

# “A man is not a man unless ...”: Male circumcision – A legal problem?

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## Introduction

It is obviously a very common perception that more is needed for becoming a societally accepted human being than to be born. While the general law of modern states confirm legal personality with birth, and only limits the legal capacity before reaching the age of maturity determined by a clearly set year after birth,<sup>2</sup> societal practices reflect a different approach. All sorts of initiation rites have developed which a human being is expected to undergo before s/he reaches the status of societal acceptance.<sup>3</sup> Some of the initiation practices are applied immediately after birth; others may follow at puberty or even later. Some do not touch on the physical integrity of the human being, such as the rite of baptism; others affect the physical status of the person to be initiated. Some are applied in a time-limited ceremonial act; others are projects that cover a certain period of time in which education is provided on matters of importance in the life of the adult – to which the initiated will belong after passing specific tests. Some are generally applied, i.e. irrespective of the gender of the person, such as the mentioned rite of baptism; some are gender-specific, informed by an often very stereotyped role a woman/man is expected to fulfil in the society concerned. Thus, that a female human being has to safeguard her virginity until given to marry requires measures to protect virginity. That a male human being has to learn to be brave in the struggle of life requires exercising the exposure to physical pain.

The reaction of law to the various initiation practices differs from society to society. In a society based on religion, for example, the fact that a human being is born into the religion of that society is not seen to be in conflict with the rights of that person.<sup>4</sup> Secular societies, on the other hand, provide for the possibility for persons below the age of maturity to

1 The following contribution is based on research by Moudi Hangula, who is currently completing her LLB at the University of Namibia in Windhoek. The research on male circumcision in Namibia formed part of her LLB dissertation being supervised by Prof. Manfred Hinz. It was during the discussion of Hangula's research project that the idea arose to write an article on male circumcision for the current volume. Hangula agreed that Hinz would write the article based on her research. In this sense, Hangula is the co-author of this article, although the responsibility for its content lies with Hinz. Hangula conducted her interviews referred to in this paper in June and July 2009.

2 Cf. Davel & Jordaan (2005:1ff); Robinson (1997:1ff).

3 Cf. Barfield (1999).

4 On the contrary: to be born into the religion may even be qualified as a God-given act.

decide whether or not they want to be associated with a religious denomination in which they were made to participate. While perceptions in some societies leave no doubt that female circumcision is obligatory for young females, there are others which have laws in place in accordance with which the application of female circumcision – or, to be more precise, female genital mutilation – is a criminal offence.

Indeed, female circumcision is widely assessed as a violation of the rights of women, while male circumcision is seen by many as legally irrelevant. Practised “since time immemorial”, as people say, and indeed, in communities with very different cultural backgrounds, male circumcision is basically accepted as a cultural normality that offers no need to consider it in legal terms.

However, a closer look reveals that male circumcision can also have legal implications, particularly when the decision to circumcise does not come from the person to be circumcised, but from somebody else – the family, the parents, the community – who may put immense pressure on the parties involved to conform and leaves no room for a decision not to follow the norm. “A man is not a man unless ...” expresses this kind of pressure, which awards the need to circumcise the quality of law – with which one just has to abide.

Moreover, there is evidence that male circumcision may lead to physical – and with this, to mental – harm, which may be beyond what law can tolerate. However, the assessment of the evidence is burdened by the fact that male circumcision is not a topic that is freely spoken about. The problem is not to argue whether or not circumcision may protect men from HIV infection,<sup>5</sup> but rather to talk about practices – or, rather, malpractices – in conducting male circumcision. A very extraordinary exemption to the tabooing of male circumcision as an applied practice is the recently published book, *A man who is not a man*, by Thando Mgqolozana, a South African Xhosa man who decided to write about his failed circumcision.<sup>6</sup> “This story is about I came to have an abnormal penis” is the sentence with which Mgqolozana opens the prologue to his book.<sup>7</sup>

So what is the situation in Namibia? It is common knowledge that some communities here, mainly the *Otjiherero*-speaking ones, still practise male circumcision, while others practised it in the past, but have abandoned it. Not much is known beyond this. Nor is much known about cases of failed circumcision, probably because not many people are ready to speak about it. It was, therefore, not easy to collect information about the state of affairs in Namibia. Some of the informants, even some who were medical doctors,

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5 An issue also being explored in Namibia. For example, a study on male circumcision in Namibia commissioned by the Ministry of Health and Social Services is so far the only recent resource on the topic (PWC 2008). A Male Circumcision Task Force was established to coordinate the further exploration relating to the use of male circumcision as a means of protection against HIV infections.

6 Mgqolozana (2009); see here also Meintjies (1998).

7 Mgqolozana (2009:1).

requested anonymity. Health administration officials were similarly reluctant to allow access to statistical materials in their possession.<sup>8</sup> This limitation has to be taken into account when reading the content of this submission.

The next part of the article will give an account of male circumcision in Namibia, while the third section will draw preliminary legal consequences from this account. The final part will draw some conclusions for the way ahead in Namibia.

## The practice of male circumcision in Namibia

### Circumcision in traditional perspective

The question as to when male circumcision started being practised is still open for discussion. Some writers state that the practice can be dated back by some 4,000 to 5,000 years, to the time before Abraham’s covenant with God to circumcise. The Old Testament, in Genesis 17:11, reads as follows:

And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.

The preliminary results of the 2006 Demographic Health Services of Namibia<sup>9</sup> inform us that approximately 21% of males between the ages of 15 and 49 have been circumcised.<sup>10</sup> The majority of circumcisions take place amongst the *OvaHerero*. In 2007 an assessment at four hospitals, namely at Andara, Oshikuku, Nyangana and Rehoboth revealed that circumcision was a very limited practice, amounting to some 20 circumcisions per annum, applied to people between 1 and 68 years of age.<sup>11</sup> No information was available on the number of traditional circumcisers in Namibia.<sup>12</sup>

Several interviews revealed that there were quite a number of cases of failed circumcisions. One interviewee, a social worker at the Ministry of Gender Equality and Child Welfare, was very clear in demanding that circumcision should not be allowed on the basis of parental consent, but on the basis of the consent of the child.<sup>13</sup> The reason for this view was that the interviewee claimed to have been “mutilated” when circumcised.

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8 The reluctance to give information was certainly also caused by the fact that many men did not feel comfortable discussing problems affecting their masculinity with a female researcher.

9 As quoted in PWC (2008:4).

10 (ibid.). It is interesting to note that highest number of circumcisions occur in the Kunene and Omaheke Regions, followed by Otjozondjupa. Next in line are the Erongo, Kavango, Khomas and Oshana Regions. At a relatively low level are the Caprivi, Hardap, Karas, Omusati and Oshikoto Regions, The Ohangwena Region shows a figure close to zero.

11 (ibid.:27).

12 The government project to regulate the profession of traditional healers and the treatments applied by them has not produced results, even after the preparation of a Traditional Healers Bill some years ago. It is not known why this important project has not been pursued.

13 Interview by Moudi Hangula; interviewee requested anonymity.

Another interviewee, of Himba origin,<sup>14</sup> stated that he was “deformed” owing to a failed circumcision. He said that although his private parts were functional, the shape of his penis had been affected. He said he felt quite embarrassed when bathing with other males. This interviewee, who is now about 23 years old, estimated that he was between 7 and 13 when he was circumcised.

A medical doctor in the Roman Catholic Hospital in Windhoek<sup>15</sup> informed the investigating author that he had had two cases of boys who had not been properly circumcised by a medical professional. The interviewee had re-circumcised the two boys. A urologist in Windhoek<sup>16</sup> focused his comments on mistakes committed by traditional circumcisers. He stated that if a traditional circumciser lacked experience, complications could arise. The doctor referred to one particular traditional practitioner, who had circumcised children around Okakarara; he retired and was replaced by an inexperienced circumciser. As a result, several children suffered from complications caused by the latter practitioner. Among the medical complications was a child developed a fistula. According to the interviewee, the penis of a circumcised man was less sensitive because certain nerves were removed with the foreskin upon circumcision.

The same doctor also explained that the removal of the foreskin by circumcision had a purpose. Its removal may lead to dysfunction – even as far as affecting the capacity for sexual intercourse. The doctor therefore suggested that, if circumcision were to be carried at all, it should be performed as it is practised in the Philippines. There, the practice is known as the *dorsal slit*, and results in a very limited removal of skin. This ensures that all nerve endings remain, especially in the very sensitive areas of the penis. The Philippine method also reduced other health risks, according to the interviewee, in that it did not affect the blood vessels at the base of the penis. He explained that only a very minimal part of the skin was cut from the foreskin of the penis. The urologist also expressed his reluctance to circumcise any man that had not yet had sexual intercourse. It was also the specialist's view that parents should not be given the authority to decide whether or not a child should be circumcised.

A nurse at the Rundu State Hospital submitted to the investigating author<sup>17</sup> that there had only been a few reported cases of failed traditional circumcision. According to this interviewee, only one or two cases a year occurred where male children came to hospital because of bleeding after being circumcised. The interviewee conceded that failed circumcisions might happen more often, but that people were reluctant to take problems of this nature to the hospital. The hospital also did not keep a record of failed

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14 Interview by Moudi Hangula; interviewee requested anonymity.

15 Dr BS Haufiku; interviewed by Moudi Hangula.

16 Dr Hagen EA Förtsch; interviewed by Moudi Hangula.

17 Mr A Tukondjele; interviewed by Moudi Hangula. The Rundu Hospital was contacted because circumcision is still practised in the Kavango Region, albeit not too often. Attempts to get information from the Gobabis Hospital – which lies at the centre of *OvaHerero* so-called cattle country – were not successful.

circumcisions. In 2009, the interviewee reported that he had encountered one case, the case of an adult male of 20 or 21 years of age, who had been traditionally circumcised and suffered abnormal bleeding as a result.

What are the reasons behind this very widely accepted practice? Is there a general answer possible that applies universally? Circumcision is seen by some as a way to ‘purify’ individuals.<sup>18</sup> Interviews conducted for this research revealed other views as well. The following is an attempt to shed some light on the traditional practice and perception of male circumcision. The primary focus will be on the *OvaHerero* communities, where circumcision is still very prominent. A secondary focus will be on *Oshiwambo*-speaking communities, where circumcision is basically no longer practised.

### **Circumcision in the *Otjiherero* tradition**

Male circumcision has a very particular spiritual meaning for the *OvaHerero*. The *Omusukarise* or *Onganga yo mbazu* – the traditional doctor who performs the operation according to custom – takes away evil spirits away from the boy being circumcised.<sup>19</sup> Evil spirits hinder the development of knowledge of oneself and of God.<sup>20</sup> They also hinder self-control and the understanding of the role of suffering.<sup>21</sup>

Tjitavi Kambausuka, a traditional circumciser, stated in an interview that he became a practitioner after the death of his uncle. He explained that he was committed to practising circumcision in an “undiluted” manner, “unspoilt” by modern technology.<sup>22</sup> He stressed that the pain the child endured during circumcision was intended to teach and prepare it to face “greater dangers” in life.<sup>23</sup> Kambausuka said he complied with the demands of hygiene by washing his hands with salt water and using different blades for each child.<sup>24</sup> Katuutire Kaura, a Member of Parliament and of *Otjiherero* origin, is reported to have stated that –<sup>25</sup>

... the circumcision of the Herero children under those circumstances and those rituals is what makes the Herero people a people. If you remove them, they will be like an elephant without a trunk.

Uncircumcised boys will, according to Kaura, not easily be accepted into society and will have difficulty bonding with playmates. Uncircumcised men, according to Kambausuka,

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18 Mapaire (2005:75).

19 (ibid.:78).

20 (ibid.:78).

21 (ibid.:75).

22 Ntinda (1997:13).

23 (ibid.).

24 However, medical advice is that this is not enough to prevent HIV and bacteria. Cf. Ntinda (1997:14).

25 Quoted in Ntinda (1997:13).

may find it difficult to have sex with *OvaHerero* women because women reportedly fear pain from sex with such men.<sup>26</sup>

In his research on male circumcision in Otjimbingwe, Mapaure noted that the practice of circumcision had been observed “since time immemorial”.<sup>27</sup> *Okusukara*, which is the *OtjiHerero* term for circumcision, is usually performed below the age of 5. The child's parents take him to the traditional circumciser, where he is placed on a table with his extremities fastened or held down. A variety of surgical instruments – probes, clamps, a scalpel – are used to grasp the foreskin, separate it from the glans, slit it, stretch it, crush it, and eventually amputate it.<sup>28</sup> In the olden days, a knife known as an *okuruuyyo* was used in the surgical removal of the foreskin. Nowadays, a knife or razor is used.<sup>29</sup>

According to the literature,<sup>30</sup> traditional circumcisers know certain trees with properties that assist the healing process after a circumcision. It is said that, when the wound starts healing, it needs to be wiped with warm water and *ekara romugondo* – a paste made from the leaves of certain trees – is to be applied. If one uses the *ekara romugondo* paste, the child's wound will not become septic. Should the wound nevertheless become septic, another medication called *omujapu* is applied to absorb the fluid in the wound. As a general rule, however, *ekara romugondo* is used in winter, whilst *omujapu* is used in autumn.

In conducting the research on the practice and perception of circumcision amongst the *OvaHerero*, additional attention was paid to the *Ovahimba* of the Kunene Region. Almost all male *Ovahimba* have undergone circumcision. Circumcision is usually performed between the age of 1 and 2 years. In exceptional cases one may find a Himba boy having been circumcised at an older age, for example, if he did not grow up with his father or grandfather. Circumcisions among the *Ovahimba* are carried out at an isolated place during the winter. A well-known Himba traditional leader who preferred to remain anonymous summarised the reasons for circumcision, as follows:<sup>31</sup>

- Circumcision served a health purpose: It prevented the spread of sexually transmitted diseases
- Circumcision served a hygienic purpose: The *Ovahimba* were semi-nomadic, and spent up to a month in the wilderness just herding their livestock; as a result, they did not always have access to water, and
- Circumcision served a personal purpose: It assisted in prolonging the sexual experience, as the nerves on the foreskin had been removed.

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26 As reported in PWC (2008:19f).

27 Mapaure (2005:76).

28 (ibid.:77).

29 (ibid.:78).

30 Ntinda (1997:14).

31 The interview requested by Moudi Hangula had to be conducted by a male assistant, as the chief was not prepared to speak to a woman about circumcision.

The Chief did not appreciate<sup>32</sup> being asked whether it would not be appropriate to consider the need of consent by the person to be circumcised. He responded that the practice of circumcision had to be maintained in the way that had been done by their forefathers. He said that circumcision was “compulsory”: there was no room for consent or dissent, especially “when you reside with your father or grandfather; ... Himba custom tells you, *You are not a man until you are circumcised*”.

### **Circumcision in the *Oshiwambo* tradition**

Owambo communities used to practise circumcision. The German writer Hermann Tönjes informs us that circumcision was applied to adults, but only to the nobility, the wealthy, and to those in high office serving the King.<sup>33</sup> Traditional circumcisers used to charge substantial fees for their services. There were also some cases of death due to circumcision. Young men who qualified for circumcision (*etanda* in *Oshiwambo*) were escorted by their fathers to the place where the circumcision was to take place, known as *oshombo* or *ontanda*. Circumcision was seen to be a physical and spiritual intervention. In terms of the latter, circumcision linked the young man to the spiritual world of his ancestors to secure his fertility.

The various *Owambo* communities gradually abandoned the practice of circumcision, however.<sup>34</sup> The first to discontinue the practice were the Ondonga community, with the rest following later. In Oukwanyama, the last King to be circumcised was *Ohamba* Haimbili ya Haufiku. King Haufiku died around 1860.<sup>35</sup> His successor, King Mweshipandeka, refused to undergo circumcision – with the result that the members of his community followed his example.<sup>36</sup> In other parts of Owambo, the practice of circumcision was more or less abandoned, partly due to colonial intervention, and partly to the instruction by missionaries, who objected to the practice.<sup>37</sup> Looking at the statistical data available, the practice of circumcision has practically disappeared in Oukwanyama, whereas it has survived in other parts of Owambo at a relatively low level.<sup>38</sup>

### **Legal observations**

The information on the practice of circumcision in Namibia gives rise to a number of legal questions:

- Is circumcision as such a treatment that would qualify as “cruel” in terms of Article 8 of the Namibian Constitution, or does it enjoy constitutional acceptance

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32 His initial response was, “Why are you asking me these questions?”

33 Tönjes (1911:47), but also PWC (2008:22ff) and also a report in *The Namibian*, 2 February 2001.

34 Cf. PWC (2008:22ff).

35 Nampala & Shigwedha (2006:49).

36 (*ibid.*:50).

37 (*ibid.*:92).

38 See PWC (2008:13).

in terms of Articles 19 and 66(1) of the Constitution, meaning that, although circumcision is an intervention in terms of the physical integrity of a person, such intervention would be of minor relevance compared to the importance of the right to culture?

- Are rules of customary law with the compulsory obligation to undergo circumcision – at whatever age – acceptable under the Constitution?
- Is parental consent a requirement, thus overruling compulsory customary practices?
- Would the legal principle of the best interest of the child require that consent of the person to be circumcised is a condition for the application of circumcision?
- Should such condition be the case, what would this mean for children who cannot yet express themselves?
- What possibility exists to change the relevant customary laws, and what are the chances of implementing such changes?
- What could be done to limit the risks of failed circumcisions, in particular with respect to improving the traditional circumciser's knowledge of sanitary requirements?

This article is not the place for the comprehensive analysis required for gaining convincing answers to the above questions or others that could be added to the list.<sup>39</sup> Instead, the paper will concentrate on one issue that appears to be central – and, to some extent, also underlies the listed questions, i.e. the issue of consent of the person to be circumcised. Should we come to conclude that consent is, indeed, central in assessing the practice of circumcision, the ground will be prepared to approach the rest of the questions.

In investigating the relevance of consent, we will first look at consent in general terms before turning to the application of circumcision at an age where the person to be circumcised does not have the capacity to express himself.

Courts of law have increasingly emphasised the strong interest which human beings have in being free from a non-consensual invasion of their bodily integrity. Exceptions are cases of emergencies posing threats to life or danger of grievous bodily harm, self-defence, and other comparable situations. If no consent exists, even minor physical contact may give rise to liability. This ensures the bodily integrity as outlined in Article 8 of the Namibian Constitution, as was discussed by the Supreme Court of Namibia in the case of *Namundjepo & Others v Commanding Officer, Windhoek Prison*.<sup>40</sup>

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39 There is a vast amount of literature available with arguments against male circumcision. For information on references, see the National Organisation of Circumcision Information Resource Centre ([www.noirc.org](http://www.noirc.org)); Doctors Opposing Circumcision ([www.doctorsopposingcircumcision.org](http://www.doctorsopposingcircumcision.org)); Male Circumcision Guide for Doctors, Parents, Adults and Teens ([www.circinfo.net](http://www.circinfo.net)). Cf. also Bennett (1999:108ff), who discusses initiation practices in general in terms of human rights.

40 2000 (6) BCLR 671 (NmSC).

What is *consent*? It is an act of reason, accompanied by deliberation: the mind weighing the good and the evil side of an event. This dimension of consent is what the legal concept of *informed consent* entails. Informed consent is a requirement in medical treatment and surgery. *Informed consent* is an agreement a medical patient gives to a procedure after the risks involved have been disclosed to him/her. Thus, consent presupposes physical and mental power and their free exercise. Informed consent protects the patient by providing him or her with the required information to make an informed decision; informed consent also protects the doctor from financial liability, provided that the treatment is done in accordance with the prevailing standard of care.

Who gives consent? To what extent can persons below the age of maturity be expected to consent to something? The general rule is that when patients are incapable of giving their consent, parents or guardians are there to consent on behalf of the incompetent person and, in the case of children, in their best interest.<sup>41</sup>

The South African Children’s Act<sup>42</sup> appears to be a piece of legislation that comes closest to applying the concept of *informed consent* to the practice of circumcision. Section 12(8) of the Act prohibits the circumcision of children under the age of 16, except when the circumcision is performed for religious purposes and in accordance with the practices of the religion concerned and in the manner prescribed, or for medical reasons on the recommendation of a medical practitioner. Section 12(9) states that a male child over the age of 16 may only be circumcised after he has given consent to the circumcision in the prescribed manner, and after proper counselling. In consideration of the child’s age, maturity and stage of development, every child has the right to refuse circumcision.<sup>43</sup>

In other words, the Act concedes to Muslims and Jews the right to perform circumcisions at birth or immediately thereafter, while circumcision for customary and cultural reasons as practised by, for example, *Otjiherero*-speaking communities, would not be permitted, at least not when following the widely accepted distinction between religious practices in terms of Christianity, Islam or Judaism on the one hand, and African customary practices, called *cultural practices*, that are distinct from religion – the latter, of course, being debatable – on the other.<sup>44</sup>

The Application of Health Standards in Traditional Circumcision Act (Eastern Cape)<sup>45</sup> introduced certain health standards to be maintained in the performance of circumcision according to the customs applied in the Eastern Cape Province of South Africa. This Act appears to be of significant importance as it is one of the few, if not only, to attempt to

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41 The concept of *best interest of the child* also enjoys constitutional recognition; see Article 15(1) of the Namibian Constitution.

42 No. 38 of 2005.

43 Section 12(10) of the Act.

44 Here, see the approach on non-state law in South Africa in Bekker et al. (2006).

45 No. 6 of 2001.

provide for certain requirements to be met before a person can legally be circumcised.<sup>46</sup> The Act applies to traditional practices of circumcision in the broadest possible sense, as is apparent from the definition of *traditional practice* in the definition section of the Act. According to the Act, *traditional practice* includes “any practice according to custom, religion or any rules of similar nature”.<sup>47</sup> Only medical practitioners have the authority to perform circumcisions: others need permission from medical officers.<sup>48</sup> In determining the requirements for such permissions, the Act focuses on the need to use appropriate instruments in performing circumcision, and the need to meet certain conditions before permission to circumcise is granted by a medical officer.<sup>49</sup> These conditions include establishing that the person to be circumcised has reached at least the age of 16. If the person is 16 years of age but not yet 18, parents are required to give their consent. In addition to this, the Act regulates the conducting of circumcision and initiation schools.<sup>50</sup>

In accordance with the South African National Health Act,<sup>51</sup> the competent minister may make regulations prescribing the conditions relating to traditional medicinal practices to ensure the health and well-being of persons subjected to such health practices. Health officers are appointed to monitor and enforce compliance with the Act. These officers are empowered to enter premises, including circumcision schools, and to conduct inspections to ensure compliance with the Act. Non-compliance is an offence.<sup>52</sup>

Does the South African example show the way forward? Does it also provide for a solution to the case of Namibia?

## **Conclusion – or: Where do we go from here?**

The concept of *children's rights* is a new one – at least for African societies.<sup>53</sup> The emphasis is on rights: challenging the authority of parents and the care they administer to their children in the latter's best interests, as they define it. Without investigating the amount of legal force this new trend has in terms of binding Namibia domestically to international law, it is obvious that such a trend will face reservations comparable to those experienced when the Married Persons Equality Act<sup>54</sup> was introduced some years ago.

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46 For ease of reference, selected parts of the Act appear in the Appendix to this paper. The research could not trace any other legislative instrument of comparable importance.

47 Section 1 of the Act.

48 Section 4(1) of the Act.

49 See Section 4(2)–(5) of the Act.

50 Section 5.

51 No. 61 of 2004.

52 See sections 86–89 of the Act.

53 See Davel & Jordaan (2005:55ff).

54 No. 1 of 1996; parts of the debate are documented in Hinz (1998:139ff).

Legal provisions such as those enacted in the South African Children’s Act will, in all probability, probably fall on deaf ears in Namibia. This is particularly likely because the culturally determined circumcision practised by *Otjiherero*-speaking communities is applied at an age when rules relating to the consent of the person to be circumcised cannot apply. The Namibian Child Care and Protection Bill, still under revision by the Ministry of Gender Equality and Child Welfare,<sup>55</sup> will change the legal situation in Namibia at least in so far as it emphasises the rights of the child. However, as it currently stands, the Bill has no provision on circumcision. Moreover, the last available version of the Traditional Healers Bill is also silent on this issue, and it is not known how far the latter legislation has progressed.<sup>56</sup>

It is the purpose of this article to plead that such silence be reconsidered. Granted, South Africa’s approach to regulate circumcision as set out in its Children’s Act may not be a viable alternative to what is currently applied in Namibia. However, rules to protect children against any indisputably unhealthy consequences of circumcision – like those against which the National Health Act of South Africa and the Eastern Cape Application of Health Standards in Traditional Circumcision Act seek protection – should be viable in Namibia without affecting the deep cultural foundations of circumcision.

In addition to this, a more open handling of the pros and cons of circumcision could contribute to an increasing awareness about the practice.<sup>57</sup> Heightening awareness could also influence the lawmaking by traditional communities in terms of section 3(3)(c) of the Traditional Authorities Act.<sup>58</sup> Instead of waiting for health-related rules in traditional healers’ legislation, traditional authorities would have all the rights they needed to amend customary law, along with the required provisions to secure the professional conduct of traditional healers and surgeons.<sup>59</sup>

The debates that can be expected to start around issues of this nature may well go beyond that on the hygienic conditions in which traditional circumcision is practised, and extend to the broader challenge of recognising the rights children have, including the right to decide about their bodily integrity. Progress in this respect could prompt changes in perceptions of masculinity according to which “A man is not a man unless ...”, as well as changes in law.<sup>60</sup>

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55 Here, see Hinz & Mapaire (2009:323f).

56 For the sociocultural complexity which governs the background of the project to regulate traditional healers, see Hinz & Patemann [Forthcoming]; LeBeau (2003); Lumpkin (1994).

57 Increased awareness will also be important in view of the attempt to assess male circumcision as a means of protecting oneself against HIV infection.

58 No. 25 of 2000.

59 We refer here to what is currently being pursued in the project to ascertain customary law in Namibia; cf. Hinz (2009a). Phase Two of the project will include the ascertainment of *Otjiherero* customary law.

60 This is what Hinz suggests is a “soft human rights approach”; cf. Hinz (2009b).

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## Appendix

### Application of Health Standards in Traditional Circumcision (Eastern Cape) Act, 6 of 2001

[Extract]

#### *Powers and functions of medical officer*

3. The medical officer must, in addition to any other power and functions entrusted to him or her by this Act, exercise and perform the following powers and functions:
  - (a) Issuing of permissions to circumcise or treat an initiate;
  - (b) Keeping of records and statistics pertaining to circumcision and reporting thereon as prescribed, to the Department; and
  - (c) A right of access to any occasion or instance where circumcision is performed or an initiate is treated.

#### *Permission to perform circumcision*

4.
  - (1) No person, except a medical practitioner, may perform any circumcision in the Province without written permission of the medical officer designated for the area in which the circumcision is to be performed.
  - (2)
    - (a) A person may apply as prescribed for permission to perform circumcision and such permission may not be given unless all the conditions set out in Annexure A of the Schedule have been complied with.
    - (b) A medical officer may, as part of the condition provided in item 7 of Annexure A of the Schedule –
      - (i) disallow the use of a surgical instrument that the traditional surgeon intends to use; and
      - (ii) prescribe or supply a proper surgical instrument where the use of a particular instrument has been disallowed in terms of subparagraph (1).
    - (c) Where a proper surgical instrument has been prescribed or supplied in terms of paragraph (b)(i), the medical officer concerned must demonstrate to, or train, the traditional surgeon as to how the instrument should be used.
  - (3) A medical officer must, in the following manner, present the conditions set out in Annexure A, to the person applying for permission in terms of subsection (2)(a):
    - (a) The medical officer, or any other person assisting such medical officer, and in the presence of the medical officer, must read the conditions in the official language understood by the person applying for permission;

- (b) both the medical officer and the person applying for permission to perform a circumcision, must write their full names and signatures, and the date, on the document containing the conditions.
- (4) A person who has applied must within one month of the date of such application, submit proof of compliance with the conditions referred to in subsection (2), failing which the application of such person shall lapse.
- (5) A person whose application has lapsed as contemplated in subsection (4), is eligible to make a new application for permission to the medical officer concerned, and the provisions of this Act Apply to such person as application for permission is made for the first time.

## **SCHEDULE**

### **ANNEXURE A**

#### **CONDITIONS FOR OBTAINING PERMISSION TO PERFORM CIRCUMCISION**

1. There must be proof in the form of a birth certificate or an identity document that the prospective initiate in respect of whom permission is requested is at least 16 years old, or if the parents of the initiate so specifically request, at least 16 years old.
2. Parental consent must be obtained in respect of a prospective initiate who is under 21 years of age or who has not acquired adulthood, and such consent must be given either by a parent or a guardian of the prospective initiate concerned.
3. A prospective initiate must undergo a pre-circumcision medical examination by a medical doctor. The medical certificate must indicate as to whether the prospective initiate, based on the examination by the medical doctor who must have considered amongst others the medical history of the prospective initiate, is fit to undergo circumcision or not.
4. The traditional surgeon must be known to the parents of the prospective initiate, and must use instruments approved by such parents, or in the case of an orphan by his family, guardian or relatives, unless a medical officer has prescribed another surgical instrument.
5. A traditional surgeon, who is to perform a circumcision within an area falling under a traditional authority, must inform such traditional authority thereof.
6. Where a traditional surgeon does not have the necessary experience to perform a circumcision, he must perform it under the supervision of an experienced traditional surgeon.
7. An instrument used to perform a circumcision on one initiate must not be used again to perform a circumcision on another initiate, and the traditional surgeon must use the instruments supplied by the medical officer where the traditional surgeon has to perform more than one circumcision on more than one initiate but does not have sufficient instruments.

8. The traditional surgeon must keep instruments to be used by him to perform circumcision clean at all times before a circumcision, and shall use any substance prescribed by a medical officer for the sterilisation of the instruments.
9. The traditional surgeon must cooperate at all times with the medical officer concerned in respect of any directive given or decision made by the medical officer under the powers vested in the medical officer by this Act.

Traditional surgeon

Medical officer

Name .....

Signature .....

If initiate is under the age of 21 years

Parent or guardian .....

Date .....

