

Customary practices and children with albinism in Namibia: A constitutional challenge?

Ruusa N Ntinda¹

Introduction

In Africa, many people are affected by albinism, characterised by the lack of pigmentation. Namibia has one of the highest prevalence rates of albinism in the world, with a ratio of one albino in every 3,000 of the country's estimated 2 million people.² In addition to sight problems and cancer risks that come with the condition, albinos are subject to persistent beliefs. In spite of educational campaigns, human sacrifices still occur on the continent and it is not that unusual to find the murder of an albino in the columns of an African newspaper.³

In order for all citizens to embrace and enjoy a diverse cultural heritage, Namibia made provision for the protection of culture and customary law in its Constitution and other legislative acts. With specific regard to the rights of children with albinism, the question is whether they are regarded by law as the same as other children, whether they enjoy the same rights as them, or whether they should be treated in a category on their own.

This paper will focus on various cultural practices and superstitions surrounding children with albinism in Namibia, which stigmatise and discriminate against them on a daily basis. The intention of this article is to find an answer to whether the customary practices in question present a constitutional challenge. To answer this question, the validity of these practices under customary law will be examined and compared with obligations under the Constitution. Thus, the human rights of these children under customary law will be discussed in relation to their right to equality, freedom from discrimination, and affirmative action.

Cultural beliefs, superstitions and albinism

Albinism is a global phenomenon. It occurs in people of all races throughout the world, and involves a deficiency of the pigment melanin. Unlike other continents, however, the original inhabitants of African soil were dark in colour. Hence, if someone was born an

1 Ruusa Ntinda is a person with albinism.

2 *New Era*, 24 October 2008.

3 See <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

albino, his/her whitish skin and hair would stand out in stark contrast to those around them. Due to Namibia's diverse cultural heritage, many traditional names are used to refer to individuals with albinism. These range from *ekihi*,⁴ *otjihenyange*,⁵ *tsirende*,⁶ *ekishi*,⁷ *neyoolile*,⁸ *nghixupulasha*,⁹ *ndoomba ekutu*,¹⁰ *nambalakata*,¹¹ *ethithi*,¹² *etokatoka*,¹³ and *litokatoka*,¹⁴ just to name a few.

Like many other things in Africa's diverse cultures, albinism is surrounded by many cultural beliefs, superstitions and stereotypes. Some of these are as follows:

- Some see children with albinism as a gift or a blessing because such children are believed to have magical powers or can tell the future.
- Others believe children with albinism are a curse. They are seen either as being a punishment to a woman, man or family that has been wicked and angered god, or as being a result of a bewitchment in the family.
- In some parts of Africa, people with albinism are not perceived as human beings but as sacrificial lambs, wanted for their hands or their genitals which are considered as the body's strongest parts.¹⁵ Albinos are killed for their body parts for making fetishes or potions that witchdoctors' allegedly advise their clients to drink in order to obtain wealth.¹⁶ In the past, albinos in certain communities in Namibia were killed and were used for *muti*.¹⁷ Each part had its own use and meaning. For instance, if eyes were used in the muti, then your boyfriend, girlfriend, wife or husband will never cheat on you. If legs were used, then you will be a Casanova. If blood, hair, nails, sexual parts and breasts were used, then you will be rich.¹⁸
- If you are married to an albino, it is believed that you will be a very lucky man or woman.¹⁹

4 *Otjisherero*; plural = *omakih*.

5 *Otjizemba*.

6 *Khoekhoegowab*.

7 *Oshiwambo*; plural = *omakishi*.

8 *Oshiwambo*; literally, "long tooth"; originates from folk tales, where people with albinism were portrayed as cannibals.

9 *Oshiwambo*.

10 *Oshiwambo*.

11 *Oshiwambo*.

12 *Oshiwambo*; plural = *omathithi*.

13 *Rukavango*; plural = *matokatoka*. Actually, *Rukwangali*, *Rugciriku* and *Thimbukushu* are languages, whereas the glossonymic unit *Rukavango* does not correspond to a language, but to a cluster of languages. The phrase *Kavango languages* used by Möhlig (1997) could be more appropriate.

14 *Rukavango*; plural = *vatokatoka*.

15 See <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

16 For example, in east-central African countries, especially in Tanzania; <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

17 "Traditional African medicine, especially that based on the use of herbs or parts of animals" Concise Oxford English Dictionary (2002).

18 Interviewee from Nkurenkuru; 19 July 2009.

19 (*ibid.*).

- Albinos in some cultures are perceived to be cannibals. In many folk tales told to children, albinos are portrayed as evil cannibals. Sometimes, when a child misbehaves, s/he will be told that if they continue being naughty they will be devoured by an albino.
- Some believe that albino children are the result of inbreeding or racial mixing. For example, many believe that the child is white because its mother had sex with a white man. The woman will be accused of infidelity and be abandoned.
- Albinism is also thought to be very contagious. Some people believe that if one eats, sits, sleeps next to, drinks from the same cup or has any other physical contact with a person with albinism, you will also become an albino²⁰ or you will smell like them.²¹ Clearly, this is untrue: albinism is a genetic condition and can only be passed on to another person by genetic means, namely from parents to their offspring.
- Some people believe that people with albinism do not die in the presence of other people without albinism: they go into hiding and die elsewhere. The truth of this is questionable, because children with albinism are killed at birth in some African cultures, so they are not alive at some 'old age', when this 'slipping away' is supposed to happen. This is more likely to be why people have never seen funerals for people with albinism.
- In Zimbabwe, it is thought that having sex with a woman with albinism will cure a man of HIV. As a result, many women with albinism in the area have been raped. Clearly, this is another fallacy: having sex with an albino will not cure an HIV-positive man.²²
- Some believe that people with albinism are sterile. This, too, is a fallacy: albinos are as capable of reproduction as non-albinos.
- Many also believe that people with albinism do not live long. Could it be that this is the reason some albino children in Namibia are killed at birth, and are not allowed to enjoy their constitutional right to life?²³

It is evident that these traditional beliefs and practices are very wrong and are very harmful to the emotional, physical and psychological state of both children and adults with albinism. The issue needs to be dealt with in order to protect the rights of these children in particular.

A constitutional challenge?

Traditional cultural practices reflect the values and beliefs held by members of communities for periods often spanning generations. Whilst some practices are beneficial

20 This is my strong belief, based on the experience I had at school. I was tormented and beaten by other children, and if I drank from a tap, no one else would drink from it after me unless it had been washed with soap. In class and during break, I sat alone.

21 Some say that albinos have their own unique smell. It is believed to be a bad smell. If one sits next to an albino, one will smell so bad that others will vomit.

22 There is currently no cure for HIV/AIDS, although some drugs are showing promise.

23 See Article 6 of the Namibian Constitution.

to all members of a cultural group, others are harmful to certain individuals within that culture;²⁴ such is the case with persons with albinism. It is evident that children with albinism are particularly vulnerable to harmful customary practices. Are these practices a constitutional challenge? If so, what is Namibia doing about it? In order to answer these questions, one needs to look at the constitutional standing of customary law in Namibia.

Customary law and the Namibian Constitution

Customary law in Namibia is put on par as a source of law with other sources of law.²⁵ Article 66(1) of the Constitution declares as follows:

Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

This is evident in the Traditional Authorities Act,²⁶ which expressly recognises the existence of customary law. *Customary law* is defined in section 1 of the Act to mean –

... the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia.

If one considers the above definition and application of customary law, can the customary beliefs and practices discussed earlier fall under this definition? One could argue that such cultural beliefs are a manifestation of the right to culture. But then, what exactly is *culture*? And to what extent does this right to culture prevail?

Article 19 of the Constitution provides the rudiments of a cultural approach to customary law:

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution as well as in Article 15(1)(a) of the ICESCR. In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights.²⁷

24 See LAC et al. (2008:9).

25 These include the Namibian Constitution, common law, juristic writings, international law and agreements, and other relevant legislation applicable to Namibia.

26 No. 25 of 2000.

27 Ruppel (2008:23, 45).

A *right to culture* can be juridically construed to mean the freedom – akin to the freedom of expression – to perform or practice the arts and sciences. But *culture* denotes a people's entire store of knowledge and artefacts, especially their language and system of belief.²⁸

However, various aspects of customary law have been identified as outmoded or contrary to human rights, and proposals have been made for them to be changed. According to Bennett,²⁹ –

[t]he application of customary law is subject to three provisions. One of the three is the so-called “repugnancy proviso”, a general reservation in favour of public policy and natural justice.

Namibia, after Independence, replaced the repugnancy provision with the constitutionality provision, which renders a particular customary law unenforceable on the grounds of its inconsistency with the Constitution or a provision of a statute.³⁰

However, for us to see whether the customary practices, beliefs and superstitions surrounding children with albinism are a constitutional challenge, we need to look at children's human rights under customary law and the policy of Affirmative Action in Namibia.

Human rights of children with albinism under customary law

Human rights were originally devised to protect citizens from arbitrary and oppressive treatment by the state: they were not conceived to be a ground of action by citizens inter se. Hence, whether constitutional rights override customary law or, conversely, whether customary law should be allowed to limit constitutional rights depends on the viewpoint and the situation at hand. Indeed, special provision is made in Article 21 of the Namibian Constitution for the limitation of human rights listed in Chapter 3 therein. An analysis that may overlap to some extent will include reference to the social conditions and cultural traditions of the country.

Unlike most other legal rights, human rights are of a high degree of abstraction; and because they are so broadly conceived, the process of interpretation becomes particularly important. Interpretation of human rights is an overt value judgement, amounting to an act of creation and imagination.³¹

28 Bennett (1999:23).

29 (ibid.:52).

30 The repugnancy provision appears to have been repealed in 1985, following the abolition of the Native Commissioners' courts by the Native Administration Proclamation Amendment Act, 1985 (No. 27 of 1985). See Hinz (2003).

31 *Matiso & Others v Commanding Officer, Port Elizabeth Prison & Another*, 1994 (4) SA 592, 597.

Namibia, a country of diverse cultures, is in no position to reject its indigenous cultural traditions. While the prominence given to so-called Western institutions in the Constitution might suggest that African cultures are to be swept aside whenever they are in conflict with the Bill of Rights, such a drastic reading would not be aspirational. Some form of accommodation can be found between customary law and Chapter 3 of the Constitution. Cultures, too, are amendable to compromise. Like Bills of Rights, they change constantly, both in reaction to extrinsic forces and through the dynamics of internal conflict. Opinion on African tradition is no monolith of uniformity: even those who might reject what they see as a menacing Western influence do not necessarily support all parts of their own heritage.³² In view of the aforementioned we are going to look at the right to equality and freedom from equality in order to discuss the subjectivity of children with albinism to customary law.

Right to equality and freedom from discrimination

Once the application of customary law is considered a constitutional right and not a precious freedom, it is thrown into competition with the other fundamental rights in Chapter 3 of the Constitution. What will ensue is a series of conflicts, especially between the right to equal treatment on the one hand, and the many customary laws on the other that subordinate the interests of women and children to senior males. Even if these contradictions are inevitable, the Constitution gives no indication whether fundamental rights supersede customary law or vice versa.³³ The fundamental rights are, therefore, not ranked. However, if a right to culture/customary law is to be read in the context of the Constitution as a whole, and if Chapter 3 rights are to be construed so as to give effect to underlying constitutional principles, there can be little doubt that customary law will be the loser.³⁴

The right of children with albinism to equality and freedom from discrimination is one of their most important rights. The Convention on the Rights of the Child has identified this right as a principle of fundamental importance to the implementation of the whole Convention. The term *discrimination* should be understood to imply –³⁵

32 See Bennett (1999:5).

33 Apart from Article 66(1) of the Namibian Constitution, the constitutions of other African states were careful to shield customary law from the norms of equality/non-discrimination. For example, section 23(3)(b) of the Zimbabwean Constitution (Order 1600 of 1979) provides that the application of African customary law is not subject to the prohibition on discrimination contained in section 23(1)(a) of that law. A similar provision is contained in section 23(4)(d) of the Constitution of Zambia (Act 1 of 1991); section 15(4)(b) of the Swaziland Constitution (Independence Order 1377 of 1968), and section 15(4)(d) of the Botswana Constitution (Independence Order 1171 of 1966), as amended by the Constitution (Amendment and Supplementary Provisions) Act 30 of 1969.

34 See Bennett (1999:43).

35 Hodgkin & Newell (2007:17).

... any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Article 10 of the Namibian Constitution recognises this right, as follows:

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Nevertheless, children with albinism in Namibia are still discriminated against on the basis of their colour. This rocks the very foundation of the human rights norm because, as a result of this discrimination, the fundamental rights of children with albinism seem to be pushed aside. For instance, if a child with albinism is discriminated against on the basis of his/her skin, the following can happen, amongst other things:

- Some school teachers cannot stand the sight of the child and, as a result, mistreat the child.
- Other children see the teacher's example and start behaving the same way or even worse.
- The child's self-confidence will be destroyed – to the extent that s/he drops out of school.
- The child's right to education and development is, therefore, pushed aside.
- These children are sometimes killed at birth.
- As a result, their right to life and protection is pushed aside.

In terms of their obligations of non-discrimination towards various international human rights treaties,³⁶ states parties are also obliged to remove the stigma associated with children with albinism. Especially the vulnerability of these children must lead to a more effective prevention of their maltreatment. One way of dealing with the discrimination against children with albinism is through what is known as *affirmative action*.

Affirmative action

The notion of *affirmative action* is controversial, even in countries where it has been in use as a strategy for equality for a longer period than it has in Namibia. Affirmative action is well known in international human rights law. Both the International Convention on the Elimination of All Forms of Racial Discrimination³⁷ and the Convention on the Elimination of All Forms of Discrimination Against Women³⁸ provide a basis for

36 See contribution by Oliver C Ruppel elsewhere in this volume.

37 Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969.

38 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of

affirmative action.³⁹ Namibia is a party to both these treaties, and by virtue of Article 144 of the Namibian Constitution, the provisions in these treaties are part of the law of Namibia.

Affirmative action means that positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have historically been excluded.⁴⁰

However, in its particularity, affirmative action has fallen prey to muddled terminology and misconceived application. Has the term *affirmative action* become interchangeable with the term *reverse discrimination*? Indeed, affirmative action is criticised for contradicting the philosophy of non-discrimination: one form of discrimination appears to be substituted for another. However, preferential treatment in the form of 'reverse' or 'positive' discrimination (depending on where one stands on the issue) is not necessarily the same thing as affirmative action.

Affirmative action is necessary to translate the goals of equality from empty theory into concrete realities. Thus, this remedy aims to make up for the effects of a long heritage of bias by giving some preference to individuals who were historically disadvantaged.

In Namibia, affirmative action was portrayed as the principal instrument to redress the imbalances of the past. Article 23 of the Namibian Constitution provides as follows:

- (1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.
- (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.
- (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

rights for women.

39 See Tahmindjis (1997:44) for a discussion on affirmative action in a democratic society.

40 See <http://plato.stanford.edu/entries/affirmative-action/>; accessed 20 September 2009.

No particular group is identified by Article 23, although Article 23(3) recognises the special discrimination traditionally experienced by women. But what about children with albinism? Since no specific group was identified, do they not fall under the category of those discriminated against and previously disadvantaged?

Affirmative action, as a remedial concept, necessarily implies that inequalities first need to be identified, after which the appropriate strategies need to be put in place to secure equality. The concept does not so much solve problems as pose options: there is no obviously ‘correct’ policy. The problem is that, more often than not, one option or one group’s interest will have more value and worth than another. Affirmative action reflects – and its processes test – the principle of social justice which a particular society holds dear. In this regard, it can be a much more accurate indicator of true social value for that society than the most earnestly expressed sentiments in a Constitution. The goals of affirmative action policies and programmes can be as telling as the selection of the groups which are its objects or as the strategy for its implementation. For the purpose of enhancing the quality of life for children with albinism the aim must be to change a culture, because children with albinism face barriers in the enjoyment of their rights due to a combination of social and cultural attitudes.

Some complain that affirmative action can have a stigmatised effect on the very people whose interests it is meant to promote, i.e. in order to help these people effectively, sometimes they have to be singled out. However, some people with albinism are against the idea of the public being educated about them and their needs, because they believe this puts them under the spotlight – meaning they will be discriminated against even more than before. While some are of the opinion that affirmative action will bring about beneficial change and the rights of children with albinism will be given the recognition they deserve, in order for Vision 2030 to be given effect, affirmative action must be directed at achieving change.⁴¹

Affirmative action, however, is a process and not an end, and it brings with it no guarantees. Change to bring about equality cannot be brought about simply by the stroke of a legislative pen. Nevertheless, we must be sure what we need and mean by *equality*, so that we know it has in fact been achieved.

Article 19 of the Constitution supports the argument that, while all people have the right to participate in the cultural life of their choice, individuals are also free to opt out. It follows that no child can be compelled to undergo initiation or other practices against his or her will, especially if such cultural practices are prejudicial to the child’s health or life. Section 13 in the Children’s Act of 1998 in Ghana, for example, states the following:

41 Vision 2030 provides long-term alternative policy scenarios on the future course of development in Namibia at different points in time up until the target year 2030; see http://www.npc.gov.na/vision/vision_2030bgd.htm; accessed 25 September 2009.

No person shall subject a child to torture or other cruel, inhuman or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child.

Other African countries, like Uganda, have similar provisions in their legislation concerned with the protection of children's rights. Namibia needs to be guided by what other countries have done to protect their children from harmful social and customary practices.⁴²

Conclusion

There are many cultural practices in Namibia which, by human rights standards, are difficult – if not impossible – to reconcile. But there are also many instances in which cultural arguments continue to be used today to justify the denial of children's rights, e.g. the right to culture. But these arguments should be tested against the values and the principles of the Namibian people.

Strategies are needed, in particular, to challenge traditional and other discriminatory attitudes and customs. For this purpose, all harmful cultural practices need to be identified. Traditional attitudes and customs that promote discrimination in our society also then need to be extinguished.

It is the state's responsibility to raise awareness in order to challenge discrimination against children with albinism. Therefore, it must increase its efforts to adopt a proactive and comprehensive strategy to eliminate the discrimination directed against these children by introducing legislation to protect their equal rights to life and protection from all forms of violence and discrimination. The Constitution not only has abundant reference to a desire to eliminate all forms of discrimination, but it also binds the state to the policy of affirmative action, a principle that obliges the state to uplift those who have previously been disadvantaged. Obviously, change does not happen overnight. It remains to be seen if the long expected Child Care and Protection Act will – at least on paper – do away with those traditional cultural practices – including those with regard to children with albinism – that are harmful and not beneficial to all members of the cultural group where they are being practiced.

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