

Involuntary Circumcision of Males in Illegal Initiation Schools in South Africa: A Violation of African Customary Human Rights?

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Abstract

The incidence of deaths associated with the practice of forced and botched circumcisions at initiation schools has become a topical issue in South Africa. In recent times, the number of deaths and injuries among initiates has risen at an alarming rate, most of them occurring at illegal initiation schools. The continuous rise in the number of injuries among initiates at these schools has elicited mixed reactions among community members, some referring to it as genocide in the case of fatalities and calling for its abandonment, while others argue that this traditional practice should be allowed to continue. The majority of young men who go to initiation schools do not make the decision on their own, nor do they have a choice in the matter. Instead they are compelled by parents or guardians, influenced by friends, and also coerced by others in the community who insist that they have to 'go to the mountain', as initiation schools are generally referred to in South Africa. It has been argued by those against circumcision that this practice infringes constitutional rights and contravenes the Children's Act 38 of 2005. There have been numerous instances where young and even mature males have been taken from the streets, or even from the comfort of their homes, and forced into circumcision camps with or without their consent. This begs the question whether the continued practice of a cultural tradition that violates the fundamental human right and freedom to choose religious and cultural beliefs is justifiable.

Keywords: Male circumcision; World Health Organisation; human rights; initiation schools



Introduction

This article consists of nine parts:

- introduction;
- definition of the practice of male circumcision;
- the World Health Organisation (WHO)/the Joint United Nations Programme on HIV and AIDS (UNAIDS) policy and guidelines;
- parental authority over a child;
- the importance of the custom versus forced circumcision in violation of human rights;
- perceptions of the practice in South Africa, Uganda and Kenya;
- societal responses to forced circumcision;
- international and regional instruments on human rights, and
- conclusion.

The practice of initiation schools and circumcision is an accepted old custom with an African cultural denotation within African communities. In South Africa, a distinction is made between legal and illegal initiation schools. Legal initiation schools are regulated by law on the assumption that they are voluntary. On the other hand, most illegal initiation schools are involuntary, with the result that people are coerced or abducted into them. Injuries can occur either at a legal or illegal schools, but most have been recorded at illegal schools. The purpose of this study is to examine the violation of this customary practice by people who conduct it with insufficient knowledge or illegally, which results in forced or botched circumcisions', and violations of the human rights of the victims. The focus of the study is on the forced and botched circumcisions in South Africa that result in injuries to or the death of the initiates, which is a violation of the Constitution. Reference is also made to other countries in sub-Saharan Africa and the rest of the world highlighted by local and international sources on the subject.

In most parts of Africa the practice of circumcision has been, and remains, part and parcel of people's lives.¹ To some people it is perceived as a rite of passage from childhood to adulthood.² Recently, however, in some countries circumcision has taken on another dimension (although wrongly and unlawfully so): its use as a political instrument to punish citizens who hold a different political opinion from the general

1 Susan Bailey, 'Circumcision and Male Initiation in Africa' in Theodore Celenko, *Egypt in Africa* (Indiana University Press 1996) 88.
2 Nicola Zampieri, Emanuela Pianezzola and Cicilia Zampieri, 'Male Circumcision through the Ages: The Role of Tradition' (2008) *Acta Paediatrica* 1305.

populace.³ The natural benefits and essence of the practice of circumcision is gradually being eroded by greedy and selfish people masquerading as advocates of culture, yet demanding financial benefits.⁴ These pseudo-culturalists lack the necessary skills and tools to perform circumcisions successfully, often causing serious injury and even death to initiates.

In such circumstances, the initiate's consent is hardly ever obtained, resulting in a latent violation of human rights. The people most directly affected by these malpractices are typically those living in remote villages where there is an absence of adequate policing due to the lack of statutory resources (such as police stations to report what they believe to be wrongdoing or even counselling centres where prior- or post-circumcision counselling could be provided). As a consequence, perpetrators act with impunity: first, because they are not held accountable for their deeds and, second, because most initiates are so ill-informed that they do not realise that their rights are being infringed.

Apart from the lack of effective policing, most males (young and old) have simply accepted the traditional belief that all males should be circumcised in order to be accepted by the community and participate in its activities. With all its 'good and bad', the practice of male circumcision has left public opinion polarised according to traditionalist and Western-civilised schools of thought. Those opposing the practice typically argue that traditional circumcision rites no longer have any place in a civilised

3 Robbie Corey-Boulet, 'In Kenya, Forced Male Circumcision and a Struggle for Justice' (*The Atlantic* 1 August 2011) <<http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>> accessed 8 July 2013.

4 Mathole Motshekga of the Kara Institute puts the blame on what he calls 'the western model of development and the imported religions', which he accuses of showing a lack of understanding of African spiritual and cultural aspirations. He also claims that the few people who still have a knowledge of the indigenous cultural and spiritual systems have been isolated from the mainstream of society. Lumka Oliphant, 'Greed Blamed for Death of Initiates' (*IOL* 5 July 2002) <<http://www.iol.co.za/news/south-africa/greed-blamed-for-death-of-initiates-1.89276>> accessed 17 May 2016.

world, whereas those supporting it not only argue in favour of its cultural benefits,⁵ but also point to the medical benefits which can be confirmed from a scientific perspective.⁶

Despite the WHO view on circumcision (the medical benefit especially towards the transmission of HIV), communities remain divided between those supporting it and those who oppose it. A substantial number of communities nevertheless continue to support male circumcision and insist on it.⁷ Those who oppose circumcision feel that their rights are being infringed. In certain parts of the country, such as the Eastern Cape, males who do not undergo circumcision—or the so-called ‘rite of passage to manhood’—continue to be treated as boys and are addressed in derogatory terms since they are not regarded as men or as full members of the community until circumcised.⁸ This creates a conflict between communal and individual interests, leaving the subject to choose between aligning himself with local community practices so as to be accepted as a member of it,⁹ or to maintain his conviction about circumcision and be ostracised.¹⁰

Owing to the remoteness of most communities, complaints can be directed only at the communal chiefs, who very often support the practice as an age-old tradition and are therefore reluctant to act against perpetrators. State institutions, such as the police and the prosecuting authorities, are perceived as being less than effective in dealing with violations of human rights such as that of male circumcision, and this is evidenced by the extremely low number of prosecutions linked to reported cases of forced

5 This is the challenge when trying to impose the Western conceptions of manhood within a cultural context. To the proponents of African customary law this raises the question why not let the practice develop in its own context of collectivism and deal with the elements that seek to undermine it. The question of forced circumcision cannot be ascribed to the acceptable norms and standards according to which the custom is applied because the custom itself does not allow the circumcision of underage boys. Even adult males who insist that they do not want to go through the practice have lost sight of the fact that customary law, with its rules and principles, has developed differently and should be treated as such within its own framework and that the common law should not be allowed to be imposed on the system.

6 WHO/UNAIDS, ‘New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications’ (Montreux 2007) <http://libdoc.who.int/publications/2007/9789241595988_eng.pdf> accessed 17 May 2016.

7 Louise Vincent, ‘Male Circumcision Policy, Practices and Services in the Eastern Cape Province of South Africa’ (2008) <http://www.malecircumcision.org/resources/documents/South_Africa_MC_case_study_May_2008_002.pdf> accessed 17 May 2016.

8 Vincent (n 7).

9 See note 5. The argument by proponents of African customs is that the customs that bind communities together form the core content of commonality more than self-imposed individualism.

10 See Zampieri, Pianezzola and Zampieri (n 2) 1305.

circumcision.¹¹ This lack of action, accompanied by inadequate monitoring systems, provides an ideal environment for perpetrators to continue with forced circumcisions as they are seldom held accountable for their actions.

It must be acknowledged, however, that the practice of circumcision has a long history. The origin of male circumcision is unknown, and even anthropologists are uncertain about its origins.¹² Some who defend the practice claim that male circumcision is a sacred rite and refer to the Bible in support of their view.¹³ Accordingly, Maseko¹⁴ observes that circumcision originated in the Middle East and was adopted by Africans through their contact with the Arabian countries. It would seem that male circumcision has a very long history, which probably accounts for the uncertainty as to its origin. According to Marck:

The distribution of circumcision and initiation rites throughout Africa, and the frequent resemblance between details of ceremonial procedure in areas thousands of miles apart, indicates that the circumcision ritual has an old tradition behind it and its present form is the result of a long process of development.¹⁵

In some cultures children are subjected to a variety of transitional rituals, including circumcision, starting at birth and continuing throughout their adolescent years. These rituals are believed to have a positive impact on a child's development, for instance their health and spiritual wellbeing. The alleged relationship between circumcision and human development differs depending on the various cultural and historical traditions.

11 Despite the large number of deaths at initiation schools, there is no record of anyone having been convicted for these deaths.

12 See Zampieri, Pianezzola and Zampieri (n 2).

13 People of Jewish descent often quote Genesis 17 verses 10–14, which reads:

‘10 This is my covenant with you and your descendants after you, the covenant you are to keep: Every male among you shall be circumcised.

11 You are to undergo circumcision, and it will be the sign of the covenant between me and you.

12 For the generations to come every male among you who is eight days old must be circumcised, including those born in your household or bought with money from a foreigner – those who are not your offspring.

13 Whether born in your household or bought with your money, they must be circumcised. My covenant in your flesh is to be an everlasting covenant.

14 Any uncircumcised male, who has not been circumcised in the flesh, will be cut off from his people; he has broken my covenant’. Biblica Inc., *Holy Bible, New International Version* (1973, 1978, 1984, 2011) <<https://www.biblegateway.com/passage/?search=Genesis+17:10-14>> accessed 17 May 2016.

14 Temba Maseko, ‘Constitutionality of the State’s Intervention with Male Traditional Circumcision in South Africa’ (2008) 29 (2) *Obiter* 191–208.

15 Jeff Marck, ‘Aspects of Male Circumcision in Sub-Equatorial African Culture History’ <<http://htc.anu.edu.au/pdfs/Marck1.pdf>> accessed 14 March 2016.

It is also a common religious practice among Jewish and Muslim families and communities.¹⁶

In some Jewish communities male circumcision is compulsory, whereas in others it is merely a recommendation.¹⁷ These communities believe that male circumcision symbolises faith in God as commanded in the book of Genesis in the Bible.¹⁸ In Jewish communities, circumcision is performed by a trained surgeon called a *mohel*, and usually occurs eight days after birth during a ceremony called *Brit milah*. Jews also use circumcision for reasons of personal health and hygiene.¹⁹

Some evidence is emerging to support the health benefits of male circumcision. Research conducted during the latter part of the twentieth century confirms that male circumcision reduces the risk of contracting HIV infections, penile cancer and sexually transmitted diseases.²⁰

In South Africa, male circumcision—or ‘going to the mountain’, as it is often described—is viewed as a rite of passage to manhood. It should be noted that the custom is prevalent not only in Africa, but also in most parts of the world.

The next part of this discussion examines more closely what the practice of male circumcision entails.

Defining Circumcision

A cursory look at male circumcision reveals that it involves the surgical removal of the foreskin, or prepuce, of the male genitals. It is performed by different people for different reasons—for example, for health, religious or cultural reasons. It may be performed in a hospital by trained medical officers or at some location in the bush by traditional healers or by people trained in the traditional ways. In the latter case, it is required among the South African Xhosa tribes as a transitional period marking the

16 Catherine Connolly and others, ‘Male Circumcision and Its Relationship to HIV Infection in South Africa: Results from National Survey in 2002’ (2008) 98 (10) *The South African Medical Journal*.

17 SAH Rizvi and others, ‘Religious Circumcision: A Muslim View’ (1999) 83 (Suppl.1) *BJU International* 13.

18 See (n 13).

19 BBC, ‘Religions and circumcision’ (*BBC* 2014) <http://www.bbc.co.uk/ethics/malecircumcision/religions_1.shtml> accessed 17 May 2016.

20 See UNAIDS, ‘Global AIDS Response Progress Reporting 2014: Construction of Core Indicators for Monitoring the 2011 United Nations Political Declaration on HIV and AIDS’ (2014) 173 <http://www.unaids.org/sites/default/files/media_asset/GARPR_2014_guidelines_en_0.pdf> accessed 19 May 2016.

progress of the initiate from childhood to manhood.²¹ In this context, it is also viewed as a gateway to sexual intercourse and therefore attracts many young boys.²²

As indicated earlier, the latest research indicates that male circumcision contributes significantly to the fight against HIV/AIDS. This was highlighted in an important scientific study,²³ which strongly recommended male circumcision as part of a comprehensive health package in the fight against HIV/AIDS and other sexually transmitted diseases. However, the recommendation was made on the assumption that it would be performed in harmony with humanitarian principles and as a means of protecting rather than violating basic human rights.²⁴ In this regard, the informed consent of the initiates would be of critical importance in order to prevent forced initiation processes.

In addition to the fact that male circumcision has been shown to reduce the chances of contracting HIV by some sixty per cent,²⁵ the study also indicated that women would be less likely to contract cervical cancer if their partners were circumcised.

21 NK Momoti, 'Law and Culture in the New Constitutional Dispensation with Specific Reference to the Custom of Circumcision as Practised in the Eastern Cape' (LLM Dissertation, Rhodes University, 2002) 30–31.

22 BL Meel and Ram Prakash Kaswa, 'Traditional Male Circumcision-related Fatalities in the Mthata Area of South Africa' (2009) 51 (5) South African Family Practice.

23 Bertran Auvert and others, 'Effect of Circumcision on the Prevalence of High-risk Human Papillomavirus in Young Men: Results of a Randomised Controlled Trial conducted in Orange Farm, South Africa' (2009) 199(1) The Journal of Infectious Diseases 14. See also Paul Drain and others, 'Male Circumcision, Religion and Infectious Diseases: An Ecologic Analysis of 118 Developing Countries' <<http://www.biomedcentral.com/1471-2334/6/172>> accessed 14 March 2016.

24 Articles 7 and 23 of the International Covenant on Civil and Political Rights (CCPR), in 1966 are relevant. Article 7 provides that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no-one shall be subjected without his free consent to medical or scientific experimentation. Furthermore, Article 24 provides that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

25 UNAIDS, 'Human Rights Ethical Legal Guidance' <http://data.unaids.org/pub/Manual/2007/070613_humanrightsethicallegalguidance_en.pdf> accessed 14 March 2016.

WHO/UNAIDS Policy and Guidelines

The WHO/UNAIDS²⁶ organisation strongly encourages voluntary male circumcision. This organisation also provides well-established guidelines and policy frameworks to promote safe procedures for male circumcision. A key principle is the recommendation that male circumcision should be voluntary and informed.²⁷ Coercing subjects to submit to circumcision is not only disapproved of, but is seen to amount to a violation of human rights. It therefore remains the prerogative of the individual to choose whether to be circumcised or not.

The guidelines are formulated with a view to promoting and advancing human rights. Human rights include the rights of all human beings, including children.²⁸ This is clearly stated under article 9 (cf articles 18 and 19) of the Universal Declaration of Human Rights by the World's Religions (UDHRWR).²⁹ Article 9 states that:

(1) No one shall be subjected to arbitrary arrest, detention or exile by the state or by anyone else. The attempt to proselytize against the will of the person shall amount to arbitrary detention, so also the detention, against their will, of teenage children by the parents, and among spouses.

(2) It is the duty of everyone to secure everyone's liberty.

Likewise, Article 18 states:

(1) There shall be no compulsion in religion. It is a matter of choice.

(2) Everyone has the right to retain one's religion and to change one's religion.

26 See WHO/UNAIDS, 'A Guide to Indicators for Male Circumcision Programmes in the Formal Healthcare System' (2009) <http://apps.who.int/iris/bitstream/10665/44142/1/9789241598262_eng.pdf> accessed 17 May 2016.

27 WHO/UNAIDS (n 26).

28 In a report from Doctors Opposing Circumcision: the International Human Rights Law and the Circumcision of Children, UNICEF explains the application of human rights in the following terms: 'Human rights apply to all age groups; children have the same general human rights as adults. But children are particularly vulnerable and so they also have particular rights that recognize their special need for protection' <<http://www.doctorsopposingcircumcision.org>> accessed 17 May 2016.

29 World Conference coalition meeting to celebrate the fiftieth anniversary of the original Universal Declaration of Human Rights, 'Universal Declaration of Human Rights by the Worlds Religions' <http://gcwr2011.org/pdf/UDHRWR_en.pdf> accessed 17 May 2016.

(3) Everyone has the duty to promote peace and tolerance among different religions and ideologies.

And, finally, article 19 states that:

(1) Everyone has the right to freedom of opinion and expression, where the term expression includes the language one speaks, the food one eats, the clothes one wears, the religion one practices and professes, provided that one conforms generally to the accustomed rules of decorum recognized in the neighbourhood.

(2) It is the duty of everyone to ensure that everyone enjoys such freedom.

(3) Children have the right to express themselves freely in all matters affecting the child, to which it is the duty of their caretakers to give due weight in accordance with the age and maturity of the child.

The WHO/UNAIDS further requires the creation of a clean environment for the purposes of performing circumcisions, with due regard for personal human rights. A special provision is also made to uphold the child's best interests. Whereas the directions given encourage state members to fix the age of consent for male circumcision, the decision to undergo circumcision is not always the prerogative of the subject—many factors play a role. Sometimes, for reasons other than the medical benefits, parents take the decision to circumcise a male child shortly after birth, as in the case of the Muslim traditions.³⁰

A Parent's Authority Over the Child

It can be argued that it is the parents' right to do what they feel best to fulfil their responsibility regarding a child's upbringing. It is also acknowledged that it is normally the parents who will determine the child's relative stage of personal development. Generally, the relationship between a parent and a child is vertical and the parent takes decisions about the upbringing of the child. The responsibility of the parent regarding the child's upbringing has a natural origin and is enforced by the law.³¹ Lawrence Schäfer³² argues that it is within the discretion of the parents to provide their children with the appropriate religious instruction; however, regarding an individual's rights and

30 See Connolly and others (n 16).

31 See ss 2(b)(i) and 18(2), Act 38 of 2005.

32 Lawrence Schäfer, *Child Law in South Africa: Domestic and International Perspectives* (LexisNexis 2011) 65.

freedoms guaranteed under the tenets of democracy, this approach appears to be outdated.³³

In the case of *Kotze v Kotze*,³⁴ the court rejected a proposed divorce settlement agreement which contained a clause stating that both parents would be obligated to raise their son based on the teachings and practices of the Apostolic Church. The court refused to accede because it was of the view that the clause infringes the child's right and freedom to adhere to a religion of their choice.³⁵ Therefore the court acted in harmony with principle of the child's best interests.

A similar ruling was given in the case of *De Groot v De Groot*³⁶ involving children aged 14 and 11. In this case the 'mother and custodian parent applied to the High Court for consent to relocate with the children to Dubai for three years.'³⁷ The children's father opposed the application to relocate.³⁸ The children did not wish to relocate but wanted to remain with their father.³⁹ They clearly expressed their views and wishes not to relocate, but experts in the matter recommended to the court that the children should relocate with their mother.⁴⁰ The court subsequently ruled that this was not in the best interests of the children.⁴¹ It further indicated that ignoring the children's wishes would be in direct violation of sections 10 and 31 of the Children's Act.⁴² It follows from this ruling that the interests of the child override those of the parents. Although the courts are the upper custodian of the child's interests in South African law, this must be tested against the principles of customary law on issues concerning cultural practices. When dealing with this issue, it is advisable always to take into account the context in which the practice emanated. In most instances the focus is on the official version instead of

33 See s 45(4), Act 38 of 2005 which states that 'nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children'. See also *CM v NG* [2012] 3 All SA 104 (WCC) paras 55–56.

34 [2003] 3 SA 628 T. See also Gretchen Carpenter, 'Constitutionally Protected Rights for Parents?' (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 399.

35 *Kotze* at 632G–H.

36 Unreported case No 1408/2009 (ECD) handed down on 10 September 2009. See Trynie Boezaart, *Child Law in South Africa* (Juta 2009) 100.

37 Unreported case No 1408/2009 (ECD).

38 *ibid*

39 *Id* 101.

40 *ibid*.

41 *ibid*.

42 Section 10 of the Children's Act 38 of 2005 provides that: 'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

its living version, which makes a mockery of the recognition of the general system of customary law in the regulation of its own affairs.

The Importance of the Custom versus Forced Circumcision in Violation of Human Rights

Times have changed, and so have many ways of doing things, including the motives and reasons behind them. The previously sacred practice of our forebears has now been hijacked by unscrupulous people without the necessary knowledge and skills, whose primary motive is personal financial gain. The large number of reports of botched circumcisions, genital mutilations and the deaths of initiates clearly illustrates this point.⁴³ Involuntary circumcisions in illegal schools violate human rights and bring into disrepute the image of the custom run by people who know and genuinely practise and apply it. It is argued here that involuntary circumcision infringes the circumcision candidate's constitutional 'right to human dignity',⁴⁴ 'freedom and security of the person',⁴⁵ 'privacy',⁴⁶ 'the right to freely choose, have an opinion, and to identify with a religion or belief of their own choice.'⁴⁷ It also contravenes certain provisions of the Children's Act 38 of 2005.⁴⁸

The health benefits and cultural values inherent in the practice of male circumcision have been sacrificed in the pursuit of personal financial gain, which amounts to a violation of human rights. It must be clearly understood that Africans have never practised the custom of circumcision for financial gain, but its importance and value have always been to prepare young men for and introduce them into adulthood. Koyana argues that the custom forms part of education within the African ways of living.⁴⁹ He rightfully portrays the essence of the custom as marking the transition from boyhood to manhood in which young men are taught patience and fortitude according to African

43 Faranaaz Parker, 'Deadly initiation: Govt lacks numbers on circumcision deaths' (*Mail & Guardian* 9 June 2013) <<http://mg.co.za/article/2013-06-09-initiation-carnage-circumcision-deaths-have-no-numbers-says-govt>> accessed 21 August 2017.

44 Constitution of the Republic of South Africa, 1996, s 10.

45 Section 12.

46 Section 12(2)(b).

47 Section 31.

48 Reference is made to s 12 of the Children's Act 38 of 2005, which affords every child the right not to be subjected to social, cultural and religious practices which are detrimental to the child's well-being. See also Jacqueline Heaton, *South African Family Law* (LexisNexis 2010) 280; Trynie Davel and Ann Skelton (eds), *Commentary on the Children's Act* (Juta 2007) 2-17-2-18.

49 DS Koyana, *Customary Law in a Changing Society* (Juta 1980) 60.

values.⁵⁰ These values affirm the practice and legitimacy of the custom among the Africans.

Moila canvasses for the custom of circumcision in South Africa.⁵¹ She echoes Mönning's perception that 'the African custom of traditional circumcision is a sacred and very important ritual among most African tribes',⁵² one referred to among the Pedi tribe in South Africa as

the means of investing the initiate with the status of citizenship of the tribal community, and of according the potential of full participation in the social, political and jural activities of the tribe.⁵³

It is a norm within Africans that knowledge is transmitted orally from one generation to another. Initiation schools are not ordinary institutions where young men go to have their foreskins removed. These are important institutions in which a variety of cultural practices are taught. For example, in the case of Mozambique, Muianga indicates that initiation rites and the official schools inhabit the same social space, in which the main object is to impart knowledge to the younger generation that prepares them for the future.⁵⁴ Muianga endorses Mondlane's view on educational processes in Mozambique that

in the school of initiation, the rites provide a certain dose of knowledge and instruction which gives the individual the skills to face his immediate environment and transform immature members into grown members of the adult community.⁵⁵

The challenge today is that in South Africa there is a high number of illegal schools where the original object of the custom is undermined. Young men are abducted and involuntarily circumcised in clear violation of both the custom and the Bill of Rights as enshrined in the Constitution. WHO/AIDS urges its Member States to establish male circumcision policies that seek to encourage voluntary, safe and informed male circumcision practices consistent with the principle of respect for human rights. However, the available data seem to suggest that this object is not being realised—a

50 *ibid.*

51 See D Moila, 'The Custom of Circumcision in South Africa: Statutory Regulation and Human Rights Implications' (2003) 24(1) *Obiter* 460.

52 *ibid.*

53 *ibid.*

54 See Lucena Muianga, 'Gender, Norms, Cultural Values and the Right to Education: The Example of Three Schools in Manhica District of Mozambique' in Welshman Ncube, *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate 1998) 267–268.

55 Muianga (n 54) 286–287.

new trend is gaining momentum world-wide in which circumcision is being used as a tool to violate human rights and the perpetrators are seldom held accountable.⁵⁶

In raising the concerns mentioned above, the practices in a few selected countries in sub-Saharan Africa have been taken into account. The idea of doing away with the practice of male circumcision, as suggested by the critics of this practice, appears somewhat unrealistic amid the compelling evidence supporting its efficacy in the fight against HIV/AIDS and related diseases.⁵⁷ It also an attack on African custom. However, the government needs to work hard to eradicate these illegal schools whose unhygienic activities tarnish this custom and encroach on the rights of innocent citizens.

Perceptions in South Africa, Uganda and Kenya

South Africa

Specific provision has been made in the South African legal system to deal with issues relating to male circumcision. However, the practice of male circumcision is addressed only indirectly and by implication in the Constitution.⁵⁸ Male circumcision is practised in South Africa mainly for cultural and religious reasons: the common view in most communities is that a male who has completed the transitional process associated with circumcision is worthy of honour and respect, and is viewed as a more responsible member of the community than those who did not ‘go to the mountain’.

In effect, circumcision is used as a means of separating the boys from the men. Those who did not attend the circumcision schools are still treated as boys, even though they may be much older than those who have done so.⁵⁹ As argued above, there is no doubt that the practice of circumcision is one of the important values of African customs and should be preserved. However, the challenge is where it is used to infringe the rights of others. This amounts to unfair discrimination, which is prohibited by section 9 of the

56 See VOA, ‘Ugandan Ethnic Group Criticized for Forced Male Circumcision’ (VOA 1 November 2009) <<http://www.voanews.com/content/a-13-2007-03-23-voa58/347562.htm>> accessed 8 July 2013; John Smyth, ‘INSIGHT: Individual Rights vs Community Rights: Which Matter More?’ <http://justicealliance.co.za/download/art-2008-02-007%20Insight_%20Individual%20Rights%20vs%20Community%20Rights%20-%20Which%20matter%20more_.pdf> accessed 8 July 2013.

57 See WHO/UNAIDS (n 6).

58 See Constitution 1996, ss 30 and 31.

59 M Ramphela, ‘Teach Me How to Be a Man: An Exploration of the Definition of Masculinity’ in Veena Das, *Violence and Subjectivity* (University of California Press 2000) 112.

Constitution.⁶⁰ A case study conducted by Vincent⁶¹ relates different experiences by uncircumcised males and their comments on the unfair treatment they received from community members. Vincent reports the following examples:

- [Girls] would respond to your proposal for love by using embarrassing statements such as: 'I don't fall in love with a barking dog that has a long tail.'
- When it comes to responding to the call of nature, men will tell me I cannot relieve myself in the same toilet and at the same time as them because I am not a man. What was painful is the fact that some of these men are of my age and some are younger than me.
- I once broke the rules applying to entrance into a tavern. No boys were allowed entrance. On this day I pretended to be a man and was allowed to join the others inside this tavern. After two to three hours I went to the toilet to relieve myself. I did not notice that the tavern owner followed me. He confronted me and instructed me to produce proof that I am a circumcised man. I tried some delaying tactics but to no avail. He called other men, who started kicking and punching me all over my body and I was dragged outside the tavern yard.
- I experienced a situation whereby these newly circumcised men were calling me 'dog' and other names. In events like feasts or cultural ceremonies, they always enjoy a larger share of entertainment, including food and liquor, than me. Discrimination happens in terms of placement whereby men will be allocated a more favourable position than boys. For example, boys will be allocated away from the kraal where food and meat is dished from. The only way to get your share was to wait to be called by these men, who would give you a piece of meat.

Despite the clear terms of the Constitution, the existing legislation against forced circumcision, and the provisions for a legitimate age of consent for male circumcision, forced circumcision, in fact, remains a harsh reality in South Africa.

What must be clearly understood is that the practice has its roots in the system of customary law. It is the same system that must be used as a yardstick against which to determine the legitimacy of the forced practice that is at issue here. Furthermore, contrary to the popular perception, it must be emphasised that the system itself had never

60 See note 56. None of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

61 Vincent (n 7).

allowed the circumcision of under-age boys and therefore we cannot legitimise an illegal act and give it credibility as a customary-law practice.

Specific Provisions in the Constitution

In South Africa, parental power is provided for in the Constitution⁶² and in the Children's Act.⁶³ Section 28(1)(b) of the Constitution stipulates that every child has the right to parental care, or to appropriate alternative care when removed from the family environment. Subsection (c) further provides for the child's right to basic healthcare and social services. Although the Constitution does not directly provide for issues related to male circumcision, it may be implied in terms of this section and other parts of the Constitution.⁶⁴ In this regard, the Constitution plays an enabling role by putting the general responsibility on the parent(s) to ensure the healthy development of the child. However, in many instances parents would proceed to make such decisions without involving the child because they regard the child as a minor.⁶⁵ Among the parental decisions to be taken to ensure the healthy development of the child is whether or not he should be subjected to circumcision.

The right of everyone to freedom of religion is also provided for in the Constitution.⁶⁶ The term 'everyone' is broad enough to include children, but evidently, at a very young age, children would not be in a position to make informed decisions such as that about circumcision. In furthering the right of everyone to freedom of religion, the Constitution includes the right of everyone to use the language and to participate in the cultural life of their choice, but no-one, in exercising these rights, may do so in a manner inconsistent with any provision of the Bill of Rights. Moreover, the right of choice may also include the right not exercise a particular right at all. According to De Waal,⁶⁷ the right to religious beliefs also includes the right to reject certain beliefs.⁶⁸ In the case of *S v Lawrence*,⁶⁹ Chaskalson P referred to a Canadian decision⁷⁰ in which Dickson CJC defined 'freedom of religion' as follows:

62 The Constitution, 1996.

63 Act 38 of 2005.

64 See also ss 30 and 31 of the Constitution.

65 See (n 51) 461.

66 Section 15(1) of the Constitution.

67 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta 2005) 338.

68 *ibid.*

69 1997 (4) SA 1176 (CC) para 92. Also, see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 [CC] para 24.

70 *R v Big M Drug Mart* [1985] 1 SCR 295 at 336.

The right to entertain such religious beliefs as a person chooses; the right to declare religious belief openly and without fear and hindrance or reprisal ...⁷¹

Dickson CJC went on to state that:

Freedom is primarily characterised by the absence of coercion or constraints... subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁷²

The underlying principle highlighted here is that a person is free to exercise a choice as long as it does not conflict with the rights of others.

The Children's Act 38 of 2005

In terms of this Act and, in particular section 12(8), the circumcision of male children under the age of 16 is prohibited, except when:

(a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; and

(b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.

In terms of subsection (9), the circumcision of male children older than 16 may be performed only:

(a) if the child has given consent to the circumcision in the prescribed manner;

(b) after proper counselling of the child; and

(c) in the manner prescribed.

Subsection (10) provides a checklist to be considered when a child of 16 years or older consents to circumcision. The list includes reference to the child's age, level of maturity and stage of development. Every male child has the right to refuse circumcision.

71 *R v Big M Drug Mart* (n 71).

72 *Id* 336–337.

The alarmingly high death toll at various initiation schools in South Africa has prompted the government to call for this custom to be regulated. Although some provinces⁷³ appear to have heeded the call to regulate circumcisions, and have made legislative interventions, it seems that they have done little more than to reproduce the Children's Act and to require that initiation schools be registered or be approved before they can perform operations.⁷⁴ All the relevant legislation requires parental consent for minors younger than 16 to undergo circumcision.

Despite the clear terms of the Act against forced circumcisions and the provision of 16 years as the legitimate age of consent for male circumcision, reports of forceful circumcisions still feature daily in South Africa and elsewhere in the world.⁷⁵ As a result, the child's right to either refuse or to consent to circumcision is simply ignored. Just a few years ago, in 2013, the deaths of 29 initiates at initiation schools in Mpumalanga was widely publicised. According to media reports, the Mpumalanga Health Department failed to intervene. Instead, it cited cultural sensitivities as the reason for their failure to act, thus prompting the National Education Health and Allied Workers Union (Nehawu) to condemn the comment as immoral and preposterous.⁷⁶ Although

73 Mpumalanga [Mpumalanga Ingoma Bill, 2011], Eastern Cape [The Application of the Health Standards in Traditional Circumcision Act 6 of 2001], Free State [Free State Initiation School Health Act 1 of 2004] and Limpopo [Northern Province Circumcision Act 6 of 2001].

74 In Limpopo the Premier must approve; in Mpumalanga the king or queen or the inkosi must approve.

75 'Bonani Yamani, now 21, was abducted from his home shortly before dawn on 3 March 2007. He was tied up, taken to the bush, circumcised against his will, and then forced to eat the skin taken from his penis.' Bonani applied to the court for it to declare his ordeal unfair discrimination and to restrain traditional leaders from encouraging it. In response, Contralesa Chief Phatekile Holomisa maintained that ostracising is a way of forcing those refusing to undergo the ritual and, further, that Bonani's going to the court was just a waste of time. However, the Equality Court found that ostracising of defiant males to be amounting to an unfair discrimination and ordered Contralesa to apologise and promise to stop forceful circumcision in order to align the practice with the Children's Act. Ella Smook, 'Forced Circumcision: Son Takes Parents On' (*IOL News* 11 August 2009) <<http://www.iol.co.za/news/south-africa/forced-circumcision-son-takes-parents-on-1.454711>> accessed 22 August 2017. See also Wanjiru Kamau-Rutenberg, 'Watu Wazima: A Gender Analysis of Forced Male Circumcisions during Kenya's Post-election Violence' (Africanarguments.org 17 July 2009) <http://www.csls.ox.ac.uk/documents/Kamau_-_Rutenberg_-_Gendered_look_at_Kenya_PEV_OTJR.pdf> accessed 17 May 2016.

76 Sizwe Pamla, 'NEHAWU Condemns the Death of Twenty Three {23} Initiates in Mpumalanga' (*Politicsweb* 19 May 2013) <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=377614&sn=Detail>> accessed 22 August 2017. Another news reporter made the following claims: 'that the MEC of Health in Mpumalanga was not prepared to investigate the death of initiates because she is a woman and police, on the other hand, refused to investigate without seeing traditional leaders'. eNCA, 'Update:

Mpumalanga is reported to be home to some 104 unrecognised initiation schools,⁷⁷ with a recorded 29 deaths, it has failed to secure even a single conviction against the persons responsible for these deaths and malpractices.

According to an article published in the *Mail & Guardian*,⁷⁸ the death toll among initiates for the period 2008–2012 in the Eastern Cape alone was 323. This translates to some 80 deaths per annum and to date, despite the provincial governments' effort (in the Eastern Cape and other provinces) to formulate policies to deal with the problem, it still persists. In their research on 'Challenges facing traditional male circumcision in the Eastern Cape', Douglas and Nyembezi's circumcision statistics between 2006 and 2013 indicates a total of 19 547 illegal initiates, 5 035 hospital admissions, 453 deaths and 214 amputations as a result of involuntary circumcision.⁷⁹

Uganda

Apart from its membership of the international organisations supporting and promoting respect for human rights, Uganda also has domestic laws protecting human rights in general, and children's rights in particular.⁸⁰ The rights of children are prescribed in both the Constitution⁸¹ and the Children's Act Chapter 59 of 1997. This Act provides a legal and institutional framework for the care and protection of children consistently with the Constitution. In terms of the Children's Act, the responsibility for the care and protection of the child lies with the parent(s). In article 5(2), the Act states that any person having custody of a child shall protect the child from discrimination, violence, abuse and neglect. In addition, article 7 provides that it shall be unlawful to subject a child to social or customary practices that are harmful to the child's health. The protection of the child from violence and/or any act(s) or omission(s) that violate human rights is likewise enforced by this law.

Tradition Hampers Initiation Deaths Probe' (*eNCA* 17 May 2013) <<http://www.enca.com/south-africa/woman-hampers-initiation-death-investigations>> accessed 22 August 2017.

77 Sapa, 'Circumcision is a Money Spinner: Motsoaledi' (*Sowetan* 31 May 2013) <<http://www.sowetanlive.co.za/news/2013/05/31/circumcision-is-a-money-spinner-motsoaledi>> accessed 8 July 2013.

78 Faranaaz Parker, 'Deadly initiation: Govt Lacks Numbers on Circumcision Deaths' (*Mail & Guardian* 9 June 2013) <<http://mg.co.za/article/2013-06-09-initiation-carnage-circumcision-deaths-have-no-numbers-says-govt>> accessed 22 August 2017.

79 See Mbuyiselo Douglas and Anam Nyembezi, 'Challenges Facing Traditional Male Circumcision in the Eastern Cape' (Human Sciences Research Council 2015).

80 See, for example, the Children's Act, 1997 and Prohibition of Female Genital Mutilation Act, 2010.

81 The Constitution of the Republic of Uganda, 1995.

In addition to the above, Uganda has a policy on male circumcision that is based on the principles of respect for human rights and voluntariness.⁸² However, it has also experienced its share of atrocities related to forced circumcisions. Circumcision is often forced on males on the basis of its health and religious benefits, but also for some rather obscure and unscientific reasons. It has been reported, for example, that compulsory circumcision is required of any male contemplating a sexual or marital relationship with a woman from the Bamasaba tribe in the town of Mbale, in some instances involving boys as young as 15 years old. It has also been reported that ‘in pursuit of a healthy community’, men are at times stopped in the street and forced to expose their genitals in order to determine whether or not they are graduates of the initiation schools.⁸³ In one incident reported by a local newspaper, a man was photographed fleeing naked from a group of 50 men in an attempt to escape forced public circumcision.

What is happening in Mbale should not be viewed as isolated incidents, because similar practices have been reported in other communities in Uganda. For example, in another part of Uganda called the Bagishu, it has been reported that the elders are tasked with seeking out boys of 15 years and older who are trying to avoid circumcision. If caught, they are stripped naked and circumcised in public. According to reports, even women assist in these forced circumcisions by reporting uncircumcised males to the tribal elders.⁸⁴

Kenya

According to statistics released in 2008, Kenya is one of the leading African countries where, in harmony with the recommendations of the World Health Organization (WHO), male circumcision has been declared a priority strategy in the fight against HIV. Reportedly some 85 per cent of Kenyan males submitted to circumcision in 2010.⁸⁵ But according to Wangechi,⁸⁶ forced circumcisions are also used to make

82 Government of Uganda Ministry of Health, ‘Safe Male Circumcision Policy’ <http://malecircumcision.org/programs/documents/Uganda_MC_policy_JAN10.pdf> accessed 8 July 2013.

83 Godfrey Olukya, ‘Storm Brews over Forced Circumcision in Uganda on 20 June 2012.’ (*The Africa Report* 20 June 2012) <<http://www.theafricareport.com/East-Horn-Africa/storm-brews-over-forced-circumcision-in-uganda.html>> accessed 8 July 2013.

84 See VOA, ‘Ugandan Ethnic Group Criticized for Forced Male Circumcision’ (*VOA* 1 November 2009) <<https://www.voanews.com/a/a-13-2007-03-23-voa58/347562.html>> accessed 22 August 2017.

85 Editorial Staff, ‘Tracking the male circumcision rollout’ (*IRIN* 2 March 2010) <<http://www.irinnews.org/report/88286/africa-tracking-the-male-circumcision-rollout>> accessed 8 July 2013.

86 The ‘political and ethnic significance’ of forced male circumcision in the Kenyan context, she said, makes it much more than just circumcision. ‘It was intended as an expression of political and ethnic

political statements or to demonstrate political dominance. In this regard, male circumcision not only serves a cultural purpose but is used to silence political opponents. Relating how her husband was forcibly circumcised, Caroline Anyango commented that he was running for councillorship under Raila Odinga's Orange Democratic Movement when a group of about 20 men, in full view of his family, including the children, circumcised her husband with a panga or machete.⁸⁷ This individual's right to be different and to have a different political opinion was therefore unlawfully suppressed by the threat of a forced circumcision.

Uncircumcised men are subjected to inhumane treatment and stigmatisation, and circumcised Kenyans insist that uncircumcised men are not adults.⁸⁸ What this means is that a man remains a child until he is circumcised. Accordingly, he is excluded from important discussions, including matters such as inheritance and property issues—seniority in terms of age amounts to nothing: the only recognised qualification is circumcision. Sadly, there still is no law against forced circumcisions in Kenya.

Efforts were made to request the International Criminal Court (ICC) to criminalise forced circumcisions in Kenya as a form of sexual violence, but they failed.⁸⁹

Societal Responses to Forced Circumcisions

Attempts at reporting forced circumcisions in South Africa have only met with resistance. Those reporting such atrocities are either met with a blunt refusal to take action or they are simply told that circumcision is an inescapable requirement. The landmark case of Bonani Yamani⁹⁰ revolved around a young boy from Bisho in the Eastern Cape who was put under constant pressure to undergo circumcision but persistently refused to do so, defending his stance by referring to his affiliation to a

domination by one group over the other, and was intended to diminish the cultural identity of Luo men.' Robbie Corey-Boulet, 'In Kenya, Forced Male Circumcision and a Struggle for Justice' (*The Atlantic* 1 August 2011) <<http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>> accessed 8 July 2013.

87 See Corey-Boulet (n 86).

88 See Kamau-Rutenberg (n 75).

89 Editorial Staff, 'Plea to ICC over Forced Male Circumcision' (*IRIN* 25 April 2011) <<http://www.irinnews.org/report/92564/kenya-plea-to-icc-over-forced-male-circumcision>> accessed 8 July 2013.

90 *Justice Alliance of South Africa and Bonani Yamani v Lindile Yamani, Eastern Cape House of Traditional Leaders Chairperson, Eastern Cape CONTRALESA Chairperson, MEC for Health EC and MEC for Local Government, Housing and Traditional Affairs, EC*, 2009. Case No. 1/2008, Equality Court, Eastern Cape High Court (Bisho) <<http://justicealliance.co.za/download/cc-2009-10-26%20Official%20Judgement%20Bonani%20case.pdf>> accessed 8 July 2013.

particular Christian religion. Despite this, his parents continued to put pressure on him. Eventually Bonani had no choice but to leave home and to turn to the police for assistance, but the ‘men in blue’ simply refused to help him. His fundamental right to legal protection was denied, ironically by the very people who had been trained to ensure his protection. Ultimately Bonani succumbed to pressure and secretly went to hospital to be circumcised. In doing so, he was effectively forced to abandon his personal religious conviction, which is protected by the Constitution.⁹¹

Despite the fact that Bonani had already been forced to compromise his religious convictions by getting circumcised, he was rudely awakened one morning by a group of about ten men who overpowered him, tied him up and circumcised him for a second time. He tried in vain to convince them that he had already been circumcised, even exposing his genitals as proof of this. Instead of heeding his appeals they simply mocked him and proceeded to circumcise him again and then forced what they believed to be his foreskin, into his mouth and forced him to eat his own flesh. (This amounts to cannibalism.) Angered by this ordeal, and with the assistance of the Justice Alliance of South Africa (JASA), he appealed to the Equality Court. The Court required the perpetrators to apologise to Bonani and to abstain from similar unlawful acts in future.

The unlawful actions engaged in by both Bonani’s immediate family and the community at large bears upon several statutory remedies: for example, the potential for taking criminal action against the assailants as provided for in the Criminal Procedure Act,⁹² and the protection of equality and against discrimination, as guaranteed in the Promotion of Equality and Prevention of Unfair Discrimination Act.⁹³

Writing about this incident, Smyth⁹⁴ proposed the integration of the *Ubuntu* principle in this traditional practice, and where necessary to adapt and change it in order to ensure that human rights are duly respected.

Regional and International Instruments on Human Rights

There are a number of regional and international instruments that pertain to the protection of human rights and which can be invoked to protect individuals against

91 Section 15(1) provides everyone with the right to freedom of conscience, religion, thought, belief and opinion, and subsection (2) speaks about religious observances ... and (c) further says that, attendance [to such observance] is free and voluntary.

92 Act 51 of 1977.

93 Act 4 of 2000.

94 Smyth (n 56).

violations of their rights in the case of involuntary circumcision. Two of these instruments are described below.

(a) African Charter on Human and People's Rights (The African Charter (ACHPR), or *Banjul*)

The African Charter is a human rights instrument adopted in 1981 by the African Union (AU), formerly known as the Organisation of African Union (OAU). The African Charter recognises and makes special provision for the protection of a wide range of human rights, including that of individuals, both in their own right or as a community or a group of people. One of the rights provided for in the African Charter is the right to freedom of religion⁹⁵ and the concomitant duty⁹⁶ of everyone to respect and consider their fellow human beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

(b) The Universal Declaration on Human Rights by the World's Religions (UDHRWR)

The right of everyone to practise the religion of their own choice and not to be coerced in their exercise of this right, is provided for in article 18, which states:

- (1) There shall be no compulsion in religion. It is a matter of choice.
- (2) Everyone has the right to retain one's religion and to change one's religion.
- (3) Everyone has the duty to promote peace and tolerance among different religions and ideologies.

All in all, there are sufficient laws at the international, regional and national levels which seek to promote and protect religion, tradition and culture. What needs to be considered is how governments ensure the implementation of these laws and put in place the monitoring mechanisms that must ensue.

95 Article 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

96 Article 28.

Conclusion

Initiation schools are important part of African customs and there is a greater need to preserve and protect them from the people who run illegal schools and in doing so violate people's rights and bring this prestigious custom into disrepute. In essence, male circumcision is not a violation of human rights in itself. On the contrary, the evidence indicates that it enhances the quality of human life. It is therefore important to view male circumcisions from this perspective, unless there is clear evidence of abuse, as illustrated in some of the scenarios related above. In instances of the abuse of this practice, it is imperative that careful monitoring and regulatory frameworks be put in place to preserve and protect citizens from unscrupulous individuals who use male circumcision as an opportunity for financial gain, exploitation that, in turn, leads to the violation of human rights. The main argument presented here is that the practice of forced circumcisions wrongfully and unlawfully infringes the fundamental rights of humans. It is unfortunate that the authorities are allowing such abuse to continue, with very little being done to curb what is a persistent problem despite the existence of regulatory policies and legal frameworks.

In view of the above, it is imperative that the provincial governments in South Africa be required to regulate initiation schools. Any person who wishes to operate an initiation school, as it is the case in the Limpopo province, should be required to apply for a permit and meet certain statutory requirements. Accordingly, traditional leaders should be required to apply to the relevant district offices of the department responsible for traditional affairs, in the prescribed format, for a permit to maintain an initiation school, and such an application must be accompanied by:

documents as prescribed;

- (a)
- (b) a certificate by an environmental officer; and
- (c) a certificate by a health practitioner.⁹⁷

Adherence to such regulations must be compulsory, and should be enforced by the police as well as by the prosecuting authorities. Severe action against transgressors will

⁹⁷ Limpopo Initiation Schools Bill, 2014 s 3(1).

prevent or at least reduce the high number of deaths from circumcisions that occur annually. The practice of male circumcision has come a long way and we cannot afford to have it discouraged at this stage, particularly in the wake of the compelling evidence about its vital contribution to the fight against sexually transmitted diseases such as HIV/AIDS. We simply cannot afford to ‘throw the baby out with the bath water’. It is important that governments should promote safe and voluntary male circumcisions consistent with the policies and recommendations of the WHO, and strongly condemn involuntary or forced circumcisions. Specialised units within the police force should be formed and officials should be both educated about how to respond to complaints of forced circumcisions and empowered to prevent future abuse.

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