/July), which is favourable for speedy recovery and healing of the wound resulting from circumcision. The circumcision phenomenon involves completely or partly removing the foreskin (circumcision) on the male reproductive organ (penis), leaving the whole glans exposed.

4. Theoretical framework

During the late 1980s and early 1990s, it became ostensible that South Africa’s systems of governance would change from repressive apartheid in favor of democratization, effectively paving way to respect for human rights and socio-economic rights. Habib, Pillay and Desai (1998) attributed this to both domestic and international pressures exerted on the National Party (NP) to democratize. The agitations were primarily informed by the need to liberalize political climate, give birth to democratic politics and bring about people centered governance (Ihonvbere, 1997), which takes into account people’s sovereignty, people’s socio-economic and cultural rights and interests when state executes all government’s administrative actions. Nonetheless, it became clear that the new regime would face multiple challenges in socio-economic, legal and political realities. This included founding acceptable system of laws that would be deemed democratic in social and political context. This is what can be posited as ‘post-apartheid integration challenge’. Every aspect of society had to be afforded space for government to be legitimate. This also concerned integrating cultural rites that had socio-economic implications into the legal system, bearing in mind the diverse nature of tribal groups and their socio-economic situations.

Be that as it was, the collective leadership of the African National Congress (ANC), Pan Africanist Congress (PAC) and other political parties faced the first challenge of ensuring peaceful transition without bloody conflicts and any loss of life. Giliomee (1995), Adler and Webster (1995), Ihonvbere (1997) and Seidman (1999) all concurred that the post-1994 transition befits a description of a dramatic change. Their argument is premised on the fact that against widespread cynical views at the time, swift transition emerged. It was important because the post-1994 transition had to found norms that would aid in governing and regulating society and state affairs, which would in turn guarantee legitimacy of the regime. This accord to Franck (1992), who posited a theory postulating that governance systems should subject legal and political authority

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to rules embedded in the Constitution in order to achieve legitimacy. Therefore, the most fundamental aspect of transition was to strive for and achieve legitimacy. Accordingly, the new dispensation subscribed to John Locke’s political theory of constitutionalism, a doctrine which governs the legitimacy of government and its actions (Burns, 203). Subsequently, norms and rules arising from this regime would have to be subjected to interpretive theory of Ronald Dworkin which prioritizes putting the Constitution in its best light, so that the text is able to give greater effect to human rights narratives. It is for this reason that South Africa became a beacon for emerging democracies (Colasurdo and Marlin, 2013). It succeeded in terms of founding normative and institutional framework that would effectively embody ideals of respecting and protecting socio-economic and cultural rights.

Upon accepting that the post-1994 regime acquired democratic legitimacy, it is essential to understand the context of unprecedented need to regulate traditional rituals such as TMC, and within the realms of the Constitution. This is necessary because it carries with it, ethos of inculcating responsible and accountable governance to ensure safe and responsible asserting of socio-economic rights. Because TMC is a ritual of long-standing history (Warner and Strashin 1981; Momoti, 2002; Meissner and Buso, 2007; Kacker and Tobian 2013), issues of legal and political regulation towards it remain a contested terrain, particularly between conservative traditionalists and contemporary liberals.

According to Kang’ethe (2013), TMC attracted the need for explicit regulation because of extensive evidence of human rights disregards which often have dire implications towards the realization of a variety of socio-economic rights. He asserted that because TMC had become a panacea owing to its capacity to reinforce cultural social identity, constituting immense social capital and mitigating HIV transmission, government ought to be pro-active in propagating public teachings on balancing the right to culture and the significance of upholding socio-economic rights such as to education, health and so forth. Within the same context, Ntombana (2011) cautions against unconditional regulation or abolishing of TMC, arguing that such move has a potential to eradicate crucial components in cultural rites of indigenous populations. He strongly lamented scholars who subjectively write about TMC with discernible intentions of portraying it as barbaric and bad to society without attempting to appreciate the value bestowed unto it by indigenous people. It is discernible that both Kang’ethe and Ntombana reasoned as proponents of TMC. They accordingly believe that this practice should be retained and protected as part of heritage of indigenous tribes, and as a way through which state dispenses its obligation of protecting socio-economic rights and cultural rights of all its people. However, they also lamented pervasive incidences of human rights violations especially where initiates’ fundamental rights to life, health and security are compromised. They implore government to step-up and be pro-active in ensuring that the practice of TMC does not deviate from the values, spirit and purport of the Constitution. Such a move, they believe will assist in encouraging responsible behavior among interested stakeholders practicing TMC.

5. The post-1994 transformative regime and its socio-economic rights narrative: Implications on TMC rite

The post-1994 democratic dispensation officially brought an end to the system of apartheid, a system under which human rights could not develop (Sarkin, 1999), which was characterized by racial and cultural discrimination, intolerance, civil unrests
and terror. The transition ushered in a new era of sound human reasoning. It embodied a vivid paradigm shift entrusted in law and social order thereby creating a new normative system, characterized mainly by respect for human life, dignity, human rights and fundamental freedoms (Rapatsa, 2014). In the end, this regime would be credited for its willingness to adapt to liberalism particularly with regards to affording and protecting individual and/or group rights against all forms of infringements. This transition epitomized a marvel in social, political and cultural realities, necessarily because it culminated in an environment of governance of justification than governance of authority.

This change in governance system espoused pursuing the agenda of transformation through the supremacy of the Constitution, thereby subscribing to the theory of constitutionalism. This encompassed a 67 year old theory of human rights, a reputed concept which is recognized essentially as an aid to reinforcing social moral values (Risse and Sikkink, 1999; Gauri and Gloppen, 2012; Bayefsky, 2013; Rapatsa, 2015). Beitz (2001), argued that human rights theory became a noble instrument of moral touchstone, while Forsythe (2012) posited it as a means to greater social ends. By embracing human rights, state had intended to connote that governance would from then onwards be legitimated by the consent of its governed populace (Franck, 1992). Subsequently, socio-economic rights would be part of core constitutional values.

Because building a successful human rights culture depended on founding an upright socio-political and legal system and a progressive governance theory, Professor Karl Klare posited the theory of ‘transformative constitutionalism’ as an appropriate tenet through which South Africa’s human rights culture could be realized. Klare (1998) conceived transformative constitutionalism as a ‘long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction’. He argued that the Constitution offered an enterprise to induce major social change, immensely grounded in law. Van Marle (2009) emphasized that this agenda augments government’s efforts of transforming society, to the extent of giving new shape to socio-economic landscape, and traditional and cultural outlook of people’s heritage. Subsequently, TMC and other historic values and rites of cultural importance infused into a new legal system to the extent that they would be required to conform to the Constitution for all intents and purposes. It is at this point that the Constitution begins to regulate traditional rituals.

5.1 The Constitution and its rights-based approach towards TMC

First and foremost, the Constitution entrenched the Bill of Rights which contains a variety of rights that resonate with ethos of cultural diversity. As identified by Phillip Iya (1998), the text persuasively embarked on an agenda of realizing unity in diversity as a formula for progressive social integration. This is crucial for sustainable socio-economic development and social stability in society. Its aspirations are inherently founded on the notion of Ubuntu, a long-standing and well-grounded philosophy of life among Africans, which signifies ‘humanness’ (Kamwangamalu, 1999; Nussbaum, 2003). It denotes that ‘motho ke motho ka batho’, meaning ‘a person is a person through other persons’. This constituted a strategic mechanism of inculcating a culture of interdependence while in the same way giving regard to human rights philosophy, through which multiculturalism manifest in various places of human interfaces.
Therefore, the Constitution used noble cultural values to build on the culture of human rights. This is supported by a strong expression found in the preamble of the Constitution which asserts that ‘South Africa belongs to all those who live in it, united in our diversity’. Various other constitutional provisions make express efforts provision for protecting cultural and traditional rites. For instance, section 6 recognizes all 11 widely spoken languages as official in South Africa, effectively implying that everyone has the right to communicate in a language of choice. Freedom of association, religion and belief also constitute guaranteed rights in terms of section 18 and section 15. This effectively connotes that people are at liberty to choose which cultural and traditional practices they wish to participate in (Devenish, 1999) in an open and democratic setting. Further, the choice in determination of language use, cultural life and traditional rites also find express protection in sections 30 and 31. Sections 30 and 31 symbolized an explicit commitment by South African government to give effect to Article 1(1), Article 5 and Article 15 of International Covenant on Economic, Social and Cultural Rights (ICESCR). Thus, entrenching cultural rights was in furtherance of domesticating international human rights norms on culture as propounded by the ICESCR.

Given these constitutional commitments, it is indisputable that TMC is a constitutionally protected socio-economic practice. However, in terms of section 2, the Constitution is the supreme law of Republic, and any law or conduct that is inconsistent with it should be declared invalid. Accordingly, this requires that in the exercise of TMC, interested stakeholders (traditional leaders, healers, initiates and other participants) should uphold the law in the Constitution. This is entrenched in section 30(1) & 31(2), which provides that no person exercising the right to culture may do so in a manner inconsistent with any provision of the Bill of Rights. This connotes the non-negotiable need to respect and protect fundamental rights as guaranteed by this text. This includes protecting the right to life, dignity, education, health care, food, water, security of persons and several other first generation (civil and political) and second generation rights.

5.2 Dedicated legislative measures

It is essential to appreciate that realizing human rights achievements remain contingent on having strong normative framework. That is, legal and policy framework ought to improvise the basis of strength for monitoring cultural rights and socio-economic rights. South African government has promulgated dedicated legislations in an attempt to reinforce regulatory mechanisms on TMC. Traditional Circumcision Act No. 6 of 2001 was enacted to ensure observation of health standards during the ritual of TMC to ensure that the right to health and health care services is not compromised, as propounded in section 27(a), (b) and (3) of the Constitution.

In terms of section 43(3) of National Health Act No. 61 of 2004, the Minister of Health is empowered to monitor TMC. This constitute a strategic effort to safeguard the well-being of every person attending such an initiation school. Children’s Act 38 of 2005 was also promulgated to offer an overarching framework with regards to protecting children against unauthorized and/or involuntary circumcision practice. The Act vehemently prohibits circumcision of children under the age of 16, with the exception that such may be allowed if it is performed for religious or customary purposes or as recommended by a medical practitioner, and also with the child consenting to it after proper counselling.
6. Contemporary socio-economic concerns

In the recent past, TMC has emerged as one of the most contentious issues in society. This has been prompted by widespread incidences of explicit human rights violations, especially with regards to initiates’ right to health, life, education, dignity, welfare, safety and security. It is for this reason that Kepe (2010) strongly implored government to take responsibility and protect health and life of initiates on the premise that the Constitution requires. Kepe and Behrens (2014) come across as staunch proponents of banning this cultural rite. But, it is asserted that such a move would not be anywhere close to being a panacea to the problem. Moreover, it will be unconstitutional for government to ban a rite considered to be part of invaluable heritage to the majority of people. Above all, South Africa is party to international instruments supporting social and cultural rights. It has also domesticated these international norms by entrenching socio-economic and cultural rights in the Constitution, further promulgating legislations tailored to strengthen the justiciability of these rights in accordance with the Constitution.

Be that as it may, it is indisputable that the ritual of TMC in the contemporary society has faced a variety of challenges that have somewhat contributed in entrenching stereotypes, and effectively mystifying its value to people in general and country’s developmental objectives. Some of distinguishable problems include deaths, amputations resulting from botched circumcision, contraction of various contagious diseases and its negative effect on schooling in instances where it coincides with school calendar. All together, these challenges are socio-economic rights based and have been dominating media reports over the past decade, culminating in intense academic deliberations. Although, they can be described as after-facts, there is no denying their seriousness.

However, there is another critical aspect surrounding TMC which can best be described as a foremost problem. It is that TMC has been commercialized, becoming one of flourishing get-rich-quick schemes in society. Nonetheless, it is unfortunate because this issue is often overlooked by commentators who often concentrate on the aftermarts. Traditionally, it is known that TMC is conducted by traditional leaders and traditional healers possessing advanced levels of experience on the ritual. Their main function has been that of socializing and training young boys about manly affairs. But the commercialization phenomenon has resulted in numerous ineligible and unscrupulous individuals carelessly exploiting the ritual, turning it into an economic activity thereby sacrificing established cultural norms, and lives of initiates thereon. They often inflict hefty socio-economic burdens to indigent households, mostly in rural areas, by charging exorbitant fees for initiates admitted to their schools. Subsequently, this makes it difficult to have a properly controlled and harmless practice of TMC. And, given the country’s pervasive triple challenges of unemployment, poverty and inequalities (Mattes, 2012; Kings, 2014; Statistics SA, 2015), it is expected that the trend of persistent abuse of TMC as commercial activity will be difficult to uproot. Thus, these factors are major sources of socio-economic injustices and social instability in society as emphasized by Spreen and Vally (2006) and Coovadia (2009).
7. Conclusion

This article has revealed that South Africa boost the presence of commendable norms constituting progressive normative framework which strengthens the sustainability of the post-1994 democratic dispensation. It has been shown that its human rights narrative has entrenched itself as a moral touchstone, progressively complimenting the principle of Ubuntu, an established philosophy of life amongst the majority of South African masses. These norms have enabled socio-economic and cultural rights to easily infuse through the Constitution as justiciable rights. It is for this reason that Traditional Male Circumcision has been recognized as a contentious issue owing to its implications with regards to realizing unhindered enjoyment and protection of socio-economic rights to health care, food, water, and civil rights to life, safety and security of persons. It has also been illustrated that the implications of TMC on socio-political and economic development in society cannot be taken too lightly. Apart from known concerns over health, life and welfare of initiates, there exists a major problem associated with commercialization of this traditional rite of passage. It has been shown that the commodification of TMC has resulted in severe irregularities at initiation schools, with some operating illegally, further compounding the problem. The author argues that South Africa’s human rights narratives provides strong regulatory mechanisms within which to formulate effective mechanisms of control and efficacy towards TMC. It is emphatically asserted that there remains a dire need to accelerate human rights education across all sectors of society. This shall assist in discouraging careless individuals to desist from practicing TMC in a predatory manner, while at the expense of humanity. This is particularly important for reinforcing a culture of human rights in a country rich in cultural diversities (Mubangazi, 2012). The public should be equipped to distinguish between doing things rights in terms of human rights narrative, against pervasive human rights infringements. It is asserted that efforts towards regulating TMC must always be approached cautiously to ensure that cultural practices are not denied of their respect as propounded by the Constitution.

References


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Apstrakt


Ključne reči: tradicionalno obrezivanje muškaraca, društveno-ekonomski status, kultura i nasleđe, ljudska prava