Law and Culture in the new constitutional dispensation with specific reference to the custom of Circumcision as practised in the Eastern Cape

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NDYEBO KINGSWORTH MOMOTI

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N.K.MOMOTI

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ABSTRACT

This study examines the custom of circumcision in the context of culture, law and the Constitution.

In Chapter 1 the writer considers the pervasive role of culture in the context of the current debate in relation to equality versus culture.

In Chapter 2 the writer considers the origin, development and the legal significance of the custom of circumcision in the Eastern Cape.

In Chapter 3 the writer traces the circumstances leading to the enactment of the Provincial statute governing circumcision of children. In this chapter the writer also poses the question whether an aspect of morality can effectively be regulated by law.

Chapter 4 looks at the question of cultural rights in terms of the Constitution and the possible effect of the promulgation of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2000 on the approach of the courts in respect of constitutional challenges directed at some aspects of customary law.

Chapter 5 looks at the custom of circumcision and the need for the protection of children.

The writer raises the issue of the role of traditional leaders in the eradication of abuses associated with circumcision.

The last Chapter comments on the reasons for the failure of the new Act governing circumcision in the Province.

CHAPTER 1

1. INTRODUCTION AND BACKGROUND STUDY

1.1 Context

Male traditional circumcision is a long standing custom practised by most people of the Eastern Cape, and most of the other provinces. Notwithstanding its noble cultural significance and material values, this ritual has been associated with botched operations which, in some instances, left many initiates without their male organs, and others dying, out of complications at and outside the initiation school. These incidents have received wide media coverage which, in turn, have prompted the reaction of some of the provincial governments and the various stakeholders.

Consequently the Eastern Cape Department of Health introduced remedial strategies with the stakeholders of this custom, involving NGO's, Kings, and other Traditional leaders, Civics, Amakhankatha, and Iingcibi since early 1995. Great care has been taken during the intervention process to exercise minimal interference with the customary aspect whilst imparting safe and hygienic standards, on the other hand. Through many workshops thus far held in the Eastern Cape, provincial guidelines on the subject were born, and it was the general wish of the most participants in these workshops, that a legislative tool be promulgated to regulate the custom.

There were some technical bureaucracies, which delayed the process up until a Proclamation intended for another province was discovered, and this was a gateway to the draft of the current legislation which will be considered in this study.

The historic legislation is the product of intense consultation. An initiative by a female doctor based at the Livingstone Hospital in Port Elizabeth, who advocated the introduction of an instrument [1] from the Far East in the circumcision of boys in the Province, has prompted serious questions about the involvement of women in what is traditionally seen as a male religious ritual. Traditional leaders are strongly opposed to the introduction of the instrument.

The writer has since interviewed a cross-section of stakeholders which include traditional leaders, medical officers, social workers and church leaders in trying to find a lasting solution to a major social problem which has been exacerbated the corollary problem of HIV/AIDS in the country. I deal with this issue in Chapter 5.

1.2 Goals of research

As already been alluded to, the Provincial Government has introduced remedial legislation in an attempt to control the practice of circumcision. The new measure known as the Application of Health Standards in Traditional Circumcision Act [2] (Eastern Cape) Act No. 6 of 2001 became law from 2001.

Notwithstanding this legislative intervention, death of initiates continues unabated at an awesome rate.

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[1] The instrument is described as a Tara Clamp – the Malaysian instrument that makes the size of the wound to be considerably reduced as compared to that of the traditional surgical instrument.
[2] Act No 6 of 2001.

This state of affairs prompts the following questions:-

a. Does customary law, as modified by legislation provide adequate safeguards for the protection of children who undergo this custom and become exposed to risk of harm?

b. Has time not arrived for a drastic measure such as the abolition of this custom?

c. What should be done when morality clashes with the Bill of Rights?

d. What should be the role of traditional leaders in regulating the custom?

e. In other words should traditional leaders, in keeping with the spirit of section 212 (1) of the Republic of the South Africa Constitution Act 108 of 1996 be given a role to play in this regard?

f. What would be the effect of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act No. 19 of 2002 on the Provincial legislation seeking to regulate some aspect of a cultural practice?

The objects of the Commission under the aforementioned Act include the following:-

1. "to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;

2. to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities;

3. further mutual respect among cultural, religious and linguistic communities." (section 4 of the Act)

This study, therefore, is going to look at the problems currently being experienced with regard to the custom of circumcision in this Province and also examine the reasons for the ineffectiveness of the legislative intervention.

The latter, in turn, begs the question whether issues of morality can be effectively controlled by legislation. In other words, the jurisprudential question of the extent to which criminal sanction can be effectively used to regulate moral conduct which, though perceived by the State as wrongful, is still popular to those who still practise it.

The following observation by Van Bueren [3] seems apposite in this regard:- "Although it is the role of law to set standards aimed at eliminating all harmful traditional practices, it is questionable whether such a prohibition alone is sufficient. Certain traditional practices by their very nature reach down into the heart of a community and may even be regarded by members of that community as important in defining that community's identity. Some traditional practices such as female circumcision may perform a social role, making it difficult in some societies for girls who are not circumcised to marry.

Therefore alternatives have to be organically developed. To implement childrens' rights is not simply a matter of translation; attention has to be paid to the functions they perform in different traditions.

[3]Van Bueren "Children's Rights, Balancing Traditional Values and Cultural Plurality" in Gillian Douglas (ed) 1998 : 16.

Childrens' rights have a better prospect for implementation if they reflect local cultural beliefs."

In the light of the questions posed, the thesis will also look at the relationship between law and culture in the new constitutional order as well as the possible effect of recent national legislation concerning the protection and promotion of the rights of cultural, religious and linguistic communities. The question of culture versus the Bill of Rights came to the fore in the recent judgement of the Transkei Division of the High Court in Mhlekwa v Head of the Western Tembuland Regional Authority [4] where the respondents, *inter alia*, argued for the continuation of a culturally defined legal regime.

The respondents relied on the assurances given by the Constitutional Court in the first Certification case cited as Ex Parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa [5] 1996.

The thesis will also look at the legal significance of circumcision in the Eastern Cape, the whole question of cultural rights in the Constitution including the question whether the United Nations Convention on the rights of the child could be used in determining the extent to which criminal law should be used for the protection of children undergoing these rituals.

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[4] 2000 BCLR 979 (Tk).
[5] 1996 (4) SA 744 (CC).

Last but not least the whole question of the effectiveness of the Provincial statute will be discussed in the light of the comments from the Eastern Cape Provincial House of Traditional Leaders.

1.3 Research method

The research methods consisted of analysing the existing data, contained in the text books, being mostly Anthropological sources, decided cases and legislation. The writer also conducted interviews with various stake holders which include traditional leaders, medical officers, social workers and church leaders as already alluded to above.

1.4 Customary law and culture

In African society, particularly the African people of the Eastern Cape, culture, religion and custom are inseparable. Thus Soga [6] states:-

"Law and culture are so closely related that it is sometimes difficult to distinguish between the two, but however the term law is applied to the selected rules for the control of and sanctioned by a community." Again Soga [7] expresses himself as follows:-

"Law and Custom as well as belief in active intervention of Ancestral Spirits (Izinyanya) control very effectively the conduct of the individual and through him, his clan or tribe and the spirit's of his ancestors with whom he has direct connection."

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[6] Soga 1931: 6.
[7] Soga *op cit* at 47.

This view also gains support from Grossfeld [8] who states:-

"Every culture has its particular law, and every law its particular culture."

The author correctly observes that every legal system has a unique individuality. This is entailed in the saying that law varies directly with culture. Law is culture and culture is law. The idea that law of a culture stems from the material and spiritual life of a people is as old as law itself: phrases such as "*vox populi, vox dei* ….. are there to show it."

See also Smith and Weisstub [9] who describes law as a major articulation of a culture's self concept, representing the theory of society within that culture. Anthropologists have associated the notion of culture with tribe in terms of what they referred to as the culture theory. Indeed Bennett [10] says that customary law was viewed in terms of ideological construct: "State courts were supposed to be applying 'the law of the people', a law inherited from the founding fathers of the African tribes.

A critical examination of this assumption revealed that much customary law was in fact the creation of the colonial courts."

The relationship between culture and law features prominently in some post democratic legislation [11] and the reports of the South African Law Commission dealing with customary law [12]. The new development is to be welcomed as customary law reflects a way of life.

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[8] Grossfeld 1990 : 41.
[9] Smith and Weisstub 1983 : VII.
[10] Bennett 1991 : 46.
[11] See the definition of the Recognition of Customary Marriages Act 120 of 1998.
[12] See the latest investigation on Traditional Courts in the Proposed Bill contained in Chapter 3.

Law and custom are so closely inter-related that it is difficult to distinguish the two but law is applied to the selected rules which largely represent positive morality. In the recent case of Mabena v Letsoalo [13] dealing with an aspect of African family law. The court tried to distinguish between official customary law and living law. The latter is said to represent the law as actually followed by the rural communities.

African religion in the form of a strong belief by Africans in Ancestral Spirits (Izinyanya) plays an important role in controlling and moulding the character of an individual. [14]

The present writer is in agreement with Soga's [15]conclusion that law, custom and religion were regarded as the most powerful agencies of moulding the character of the individual tribesman in maintaining the equilibrium and stability of the tribe.

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[13]1998 (2) SA 1068 (T). The Court developed African family law relating to who should sit in Lobola negotiations. The Court said that a widow who is head of the family could negotiate the Lobola of her daughter.

[14]See Soga *op cit* at 47.

[15]Soga *op cit* at 46 – 47. In this regard the author states:-

"Customs are the handmaids of law and are a powerful corrective force making for the binding together of the tribe. As action or proposed action which might be of a subversive nature is met with the phrase:- "Asilo siko lakowetu" ("it is not the custom of our people") Both law and custom as well as belief in the active intervention of the izinyanya or ancestral spirits, control very effectively the conduct of the individual and through him his clan or tribe. See also the observation by Iya 1998 : 228 at 239 where he states:- "It is clear that there is an important relationship between law and culture. In that respect we have associated ourselves with the view that customary law denotes those aspects of social control and legal systems from African societies."

1.5 Meaning of culture

The present writer is in agreement with the following observation made by Van Bueren [16] that the concepts of culture and tradition are broad, "embracing not only indigenous but also religious, customary practices and traditions, and perhaps institutional values. Traditional values and cultural practices do not match recognised state boundaries. Within one country there may be many tribal differences ……"

Culture is defined in various ways, for example, Himonga and Bosch [17] describe culture as that which includes peoples' entire knowledge and artefacts especially the languages, beliefs, laws that regulate social groups and give them their unique characteristics. The notion of culture is associated with a particular group. This is reflected in the definition of customary law in the textbooks. [18]

Although culture is expected to be reflected in some aspects of the national legal system such as marriage and the law relating to matters of status generally, caution has to be exercised about the possible ripple effect of

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[16] Van Bueren *op cit* at 16.

[17] Himonga and Bosch 2000 : 307. See also Iya 1998 : 233 who defines culture as that complex whole which includes knowledge, beliefs, art, morals, law, custom and any other capabilities acquired by man as a member of society. "It is the sum total of the material and spiritual activities and product of a given social group." See also Iya 1998 *op cit* at 231 and Mqeke 1997 : 18. The latter quoting Mbiti 1978 : 7 describes culture as an all embracing phenomenon which includes such things as the way the people live, behave and act as well as their intellectual achievements. "This way of life manifests itself in customs and traditions followed by a cultural group."

[18] See for example Bekker 1989 : 11 who defines Customary Law thus:- "An established system of immemorial rules which had evolved from the way of life and natural wants of the people. Such law was passed on from one generation to another. Customary Laws were unwritten and through continuous application made an impact and became effective on the people." On the other hand Olivier *et al* 1995 : 171 states:- "Customary Law denotes those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist." See also Bennett 1985 : 17 who describes Customary Law as a source of unwritten rules which function in close-knit communities and rules that are generated by certain standards of behaviour.

the concept of culture in the fledging democracy. Iya [19] has encapsulated this issue thus:- "The hard-fought democracy achieved by South Africans is in great danger from divisions of its citizens grounded in exploitation, injustice and rivalry occasioned by divergent cultures. The constitutional aspirations for legitimacy, unity, democracy and reconciliation will remain threatened by factors rooted among conflicting groups and the possibility of further social disintegration and civil war will continue to dangle overhead on account of those deep-rooted divisions."

1.6 Culture as a tool of division and oppression

The author traces the genesis of the negative aspect of culture from 1652 with the arrival of the Dutch who incidentally on arrival found a number of societies or groups of families practising their own customs and culture. Their social control was based on the long standing oral traditions handed down from generation to generation.

The administrative aspect of the situation was exercised by the Kings or Chiefs assisted by councillors and elders in the community. With the arrival of the Dutch colonizers at the Cape and the establishment of a trading station, they introduced their own culture. The later British occupation and conquest of the Black people resulted in the introduction of yet another form of culture which influenced the relations between the cultures of the colonizers and the colonized (Black people).

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[19] 1998 : 229.

The Colonists despised and looked down upon the African folk and their traditional way of life as primitive, uncivilized and unchristian. Having subdued the Blacks, they were compelled to impose their rules on the Blacks whose culture, customs and language they were not familiar with.

For effective administration they had to use the chiefs and headmen. The latter had jurisdiction over their tribes only. The notion of cultural pluralism became a prominent feature of the Nationalist Party Government in the form of separate court structures created in terms of the Black Administration Act 38 of 1927 and Black Authorities Act 68 of 1951.

The then Minister of Black Administration and Development said:-
"I want to state categorically that the Government will not deviate from past assurances to the different Bantu nations of the Republic that it is the firm and irrevocable intention of the Government to lead each individual nation to self-government and ultimate possible independence." House of Assembly Debates Volume 32 Col 477 (8 February 1971).

The following statement by the then Minister of Black Affairs and Administration when he introduced the Black Homelands Citizenship Act 23 of 1970 testifies to the declared intention of the Nationalist Government:-
"Every Black who is not a citizen of a self governing Black territory and not a prohibited immigrant is a citizen of the territorial authority area in which he was born, or is domiciled, or where the Black language he speaks is used or in which he has a relation or with the population of which he has identified himself or has a cultural or racial associations."

The self-governing Black Territories or Territorial Authorities were issued with certificates of citizenship, obviously different from those of the citizens of the Republic of South Africa and in a way replaced the abolished passes and other related documents carried by Blacks for identification purposes.

The Department of Black Administration and Development was most effective in using culture as a tool of division and oppression during the Apartheid era.

The system also introduced the following statutory provisions:-

1. The Prohibition of Mixed Marriages Act 55 of 1949 which prohibited marriages between Whites and Non-Whites, Asians, Coloureds and Blacks.
2. The Group Areas Act 41 of 1950 which divided urban suburbs into zones or group areas where only members of one specific race could live.
3. The Immorality Act 21 of 1950 which outlawed sex across the colour line.
4. The Population Registration Act 30 of 1950 which designated people with racial categories.
5. The Reservation of Separate Amenities Act 49 of 1953 which legalized inequality.
6. The Black Education Act 47 of 1953 which condemned Black children into an inferior type of education.

In this regard the policy of Apartheid used culture as a divisive tool of oppression and exploitation. The policy was regarded as a crime to humanity, by the United Nations Organization, a situation that forced South Africa to be an international outcast for failing to comply with the requirements of the world body on Human Rights.

In conclusion, the idea of the principle of Apartheid or Separate Development according to ethnic groups was indeed inhuman and designed to exploit the Black people.

For instance there were no developed industries in most of the areas allocated to the Black people and such areas were therefore used as cheap labour depots or reserves for the flourishing industries mainly of minerals found in the White areas.

Mayer attributed the pervasive rite of culture to the Nationalist ideology of cultural pluralism which requires that every nation of the South African population should develop according to its own culture and tradition. Mayer [20] is instructive in this regard:-

"And 'Bantu culture' is seen as requiring chieftainship while western governmental institutions belong exclusively to 'White culture' ……"

[20] Mayer "The Tribal Elite and the Transkeian Elections of 1963" in Lloyd 1964 : 289 – 290 quoted in full by Mqeke 1997 : 87.

1.7 Culture as a choice of law factor

In the application of the choice of law rules, culture plays a pivotal role as is evident from the first statutory provision which was designed to regulate choice of law problems affecting African litigants.

For example Section 11 (1) of the Black Administration Act 38 of 1927 provided as follows:-

"Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of Black Commissioners in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the black law applying to such customs except in so far as it shall have been repealed or modified : Provided that such black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar customs is repugnant to such principles."

As can be inferred from the paragraph by Schreiner J.A. regarding the difficulties experienced by Black Commissioners' Courts, it would be that the real problem lay in the failure to understand the cultural significance of the issue raised. The following statement by Bennett [21] captures this:

"Implicit in the conflict of laws is recognition of cultural (or socio-economic) differences, whether via the medium of the territorial state (as

[21] Bennett 1985 : 16.

in private international law) or via membership of a group of people. Many African people have abandoned or are abandoning their traditional way of life in favour of what can be broadly conceived as a Western lifestyle.

The conflict of laws takes cognisance of this and purports to define the circumstances in which it would be proper to apply the appropriate legal system for the solution of a dispute. It does not purport to apply legal systems on a general basis, but instead, operates on a case-by-case basis, in terms of particular sets of facts. In this way, the blanket application of a legal system to all inhabitants of the state is avoided and, with it, the problem of finding acceptance for new laws. The conflict of laws pays due respect to all legal systems and thus, indirectly, pays regard to the personal inclinations of the people whose legal systems are involved. People need not be invariably bound by their system of personal law. If their attachment to a group changes, this can be taken into account. In this manner, the conflict process shows a high degree of sensitivity to complex social and economic problems and permits considerable flexibility in solving those problems."

This formulation was later superseded by Section 1 (1) of the Law of Evidence Amendment Act 45 of 1988 which states:-

"Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principle of public policy or natural justice: Provided further that it shall not be lawful for any court to declare the custom of lobola or bogardi or other

similar custom is repugnant to such principles." The provisions of this Act were considered in the recent case of Mayisela v Kgolane, NO. [22]

In this case Hartzenberg J, said that section 1 of Act 45 of 1988 requires a litigant who wishes to have an action determined according to indigenous law to prove that indigenous law.

In Ex Parte Minister of Native Affairs in re: Yako v Beyi [23] case Schreiner J.A. referred to the question of lifestyle of the parties as a choice of law factor. Bennett [24] comments as follows in this regard:-

"Aside from an express choice of laws all connecting factors with conflict of personal laws are designed to determine, in an objective manner, the cultural orientation of the parties. Because the laws involved are conceived in terms of culture it is obvious that the connecting factors must be conceived in like terms. The most direct access to a person's cultural leanings would clearly be his or her lifestyle."

In the recent proposals [25] contained in the South African Law Commission's Report the concept of culture is proposed as a choice of law rule in the accompanying Bill. Again in the Constitution of the Republic of South Africa Act 108 of 1996, culture features prominently in the following sections : 15 (3), 30, 31, and 185.

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[22] 2000 (2) SA 370 (TPD).
[23] 1948 (1) SA 388 (A).
[24] Bennett 1985 : 109.
[25] South African Law Commission's Report Project 90 on the Harmonisation of the Common Law and Indigenous Law, September 1999.

It seems that the following passage from a recent publication [26] will put the above statement in context:-

"Many cases, notably delicts and claims arising out of family obligations, do not involve a prior transaction. In these matters, reference to the parties' way of living, and hence their overall cultural orientation, have had a strong influence on choice of law. (In footnote 74 the author refers to the leading Lesotho case of Mokorosi v Mokorose 1967 – 70 LLR 1 and Hoohlo 1967 – 70 LLR 318 where the courts referred to the following choice of law factors: parties' manner of living, place of residence, occupation, religion, style of dress and so on). People who adhered to a traditionally African way of life were deemed subject to customary law, while those who had become acculturated to a Western lifestyle were deemed subject to common law."

The author referred with approval to the case of Sibanda v Sithole [27] where the court refused to apply common law to the case because of the lifestyle - the fact that the plaintiffs sister had participated in the customary law practice of ukutheleka.

1.8 Freedom of religion, belief and opinion

Section 15 (3) provides as follows:-

"(a) This section does not prevent legislation recognising:-

1. marriages conducted under any tradition, or a system of religious, personal or family law; or

[26] See T.W. Bennett "The Conflict of Laws," in J.C. Bekker, J.M.T. Labuschagne and L.P. Vorster (eds) 2002 : 29 – 30.
[27] 1951 NAC 347 (NE) 350.

2. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

See also Section 30: Language and culture.

This section provides thus:-

"Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

Another important provision in this regard is Section 31 dealing with cultural, religious and linguistic communities. This section provides thus:-

1. "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:-

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

2. This right may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

In Ex Parte Minister of Native Affairs in re: Yako v Beyi supra, the court, inter alia, examined earlier decisions of:-

1. The Native Appeal Court for the Cape Province and Orange Free State and

2. The Native Appeal Court for Natal and the Transvaal.

The first point addressed was whether an African woman was prohibited from suing an African man for seduction in her own name or by herself, or whether he could only be sued by her father, in terms customary law.

In disposing of the matter Mr Justice Schreiner said:-

1. That a native woman if the native commissioner decided to apply common law, would recover damages for seduction in a Native Commissioners' Court.
2. That she may not be awarded damages or limited to what would be recovered under native law. Trial courts in exercising their discretion should, however, not be debarred from increasing the amount claimed under native law in cases where they considered that higher damages were justified.

3. That a native woman, who is a partner in a customary union and living with her husband, would be deemed to be a minor and her husband her guardian. If the Plaintiff sued under native law the case would be defended according to the same native law. In such cases the seduced girl's guardian should do so if the defendant is sued under native law.

Furthermore if the question depended or was governed by native law, the capacity of any native whose right was in question would have to be decided by native law. If the question did not depend on or was not governed by native law, the capacity of such native would be decided as if he were a European (i.e. common law should be applied).

Schreiner J A, further stated that generally there was some judicially acceptable factor calling for the application of the particular legal system applied by the courts; this determining factor was not static but changed and developed in keeping with the native's social and economic life. It was therefore important for the native commissioner to set forth the reasons for the exercise of his discretion to apply European or Native law.

Once the system of law was decided upon, then that would determine questions of capacity in relation both to the party in whom the right was or was claimed to be vested and to the party on whom the obligation rested or was alleged to rest.

Commenting on the question of the use of discretion by a Native Commissioner, Mr Justice Schreiner stressed the fact that the decision concerning which system to apply in a case, carried with it a great responsibility. Most importantly it was the discretion to award damages according to persons of different social or economic groups. Such a decision would take into account the life style of the parties and it would be applied with circumspection because generally speaking justice favours equality of treatment. However he stated that in actions arising out of an, i*njuria,* it was often possible to do justice by considering the entire personality of the person injured including his or her social standards.

With regard to the question as to how far native commissioners should regard themselves as being bound to follow the decisions of the Native Appeal Courts, Schreiner J A, felt that it would be proper for the Native

Commissioner to follow the decision of the Native Appeal Court. He further emphasized that in matters where discretion was involved, the rule of, *stare decisis,* should generally be observed.

Nevertheless the native commissioner would of course have to pay due regard to the facts of the case before him since the dominant consideration was his own reasoned view as to the best system of law to apply in order to reach a just settlement between the parties.

Mr Justice Schreiner then addressed Sub-section 3 of section 11 of Act 38 of 1927 dealing with the capacity to enter into a transaction and the capacity to bring or defend legal proceedings.

In the case of Mayisela v Kgolane, NO [28] the court followed the approach of Schreiner J.A, in Ex Parte Minister of Native Affairs in re Yako v Beyi.

The case concerned a contract of sale between two Black persons.

In his judgement Mr Justice Hartzenberg stated that it was wrong to adjudicate on a sale that was not governed by indigenous law, according to principles of indigenous law merely because the parties were Black.

It was quite clear that indigenous law could apply in cases of sale only where the principles of indigenous law provided for the thing sold. It would also be wrong to regard such an agreement as regulated by indigenous law if

[28] 2000 (2) SA 370 (TPD).

common law principles not known to indigenous law had been agreed upon by the parties.

Proceeding with his comments, Hartzenberg J, stated that section 1 of the Law of Evidence Amendment Act 45 of 1988 required a litigant to prove that indigenous law was applicable to the case unless judicial notice could be taken thereof.

In the instant case, it had, therefore, been incumbent on the respondent in order to be able to rely on indigenous law, to allege firstly, the tribal allegiance of the litigants, secondly, the particular system allegedly applicable to the dispute, and, thirdly what the applicable principles were. These were all factual questions open to admission or denial by the other party.

If the opposing party denied the first party's exposition of the application of indigenous law, it was up to the latter to prove it. The respondent had failed to raise any of the above issues in the pleadings and the magistrate had accordingly been wrong in his finding that indigenous law was applicable to the case.

In the circumstances, the writer strongly feels that the answers to the above questions were most crucial because they would determine the proper direction to be followed in adjudicating the matter.

Again, the judgement of Hartzenberg J, in the said case firmly supports the issues raised by Schreiner J A, in Ex Parte Minister of Native Affairs: in re Yako v Beyi regarding choice of law and the application of discretion.

Certainly if the above issues had been raised by the respondent, the magistrate's decision of the case could have been different.

The absence of such information affected the magistrate's discretion in his application of choice of law.

CONCLUSION

In this chapter the writer has demonstrated the interrelatedness between law and culture and some of the various ways in which the notion of culture has been used in this country.

CHAPTER 2

2. CIRCUMCISION AND CUSTOMARY LAW

2.1 Origin, development and legal significance

In this Chapter it is intended to trace the origin, development and the legal significance of the custom of circumcision in this Province.

Circumcision is an initiatory rite of Judaism also practised by Muslims and Jews as a religious rite for spiritual purification. [1]

It is a ritual that has its origin from the Middle East and there is a strong belief that the Bantu speaking tribes of Africa adopted it as a result of contact with the Arabs who had built stations along the shores of Africa where the Indian Ocean meets the East Coast of Africa.

According to [2] Koyana the essence of the custom is to mark the transition from boyhood to manhood. "The initiates were taught patience and fortitude. In brief, circumcision is a period during which the boy is taught the lifestyle of being an adult."

In South Africa it is practised extensively by the Xhosa speaking people of the Eastern Cape, that is, the Tembus, Fingoes and Bomvanas. This indicates that the Abenguni had lived close to the Arabs from whom they got the cultural influence.

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[1] Encyclopaedia Britannica Micropaedia 1979 : 945.
[2] Koyana 1980 : 60.

Soga [3] states that tribes of the Abambo origin such as the Pondos, Pondomise, Xesibe and others as well as Natal tribes have never observed the custom.

In Robo v Mdweshu and Another [4] it is said that the Pondos dropped the custom in deference to the late Chief Mqikela, who owing to physical infirmity, could not be circumcised.

Circumcision has a religious significance because it emphasises a close relationship of the people who practise it with their ancestral spirits. [5] It is believed that this protection is sought for the success of the ritual at the lodge or initiation school.

The Xhosa speaking people regard circumcision rite as a national rite which seeks to prepare the initiate to a life of adulthood. In this sense it is seen as a preparatory school.

According to Maclean [6] the custom partakes partly of a civil and partly of a religious character:-

"As a civil rite, it introduces boys into the state of manhood, as a religious rite it imposes upon them the responsibility of conforming to all the rites and ceremonies of their system of superstition."

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[3] Soga 1931 : 248. The author noted that at the time of publication of this work the custom was making its way back into Pondoland.

[4] 3 NAC 40 (1913) Ngqeleni. However subsequent to Annexation the custom was once more openly practised.

[5] Soga quotes the following statement from Rev B.J. Ross who knew the Xhosas well and a statement made upon the completion of the process:-
"You are a man. It is for you to see to it that your mother's ointment pot is never dry."
According to Soga this was a proverbial way of saying that one of the young man's religious duties was to see to it that his mother lived in comfort and honour.

[6] Maclean 1858 – Reprint 1968 : 100.

At the end of the initiation period the young man is regarded as having been born afresh. His age as a man is always assessed by the number of years he has been circumcised – a period generally referred to in Xhosa as "izilimela." For example if a young man was circumcised on June 21, 1900, he would complete his year's cycle the following year on June 21, 1901. Elsewhere initiation has been assimilated to the modern ways of imparting knowledge to the younger people.

For example, according to Muianga in Mozambique initiation rites and the official schools inhabit the same space. "The former are specific institutional ways of preparing younger generations to play their social roles. The latter the official schools are established as the centre of educational activity organized around particular knowledge that is the object of deliberate……." [7]

In the Eastern Cape the boys of a particular age group are usually organized and a special date and period set for their circumcision. The boys are usually circumcised in early June or in December of each year before Christmas. The boys are assembled in one homestead/kraal referred to as a principal host (ususothu). If one of the boys belongs to the Royal Family (Chief's son) the Royal House becomes the principal host (i.e. the boy becomes ususothu). This is a matter of a great moment in the rural communities.[8]

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[7] Lucena Muianga, in Ncube 1998 : 267.

[8] In Lize v Makalima 2 NAC p180 (1910 – 1911) Tsolo, it was held that an illegitimate child cannot be the principal host, that is, he could not be "ususothu."

As part of the pre-arrangements an animal usually a goat is slaughtered as a form of sacrifice for the Ancestral Spirits (izinyanya) from whom spiritual protection is sought and regarded as a direct link between man and God (Qamata). This is illustrated in Annexure A.

2.2 Circumcision (traditional surgical operation)

A surgical operation is performed by a traditional surgeon (Ingcibi) using a sharp spear (umdlanga). A traditional surgeon is usually a skilled person with self-control and who shall arrive on the day of the ritual and does not meet with anybody other than the boys at the place of initiation. He is always in the company of a protector who shields him from any contact with women and defiling influences.

The youths are led to a spot close by the lodge where they are instructed to sit side by side, their blankets open, and their knees apart. Till that moment, the surgical instrument is kept concealed. The operator advances and stands in front of the first boy and within seconds he then circumcises all of them.

The boys' wounds are dressed and wrapped in leaves of a special plant and led into the lodge (ibuma/ithonto). See the example provided in Annexure B.

Following the surgical operation, the boys are housed in a lodge (ibuma/ithonto) spacious enough to accommodate the selected number of boys for the circumcision rite.

A traditional nurse (Ikhankata) provides nursing care and performs the dressing of wounds and takes care of the young men especially during the

first eight days following the surgical operation. This is rather the most critical period of the initiation exercise which requires proper care by keeping the wounds clean. Traditional bandages (ityeba) and (izichwe) are used for dressing the wounds of the initiates.

At the end of the first seven or eight days following circumcision, a special ceremony during which a goat is slaughtered is performed. The ceremony is known as “ukojiswa komkhwetha” and presupposes that the initiates are almost healed and after which they are now free to partake in other forms of foodstuffs though they have to be strictly selective. This is a change from the rigid diet of stamped mealies or plain corn offered during the first seven days. They are also restricted from drinking water although it is known that they may secretly do so if there is nobody near by.

2.3 Life in the lodge

During seclusion, the attendants/guardians help the initiates to smear their faces and bodies with white clay (ingceke), which they retain throughout the period of seclusion, renewing it as often as necessary. See the example given in Annexure C .

Until their wounds are healed, they may not have soft foods. They may have grains of maize (iinkobe) cooked, not husked or crushed; they must drink water from the river preferably muddy although drinking water is restricted during this period. However it is known that they may secretly do so if there is nobody nearby.

After their wounds are healed, they may eat and drink anything brought to them by their guardians and they are no longer confined to the precincts of their lodge, but may go about and even visit others.

2.4 Dancing (umtshilo)

Leading a secluded life can be boring for the boys but when their wounds have healed satisfactorily, they become involved in social activities such as dancing (ukutshila), hunting etc.

There is a special dress made for dancing known as "umhlambi." The dress is worn in the form of a kilt made of dry palm leaves. The headdress made of dry grass is called "ixhonxo" and it partially covers the face of the initiate while dancing. An illustration picture of the dress code is given in Annexure D.

The dancing of the initiates is however confined almost entirely to the lower limbs. It consists of pelvic twisting movements and jerks accompanied with skyward jabs of the extended arms and forefingers. See the example given in Annexure E. The weight of the kilt of palm leaves appears to impose restrictions on a free movement of the whole body. Even so, however much grace may be imparted to various movements and gracefulness is the deciding factor when it comes to a decision as to which boy is the best dancer. The graceful movement is also coupled with the sound made by the dry palm leaves which is quite conspicuous during the dance.

There are also other social activities like hunting wild animals such as bush bucks, rabbits and other animals of the same size. During the hunting

expeditions, they are accompanied by the young boys who together with traditional nurses look after the initiates at the lodge. After skinning the animals, the flesh is usually given to the boys to feast and enjoy themselves.

At the time of initiation rites, the youths each receive a new name, called the manhood name (igama lesidoda). For example such names as “pasonti” and “pasente” would be used as well as others.

Social visits are common during which the initiates visit others who may be housed at different places in the area. Being engaged in social activities as described, is also an indication that the young men are healed and now ready to return home and join their communities.

2.5 Expiration of the initiation period

When the initiates are completely healed, they are then prepared to return home. Their heads are shaved and they are chased to the nearby river to wash the white clay on their bodies. When they return from the river, they are anointed with special ointment by an elderly close relative/family member, provided with new blankets and then proceed home. On their journey home, the lodge is set alight and burnt with all their belongings which they had used at the initiation school such as karosses, bandages used for dressing, pots, dishes etc. The writer has given an example of this in Annexure F. They are not supposed to look back at the burning hut or lodge lest some supernatural evil should befall them hence they are therefore careful to cover heads with the new blankets with which they have been provided. See again Annexure F.

They are now a finished product, ready to be introduced to the folks at home. A special ceremony is conducted followed by a process of the admonition of the young "ukuyalwa" during which he is told to respect the Chief, elders, parents and everybody in the society. He now also joins other members of his social status.

During the process gifts would be presented to him by those assembled in the form of cattle, sheep, goats, fowls, hats, assegais and any other items of value.

In conclusion the custom of circumcision is educative because it affords the initiate to be taught about the life he is now going to lead such as being respectful to the Chief, elders, family and other community members generally. He is also taught to be able to endure pain without flinching, have trust in Ancestral Spirits and perform sacrifices to appease them whenever the occasion so demands.

2.6 Comparative survey of the position in the tribes of the Eastern Cape and others in the African continent

The circumcision rite is almost similar in character in the manner it is practised by the Nguni of the Eastern Cape of South Africa. The custom is marked by the seclusion of the group of initiates from the rest of the society and they are further subjected to the taboos of the ritual. At the end of the initiation period, the group is once more joined to the rest of the members of the community.

While the boys are at the lodge, they are taught endurance, obedience and manliness in the same way as adopted by the tribes of the Eastern Cape. The

only difference is the fact that the Thonga boys are subject to a much more vigorous form of training. For instance, it is common for a young man to be seriously beaten up for any offence be it trivial or otherwise. Sometimes the boys would be exposed to the cold at night by being forced to lie naked without blankets other than making use of light grass to cover their bodies.

It is also absolutely forbidden to drink even a drop of water during the initiation period although the boys would sometimes trick the shepherds (traditional nurses) and go to the river to drink. Should they be caught they would be severely punished.

Training is carried out in three phases and although different forms of training methods and activities involved in each phase it is by and large similar in character to that of the Eastern Cape taking into consideration its objectives.

2.7 Circumcision among the Basotho

Initiation is regarded as a formal education marking a transitional stage from adolescence to adulthood.

Boys have always been taught to regard initiation as an inevitable part of their upbringing and one they should look forward to. Prospective initiates would meet at the Chief's place/village during winter and the initiation lodge (mophatho) would be opened by a series of feasts and lavishly celebrated ceremonies.

This aspect is therefore similar to that of the Eastern Cape Nguni custom where there is a Principal Host (usosuthu) and ceremonial feasts that go along with the custom of initiation.

Basically the boys have to undergo rigorous training as well which involves going on long marches through the mountainous terrain of the Lesotho Kingdom in order to test their powers of endurance. Occasionally the boys would be addressed by leading tribesmen on correct behaviour and morality, during which talks, virtues stressed would be chastity, honesty, courage, respect for elders and the Chief.

Briefly the content of the custom is highly educative and has almost the same objective as those of the Eastern Cape tribes.

2.8 Circumcision and girls' initiation among the Bhaca of Mount Frere

Among the Bhaca [9] of Mount Frere the transition from childhood to adulthood is also dealt with extensively.

Circumcision appears to have fallen into disuse and there are no special rites that mark the attainment of manhood among boys. However due to Hlubi influence the practice is re-adopted.

Girls on the other hand should pass through a special ceremony known as "umngquzo," "umgubo" on reaching physical maturity.

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[9] On the Bhaca see further Hammond – Tooke 1962 : 80.

The Bhaca are a Nguni people who are inhabitants of the Mount Frere district of East Griqualand. They are of Natal origin and are said to have belonged to the Lala group of Natal. They were forced to flee from the Zulu armies and after many vicissitudes including a sojourn under the Mpondo Chief, Faku, finally settled in Mount Frere district.

A fairly large Bhaca population is found in the district of Umzimkhulu, East Griqualand, and the senior section occupies a few locations in the Ixopo and Bulwer districts of Natal.

Today although the Bhaca do not practise circumcision, it was a feature of early Bhaca culture. When the boys had reached the age of puberty, they would go out into the hills and stay there, their food being brought out to their hut by their respective mothers. They would then cut off the skin that envelopes the glans penis so that the latter becomes visible and make an incision thereon. The mother of each boy would take food to her son until the "ukusoka" period is over. The Bhaca used to wear a penis sheath to cover their glans.

Although today one occasionally meets informants who maintain that Bhaca boys are circumcised, one finds on investigation that there are cases in which either one of the parents is a Hlubi or where there is Hlubi influence. In two locations, under Hlubi headman, ceremonies are held annually at which large numbers of boys are circumcised at one time with a lengthy seclusion period "up the mountain." The ritual involves the killing of cattle, the observance of rigid food taboos and the imparting of sex instruction. The operation is performed by experts (iingcibi) and the whole ceremony is still

an important and vigorous element of social life. The influence of the Hlubi puberty rites appears to have extended to the Bhaca and every year an increasing number of youths joins the lodges.

As regards Bhaca girls however, at the time of their first menstruation, they are required to go through a special ceremony which marks the transition from girlhood to womanhood. The initiation rite is referred to as ‘umnqquzo’ and ‘umgubo.’

Not all girls go through the ceremony but it is believed that, one who does not might become thin and sickly. Sickness is considered to be a sign that the Ancestral Spirits wish the rites to be observed.

When a girl begins to menstruate she keeps quiet and, when asked the reason for this, she begins to cry. By this the mother knows that her daughter’s periods have begun and immediately the people present at the kraal begin singing.

Sometimes when girls go out together to gather firewood, one of the girls will begin to menstruate and will exclaim and say, “What has happened?” An older girl will reply saying, you have reached womanhood “utfombile.” The word “itfomba” means to bud, to sprout, to menstruate for the first time.

The girl will then be secluded in a hut called “umgongo” and is seldom seen. Word is also sent to the girls of the location who will come each day to help stamp and grind maize for the feast to be held on the final day. The girl remains in the hut throughout the seclusion period with one or two close

friends to accompany her and is not to be seen by anyone particularly by males.

A goat is slaughtered as a form of medicine (umhlonyane) and a special portion of the meat “intsonyama” is cut off, roasted lightly and given her. She receives it with crossed arms, nibbles at it, and spits it out.

No one is allowed to eat the meat of the “umhlonyane” until the initiate has tasted it but after this is done the goat is roasted, beer is drunk and the whole neighbourhood is merry.

The clotted blood (ubendze) is collected in a basin and eaten as a great delicacy. Some of the gall is then given to the initiate to sip after which some is smeared on her body by her paternal grandmother, or if she is not present, by any other old woman of that kraal closely related to her.

On the sixth or seventh day after entering the hut the initiate rises early in the morning and with her close friends among the girls of the location runs down to the river, clad only in the short, bead isikhakha or skirt. There they wash and return to the kraal wearing blankets until they can dress in their best clothes while sometimes in all the finery of their beadwork.

While they are at the river, the umkhanzi grass which was strewn on the floor of the seclusion hut is removed by the girls and burnt, a final break with the seclusion period and the old life of childhood. The initiate is now said to be (vutshiwe) ripe and to be looking her best. It is also common that ointment bought at the store is smeared on her face to lighten her complexion and the enforced inactivity has probably made her plump.

On this final day the ‘umgubho’ proper begins; it is often also referred to as the ‘umjadu’ or feast. After the return of the girls from the river the kraal head slaughters three or four head of cattle for meat. Usually his brother will contribute one to help him, but this is not obligatory.

Beer drinking, dancing and feasting are the order of the day and social intercourse is marked by much hilarity and good humour.

Initiation is the preparation of the girl for marriage, an indication to the society that she has become a woman and an adult member of the tribe.

2.9 Initiation among the girls’ of the Abenguni

Initiation among the girls’ of the Abenguni is known as ‘intonjane.’ Puberty is marked off by the intonjane ceremony which brings a change in the females’ social status.

Initiation for girls is a period spent in seclusion during which the girls receive tuition on womanhood from elderly experienced African women.

The duration of the period varies from two weeks to four, but generally not more than a month. It is a transition period from girlhood to womanhood and is similar to the passage of boys from boyhood to manhood during circumcision.

During the period of seclusion, a girl rests in a hut partitioned with a reed screen behind which she sleeps with two companions. Her other companions sleep with their lovers on the other side of the partition and the greater part of the evening is spent on dancing and singing.

The ritual is also marked by festivities involving the slaughtering of beasts and beer drinking.

2.10 Female circumcision among Kenyan tribes

In Kenya the practice among the girls is known as Female Genital Mutilation (FGM). It forms part of the rites of passage from childhood to adulthood and involves, the removal or deformation of sensitive female genitalia.

Female circumcision is carried out on pubescent girls by women circumcisers who use a knife, razor blade or piece of glass which are often unhygienically kept. The operation which may take ten minutes is done either in private or in public depending on the community and often it is a cause for celebration among women and family members of the initiate. For example, among the Kenyan Masai, female circumcision is done privately and it involves women from the family of the initiate. Increasingly among the Kisii community, it is carried out in hospitals or privately at home by a health worker. The health and psychological effects of female genital mutilation have been well documented and these include haemorrhage, obstructed labour, trauma, shock, urine and menstrual blood retention and infertility.

There is also the risk of contracting HIV at the time of the operation because the same instrument is used repeatedly on a number of girls without being cleaned after each use.

However, female circumcision has always been considered an important rite of passage to adulthood and has been carried alongside education of girls aimed at preparing them for their roles as wives and mothers.

It was often pointed out among Kenyan tribes that the female circumcision enhanced tribal cohesion. The initiates receive important recognition among peers and within the community, it increases marriage opportunities for girls and ensures a favourable economic situation for the family arising from the marriage gifts given upon the initiate's marriage.

Despite problems encountered, in its proper administration, it remains in Kenya an important transitional ritual from childhood to adulthood.

2.11 Circumcision among the Batswana

The writer wishes to comment on the initiation ritual among the Batswana. The ritual is practised by some tribes in Botswana more especially the Bakgatla tribe of Mochudi Village.

Upon initiation a young man becomes eligible to be a member of the Chief's regiment. By active participation in the ritual, the individual is made to feel the importance of those things that are of value to society.

Circumcision is generally an important phase in the life history of each individual. The ritual is marked by ceremonial feasts that involve moral and religious teachings which initiates find it very difficult to forget. The impact made by the custom on young men and women is indeed great.

Once more what obtains among the tribes of South African region is in principle the same and the only difference is in how circumcision is carried out.

2.12 The legal significance of circumcision

2.12.1 The position among the Xhosa

Van Tromp [10] gives the following account of the legal significance of circumcision among the Xhosas:-

"An umntu is sometimes referred to as an *inja*, a dog, to show the relationship of legal dependency existing between Chief and subject, or between father and child. The word inja is used to denote both the responsibility of the father for the torts or misdemeanours of his child, and the lack of capacity of the child to acquire and maintain rights for itself: Inja yakho, i bambela wena (inja i bambela umniniyo): the dog catches for its master. When used of the relations between chief and subject, it denotes the power of the Chief over his subject.

A human being, umntu, only gradually acquires the full legal status, according to his development in life.

According to Xhosa Law there are two stages in the life of a person which mark off his legal status: These stages are:-

(i) When he has reached the age of puberty, and undergoes the *initiation ceremony* (ukwaluka kwa makwenkwe),

[10]Van Tromp, 1947, p 1-16. The present writer has quoted Van Tromp at length as he accurately reflects the law relating to status in the Eastern Cape.

(ii) Marriage.

These two stages cover three periods: from birth to initiation; from initiation to marriage; from marriage onwards, as will be described below.

The author quotes Proclamation 112 of 1879, Section 39, "All persons male, or female, when they shall attain, or who have attained, the full age of twenty-one years, shall be deemed to have attained the legal age of majority." This is not so in Xhosa Law. The idea of majority and minority as being dependent on the attainment of a certain number of years is foreign to the Xhosa mind.

The Xhosas looked at the stages of a person's development when considering the question of status.

For example the first period from birth to initiation, may be divided into two stages:-

(a) from birth to the time when he is capable of herding cattle, and

(b) from the cattle-herding stage to initiation. The author gave the following accounts of the stages of legal developments.

(a) "The male : From birth to about six or seven years, that is when he begins to herd, a boy is not considered to have 'eyes to see,' that is, to do anything wrong : 'A yi ka tungululi' he has not had his eyes opened. He cannot distinguish between right and wrong nor can he see his danger. If he should commit a wrong, e.g. allowing cattle to stray into the lands, or burning the veld, he is punished by the injured party or his parents and the matter is over. Where the mischief results in damage, the father or lawful

guardian of the child is not responsible: ‘A yi ka tungululi.’ But the father or lawful guardian may, in order to preserve friendship and good relations, help to restore what has been damaged by his inja, child.

1. The boy has an enhanced social status from the cattle-herding stage to initiation. He is now considered to have more experience and better judgement, and is allowed to herd cattle and milk the cows.

His legal status, however has not increased. From birth to the cattle-herding stage, and from this stage to initiation, the boy remains an inkwenkwe, a boy, and is in no way legally responsible for his actions though he may be punished by anyone who finds him committing a wrong. He has no hearing in any court, he cannot enter into a contract. If he receives anything, by labour or otherwise, it falls to the household property of the hut, indlu (house), of which he is an inmate. He cannot be betrothed or married for, as a rule, only persons who have undergone the initiation ceremony are considered ripe for marriage. The initiation is the ritual transition from boyhood (ubukwenkwe) to manhood (ubudoda).

During the seclusion period the initiates, *abakhwetha*, are treated like iinyamezane, wild animals. They are not considered to be abantu, human beings, with a status or a say. Corporal punishment is common but they have no redress. They are guarded by one or more amakankatha (a kind of male nurse), representing the fathers of the initiates. The fathers and not the

amakankatha accept responsibility for the actions of the initiates. The amakankatha nurse the wounds of the boys.

2. On initiation the boy acquires the status of a man. His eyes are opened and now that he has undergone the initiation ceremony he is accepted as an *indoda*, man. He can accept presents which belong to him though these may be controlled by his father. He is ripe for marriage, can be betrothed and can enter into a valid marriage.

The day he comes out of the isutu (itonto, ipempe) or seclusion hut, while at the umzi of the umnin'umzi (owner of the seclusion hut) the act or ceremony of *ukusoka* (presenting gifts), also takes place. This is the final ceremony in which his father, family and friends give him presents indicating his status, for these now become his own. Participation in the final ceremony is an essential for attaining the status of an indoda. For only then will he be an indoda in the true sense of the word. This became clear to me in a case where an umkhwetha was charged with theft. He was imprisoned and felt much distressed about the matter, because he would not be able to attend the ceremonies on the final day, and this would, I was assured, affect his status. He could not rightly be considered an indoda although he had undergone all the previous ceremonies in connection with the initiation.

The short period from the time the abakwetha leave the isutu to the time they enter marriage, is an important one. They are called *amarwala* ; sometimes abafana, meaning adolescents or young men. They can mix freely with the opposite sex, have sexual intercourse with amadikazi, loose women. In fact,

in this irwala-period plans for a marriage are being started. Marriage is mainly a family affair and though the adolescent is allowed freedom in his choice, his father has a great say, especially with regard to his first wife he marries because though he has the status of a man he is still under the control of his father as long as he is considered an inmate of his father's umzi.

Through initiation he attains greater rights and privileges. He takes part in his family court or inkundla where he can, discreetly, question the parties. When needful he may act for his father. He can now be selected by the Chief for work perhaps as an umsengi, one who milks and provides milk for the calabashes of the Chief. He may go to the Great Place (Komkulu) and attend the Chief's Court.

In social life he has a higher status. He can attend beer-drinks and feasts with other young men of more of less his own age. He will not be pushed aside as these feasts and be branded a "kwedini" or "child."

Van Tromp [11] recounts an occasion when he met a middle aged African who had undergone a circumcision ceremony even after he had contracted a marriage ceremony and already had children. The man told him that he had done so in order to gain respect of other men of the community who treated him as a boy.

[11] Van Tromp : 37.

He had not been treated with respect and was always told to go and enjoy himself with the amakwedini, boys. And for all this treatment, treatment amounting to insult, Xhosa Law affords no remedy. Not only men look down upon an uninitiated male and treat him with contempt, but also women.

Circumcision entitles a young man to acquire heritable rights. He can also establish his own homestead. At common law the position was different where the law allows an uninitiated son to succeed his father, if he has reached the age of 21 years – or even before.

Indeed marriage gives the initiated male the full status of a member of his umzi and tribe. He has a say in the family court as well as in the Chief's Court. His word now carries more weight. His first wife having been sanctioned and lobolaed by his father, he may hereafter marry freely as many wives as he can afford to lobola. With the consent of his father he can build his own separate umzi, and thus become a kraalhead, umnin'umzi. The father is then no longer legally responsible, according to Xhosa Law, for the deeds of his son, but public opinion urges him to help his son in case of difficulty, and because he is his son's father he sometimes pays the fine for his son. While the son remained in the umzi of his father, the latter was responsible. Now that the son has his own umzi he can acquire anything and what he acquires he acquires for his umzi.

He can enter into any contractual obligations and is responsible for his own acts and for those of his wife and children.

Every individual is born with a certain status relative to the other members of his community. It is not a personal status, as it might be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community. All his conduct is conditioned by his status, which is not a permanent one but changes with his age and experience and may be affected by the decrease of relatives and the inheritance of new responsibilities. (The principle of substitution is a correlative to status, since all of the same status in the community may at anytime be called upon to act as a substitute for another member, a principle which, as we shall see is of considerable importance in African legal theory).

Van Tromp [12] further points out that in African societies with no strong centralised political systems as well as in some with such systems, the institution of age-grades has important juridical functions. "The puberty initiation rites, for example, may be the means in some societies of determining the legal capacity of the individual to marry, to become a warrior or to take part in certain other public activities of a social or legal character. Sometimes these rites are merely preparatory to some later public ceremony or display of certain personal attributes as among the Masai and the Zulu, on the successful performance or display of which alone may depend the conferment of a status requisite to prescribed forms of social participation."

[12] van Tromp, Readings in African Law : 28.

2.13 Legal effect of the ritual among the Xhosa speaking tribes

According to Elias [13] circumcision of an individual accords him a certain status in a given society. All his conduct is conditioned by his status, which is not a permanent one but changes with age and experience and may be affected by the decrease of relatives and the inheritance of new responsibilities (the principle of substitution is a correlative to status) since all of the same status in the community may at anytime be called upon to act as a substitute for another member, a principle which, as we shall see is of considerable importance in African legal theory.

He further points out that in African societies with no strong centralised political systems as well as in some with such systems, the institution of age-grades has important juridical functions.

In his view, infancy is a concept that has universal legal validity among all African societies, though the age at which it terminates naturally varies from one community to another.

"Particular ages entitle the individual to particular types of social participation in the various affairs of life, and legal capacity or incapacity accompanies certain ages. But almost everywhere one finds among the different societies the requirement that the attainment of puberty by the infant is the minimum condition for recognition as a member of his community. Thus, one sees that until the infant has performed the

[13] Elias : 37.

prescribed puberty rites, he or she is not legally entitled to get married; also, only passage through puberty school can initiate one into the various age-grades proper."

Now, puberty is normally attained between the ages of 14 and 16 for girls, and 16 and 18 for boys. But in point of fact most communities insist on their girls waiting at least a little longer; while the compulsion to acquire the often high bride-price or to participate in some military expedition or, in some communities, to organise raids for boys, generally requires that marriage must take place at still more advanced ages. Sometimes, the puberty initiation ceremony is only a prelude to yet more ceremonies which alone fix the legal and social status of the growing infant.

Proceeding further Elias states that among the Masai, every infant is expected to advance from boyhood to bachelorhood to the elder's estate. But there is no implication of superior and inferior caste as the basis of differentiation of the age-grades among the elders. Initiation makes him a warrior; two years later, he becomes an apprentice (a shaved on); at between the ages of 28 and 30 years he figures as a full-fledged brave, gets married on leaving the bachelor's kraal, and so assumes the dignity of an elder. Similarly, the girls become known as 'novices' after the appearance of their first menses; a little thereafter, they are generally regarded as fully- grown women ready for marriage; they however continue to enjoy a distinct rank until they attain their menopause.

According to Elias he further states that among the Chagga, initiation of girls takes place usually when they are 16 or older, and they marry as late as 20 or even later. At any rate, in 1935, the average marriage age was between 18 and 26 years. We learn from our source also the interesting fact that before the Lindi dynasty Chagga girls used to get married at between 18 and 20 years of age but, when the Lindi family imposed their domination after the middle of the last century, they began to drag as many girls as the liked into marriage. The only way of discouraging this habit was for parents to betroth their girls very early, about the age of 9 or 10. After the fall of the Lindi dynasty, however, the marriage age went up again until it stood at 16 for 'pagan' girls. Early betrothal seems to have taken place also among the wa-Shambala and the wa-Gogo; and we are assured by Thurnwald:- "The girl's wish is more frequently taken into account than generally conceded as true …….. The girl is expressly consulted and her wish respected ……. If not, the girl considers her self-respect impaired and even may commit suicide from loss of prestige."

Further instances could be given of practices among other African communities but probably little useful purpose would be served thereby.

Elias states that what stands out from the preceding analysis is that for capacity to marry and perhaps to do certain other legal acts, the attainment of puberty is a necessary minimum condition. Infants often have to wait, however, before they are fully received into adulthood. It may not be far wide off the mark to add that, so long as they remain unmarried and attached to the parents' home, they are for all practical purposes regarded as infants.

The parents are still responsible to others for their good behaviour as well as for liabilities to others, though exceptional circumstances may warrant a different inference. Where however, they get married but remain with the parents, the new status of matrimony will usually mean the assumption of full legal capacity by the infants.

Finally Elias states that it will have become clear by now that age plays at least as important a part in African society as it does in the English or any other human society. The means employed for social differentiation by age varies, however, in different societies. The absence of official records in traditional African societies has led to the formality of public initiation rites for groups of approximate coevals at various levels of the social strata. The public has always been the best witness to these age ceremonies on which the individual's social and legal standing in the community so largely depends. Without such symbolic acts of public testimony it would often have been difficult to ascertain when or whether an individual had reached the legal age to marry, to become a warrior, or to stand for election into such important public bodies as the so-called secret societies with definite political and juridical functions.

Although age-classes play such an important part in social life, it would nevertheless be wrong to imagine that membership of every such group necessarily confers a legal status upon the individual. The various coming-of-age ceremonies must, therefore, be carefully distinguished from those that are merely designed to celebrate the formal inauguration of cultural,

religious or social clubs – all being forms of the social instinct for masculine gregariousness.

2.14 Circumcision and religion

This section deals with African religion on customary law, culture and religion. Mbiti, [14] a leading scholar on African religion gives the following account on the social and legal significance of initiation rites in African Societies.

(a) Legal significance

- Ritual ceremonies are generally performed after the birth and naming of the child. After birth to adolescence and puberty and until the child reaches adulthood, the child undergoes radical physical changes.
- When the child reaches the puberty stage, the individual goes through the initiation period. Once more this period is marked with outstanding ceremonies. As indicated earlier in this Chapter, the initiation or circumcision event is a transition period from puberty to adulthood.
- Girls also undergo their initiation ceremony during which they are taught womanhood by specially selected adults.
- In some tribes, there is a strong belief that if a girl has not undergone initiation or genital mutilation, ill-luck would always be a common feature of her life.
- In this connection she may perhaps not be married and even looked down upon by members of her peer group. Peer group pressure

[14] Mbti – Introduction to African Religion : 90.

- becomes so much that she finds herself isolated and subject to psychological traumas culminating sometimes with death.
- Initiation is an annual or biennial event that is very much of a community or public affair.
- It is during this period that the initiates are commended to the care of their Ancestral Spirits for a speedy recovery while in seclusion.

(b) Religious significance

Mbiti [15] highlights the following religious aspects:-

- Initiation is so important in African life because it involves the shedding of blood. Mbiti stresses that blood which is shed during the physical operation binds the person to the land and consequently to the departed members of his society. This practice is observed in most tribes.
- According to the author circumcision blood is like making a covenant or a solemn agreement between the individual and his people. This means that until the individual has gone through the operation, he is still an outsider, "but once he has shed his blood, he joins the stream of his people and indeed becomes truly one with them."

[15] Mbiti - Introduction to African Religion : 93.

In most tribes initiation brings about changes in the young man's standing in society. Mbiti [16] says that the flesh is a symbol of getting rid of the period of childhood, and getting ready for the period of adulthood. "Once initiation has taken place the individual is accorded the status of adulthood and is ready to enjoy full privileges and also shoulders various responsibilities both in his immediate family and in the larger community or nation."

This is common in most tribes. The young man will now be competent to get married. According to Mbiti [17] one of the features of initiation is the period spent in seclusion during which initiates are taught many things concerning the life of their people, history, traditions, beliefs and how to raise a family.

"The mysteries and secrets of married life are normally revealed to the young people at this point so as to prepare them for what is soon to come. Nobody is allowed to get married before going through initiation and many people get married soon after the initiation exercise."

Mbiti [18] also highlights the following aspects:-

- Initiation is also a central bridge in life. This is so because it brings together one's youth and adulthood, the period of ignorance and that of knowledge.

[16] Ibid : 94.
[17] Ibid : 94.
[18] Ibid : 94.

- “Separating a person from one life it also joins him to another by dispersing the early state of passive life and then integrating it into a productive state and knitting him with the community.
- It is initiation which also bridges the male with the female, fatherhood with motherhood, since it signals the official permission for one to get married and bear children. It also joins the living with the departed, the visible with the invisible, because after initiation a person may perform religious rituals.
- Initiation is a mark of solemn unity and identification. Through it the individual is sealed to his people, and his people to him. This is a deeply religious step. During the initiation ceremonies and after, the leaders in charge offer sacrifices or prayers to God and ask for his blessings upon the young people. In other places, the spirits are believed or invited to be present and to witness the occasion.
- From that occasion onwards the initiated boys and girls will forever bear the scars of what is cut on their organs and those will be scars of identity. Through the scars, the initiated are henceforth identified as members of a specific people.

  Without that identification scar they cannot be fully integrated with their people.
- During the seclusion part of the initiation rites, the boys undergo a period of education or traditional schooling. As we have said this concerns tribal life and matters which equip them to live now as full members of their society. They also undergo physical training

to overcome difficulties and pain and to cultivate courage, endurance, perseverance and obedience.

- This [19] educational experience equips them mentally, bodily, emotionally and morally, for adolescence and adulthood. They come away as adults in the eyes of society."

The religious ceremony of the shedding of blood is observed at the end of the seclusion period. For example when the young man returns home sacrifices are offered by slaughtering animals. The whole community joins in the feasting. The practice described by Mbiti can be contrasted with that of the Xhosa tribes where slaughtering takes place before the boy goes to the circumcision lodge. When the young man returns home a different ceremony is observed. The young man is now given a new name. The young man will also show radical changes he has undergone. The young man will also wear new clothes and receive presents from relatives and neighbours. They receive respect from everyone and indeed a new rhythm of life begins for them and they commence to play a new role.

Finally, initiation brings the people together. Initiation shuts the door to childhood, and opens another one to adulthood. It makes the young people active members of that society and no longer simply passive children. The spirit of community is renewed through this period with all the feasting that goes with it; the departed, the living and those yet to be born because now the gates have been opened for the initiates.

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[19] Ibid : 93.

2.15 Conclusion

In this chapter we have demonstrated that the custom of circumcision, which sometimes is referred to as an initiation ceremony, is practised in most part of Africa and is well established.

It further brings about the relationship between law, culture and religion as agents of social control as well as being definitive factors in matters of status.

Mbiti's comment on the role of religion in this custom should be seen in the light of Mr Justice Ngcobo in the recent case of Prince v President of the Law Society of the Cape of Good Hope and others [20] where the court described religion as a means of giving content to the Constitutional value of human dignity in an open and democratic society.

[20] 2002 (3) BCLR 231 (CC).

CHAPTER 3

3. Statutory development on the practice of circumcision in the Eastern Cape

As already alluded to, the Provincial Government decided to introduce a piece of legislation [1] to regulate the custom of circumcision in the Province.

The objects of the Provincial Act are set out as follows:-

(a) To provide for the observation of health standards in traditional circumcision;

(b) To provide for the issuing of permission for the performance of a circumcision operation;

(c) To provide permission for the holding of circumcision schools and for matters incidental thereto.

In introducing the Bill the Acting M.E.C. for Health stated that the broad aim of the measure would be to ensure:-

1. The application of health standards in the performance of circumcision and treatment of initiates.
2. The designation of medical officers who are empowered, amongst others, to issue permission to persons who want to perform circumcision operations and treat initiates.

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[1] Traditional Circumcision Act 6 of 2001.

[2] Hansard – Debates of the Legislature of the Province of the Eastern Cape 25 October 2001.

In his speech the M.E.C. stated that an application for permission should comply with conditions prescribed for both traditional surgeons/traditional nurses in the schedule of the Bill.

Notable aspects of the Act include the following:-

(a) The age limit for traditional circumcision would be a minimum of 18 years, but permission may be granted on application by a parent or guardian for circumcision to be performed to an initiate who is below 18 years but not lower than 16 years.

(b) A pre-medical examination of the initiate to determine if he is fit for circumcision.

(c) Sterilization of surgical instruments.

(d) A reasonable amount of water to be allowed by the traditional nurses to the initiate in order to avoid dehydration of the initiate. This does not mean that there will be female nurses as opposed to the African tradition of male nurses.

According to the M.E.C. a maximum penalty of 10 years imprisonment or fine to an amount of R10 000 may be imposed for the contravention of the prescribed conditions resulting in the hospitalisation or mutilation of an initiate.

The M.E.C. responsible for Health may amend the Schedule to the Act, by submitting a copy thereof to the Legislature. The M.E.C can, therefore, make regulations in respect of certain specified matters.

3.1 Comments by the members of the Provincial Legislature

Varied comments on the Bill were made by the members of the Legislature, representing different political parties.

The Honourable Mr M.D. Qwase (A.N.C) presented a report of the Standing Committee on the work that it had done after they had conducted public hearings on the Bill. A number of areas throughout the province had been covered. According to him hearings were well attended and follow up meetings were held in certain places.

At some point during the hearings especially in the Maluti region, women members of the Committee and staff of the Legislature were debarred from the hearing. This was because in terms of the Basuto tradition women are excluded in these matters.

He was in support of the Bill.

He concluded by saying that the Committee succeeded in conveying the message to the communities that the Bill was not about transforming the traditional practice of circumcision, but was mainly concerned about the health of the initiates.

In considering the views from the public hearings the Committee agreed to change the title of the Bill from Traditional Circumcision Bill to Application of Health Standards in Traditional Circumcision Bill.

The question of age was also dealt with extensively and after receiving legal advice especially from the state law advisors, the Committee agreed that the minimum age for circumcision should be 18 years.

Permission could only be granted in exceptional cases of initiates younger than 18 years but not younger than 16 years if the parent or guardian so requests.

Regarding permission to perform circumcision, the Committee deliberated at length and agreed that strict health practices should be followed by medical officers and traditional surgeons.

Finally the Committee dealt with penalties on traditional surgeons who contravened the provisions provided in Schedule A, B and C.

Schedule A deals with permission to go into that process. Schedule B deals with permission for the community to hold a circumcision school. Schedule C deals with the consent from the parent because the Bill emphasizes that there should be consent by the parent for one to attend a circumcision school.

The Speaker thanked the members of the Committee on the work done regarding the Bill.

The Honourable Mr A.P. Trollip (D.A.) highlighted the high rate of incidents of hospitalisation and death ultimately causing trauma that has long lasting psychological effects on hospitalised initiates.

He hoped that the traditional communities would assist by indentifying moon-lighting ingcibi's who were trading by circumcising immature boys who enrol themselves for initiation without the knowledge of their parents.

He further emphasized the compulsory sterilisation of surgical instruments in order to prevent any possible spread of AIDS.

He supported the Bill pointing out that the intention was not to interfere with the process of initiation, but merely to focus on health standards.

The Honourable Ms M.C. Nash (N.N.P) made it clear at the onset that as women of the Legislature, their interest was focussed on the health and health only, and they were not trying to interfere with traditional affairs.

Because everybody was aware of the deaths of initiates it had therefore become necessary for Government to step in and table the Bill. The Bill dealt with the health standards in traditional circumcision.

She emphasized the need to consider recording the ages of initiates whose deaths occur as a result of circumcision, so as to establish whether this provision made for the possibility of a 16 year old to be accommodated in the process.

She maintained that it was imperative to make sure that the age factor was not also a contributing factor to the deaths of so many young people.

She supported the Bill.

The Honourable Mr P.S. Kakudi (U.D.M) in supporting the Bill stated that members of the U.D.M. appreciated the fact that most people in various parts of the Province expressed concern about the calibre of the medical officer to be appointed in communities to implement crucial and critical aspects of the Bill when it is of course an Act.

As long as such officer has himself undergone their custom, harmony and co-operation shall prevail. This is so because implementation of the provisions of the Act will involve visits to the initiation lodge, an area where customary secretness and secrecy prevails; a place where strangers dare not present themselves.

Regarding the ritual itself, he placed emphasis on training because pure traditional methods by their very nature make no room for modernity. He felt that training methods would be introduced gradually to the advantage of the custom. Such training methods would be no harm as long as they were acceptable to the tribes.

The Honourable member emphasized and appreciated the fact that no person should hold an initiation ceremony and establish a circumcision school without having obtained permission from the traditional leader in council.

In the same way, the medical officer should perform his duties in strict consultation with the traditional leader.

Finally the Honourable speaker appreciated parental involvement which endorsed the principle that no boy should be circumcised without the parents' or guardians' consent. In his view there has always been a standing

rule that initiation of boys to manhood requires parental and family involvement.

Other members of the House urged the government to organise workshops in order to make people aware of the need to take all precautionary measures designed to address the problem.

The translation of the bill into languages of the affected communities was further suggested and fully recommended. After being read for the third time, the Bill was unanimously passed by the House.

3.2 Comments by the House of Traditional Leaders

The Eastern Cape House of Traditional Leaders had made important comments on the Bill. The writer will give the House's verbatim comments on the following sections:- 3, 4, 5, 6 and 7.

CLAUSE 3 of the Bill – and now Act

"Permission to perform circumcision

(1) No person may perform any circumcision in the Province without a written permission of the medical officer designated for the area in which the circumcision is to be performed.

(2) (a) The permission referred to in subsection (1) must be given subject to the condition set out in Annexure A of the Schedule and any other conditions a medical officer may deem desirable with regard to the performance of a circumcision.

(b) A medical officer may, as part of such other conditions-

1. disallow the use of a surgical instrument that the traditional surgeon intends to use; and

2. prescribe or supply a proper surgical instrument where the use of 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)(1), 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, and any other conditions imposed in terms of subsection (2), to the person applying for permission in terms of subsection (1):

(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) 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 been permitted in terms of subsection (1), must within one month of the date of such permission, submit proof of compliance with the conditions referred to in subsection (2), failing which the permission of such person shall lapse.

(5) A person whose permission 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 if application for permission is made for the first time."

The House of Traditional leaders commented as follows:-

"The house agrees with the provisions of this Clause provided that the application for permission to hold, perform a circumcision is lodged with a Traditional Authority concerned, the prescribed documents shall be signed by all concerned. This is on condition that our proposed amendments of Annexure A is accepted."

CLAUSE 4 (5) of the Bill/Act reads as follows:-

"A person whose permission has lapsed in terms of subsection (4) is eligible to make a new application for permission to the traditional authority concerned and the provision of this Act applying to such person as if application is made for the first time."

Their comment was:-

"We propose that the provision of this clause be accepted."

CLAUSE 5 (1) reads as follows:-

Restriction of person to treat initiate

"(1) No initiate may treat or attempt to treat another initiate at any stage during or after the holding of a circumcision school.

(2) No person, other than the traditional nurse, the medical officer or any other person authorized by the medical officer, may treat an initiate."

Their comment was:-

"The House expressed its discomfort with the entire clause 5, as it is the experience of traditional leaders that initiates were the ones who sometimes treated other initiates and who themselves had the skill, and could graduate

to be traditional surgeons. Therefore to preclude them from treating other initiates would undermine this practice.

Secondly, traditional leaders were aware that in practice elderly men, who themselves had undergone this custom, sometimes do help traditional nurses in certain circumstances. Therefore for the Law to preclude these persons from helping in circumstances of need, is not acceptable.

Based on the above reservations, the House amended the clause to read as follows:-

"5. (1) No initiate may treat or attempt to treat another initiate at any stage during or after the holding of a circumcision school without the supervision and approval of the traditional nurse or surgeon.

(2) No person other than the traditional nurse, the medical officer or any other person authorized by the traditional nurse or surgeon, may treat an initiate. Provided that nothing herein contained shall preclude any person including a traditional healer from treating an initiate under supervision of a medical officer and a traditional surgeon."

Further the Bill/Act reads:

Consent by parent or guardian – We propose that the entire clause is amended to read as follows:-

"6. (1) The parent or guardian of a prospective initiate must, in respect of a prospective initiate below the age of 21 years, complete and sign a consent form in the format set out in Annexure C."

Their comment was:-

“The parent or guardian of a prospective initiate must, in respect of a prospective initiate below the age of 21 years give consent and may complete and sign a consent form in the format set out in Annexure C, before a traditional leader concerned. Provided that nothing contained herein shall preclude an initiate to join other initiates in accordance with custom. Provided further that a traditional community may at a traditional community meeting (imbizo) decide to grant initiates permission to undergo circumcision.”

CLAUSE 6 (2) of the Bill/Act reads:-

“The parent or guardian of an initiate must in addition to all other responsibilities which such parent or guardian has in respect of the initiate, render such assistance and co-operation as may be requested by the medical officer in the interest of the good health of the initiate,” which they accepted.

CLAUSE 6 (3) of the Bill/Act reads:-

“No person, including the parent or guardian of an initiate, may interfere with or obstruct the medical officer in the performance of his or her duties under this Act.”

Their comment was:-

“We propose that the provision of this Bill must be amended to read thus; No person, other than the parent or guardian of an initiate, may interfere with or obstruct the medical officer in the performance of his or her duties under this Act.”

FURTHER PROPOSALS BY THE HOUSE OF TRADITIONAL LEADERS

"The House, having considered the other clauses, felt that it was necessary for a clause to be included creating an offence for anybody who defied the orders of a traditional leader or custom of a traditional community concerned. The following clause is proposed as Clause 6 (A) –

"Disobeying lawful orders of traditional leaders/customs"

CLAUSE 6 A

"No person shall construct a circumcision lodge, perform circumcision or take part in circumcision or in any manner defy lawful orders of a traditional leader or custom of a community.

6B Powers of traditional courts:-

The power to try matters contemplated in the Act or any regulations framed in terms of this Act shall vest in traditional court concerned."

7. Regarding "penalties" – the entire clause was amended to read as follows:-

"7.1 Any person who contravenes the provision of section 5, 6(2) and 6(3) is guilty of an offence and liable on conviction to a fine of R300.00 (three hundred rand) or to imprisonment for a period not exceeding three months.

7.2 Any person who contravenes the provisions of section 3(1) and 4(1) or who fails to comply with any condition imposed by a medical officer in terms of section 3(2) and 4(2), is guilty of an offence and liable on conviction to a fine exceeding R5000.00 (five thousand

rand) or to imprisonment for a period not exceeding five years, or to imprisonment for a period of three years without the option of a fine."

In addition the following comment was made:-

"We propose that any person who contravenes the provisions of this Act shall be guilty of an offence and be liable on conviction to a fine not exceeding five (5) beasts or their value at R1 500 each. Provided that in the case of default or inability to pay, the Magistrate of the district concerned may impose an alternative term of imprisonment not exceeding five years.

(1) In cases of assault of a serious nature the Magistrate's Court having jurisdiction shall have the power to try such cases and impose an appropriate sentence."

Before proceeding with my Evaluation Comment, the writer wishes to submit as follows:-

Under section 183 of the Interim Constitution Act 200 of 1993 which envisaged the establishment of Provincial Houses of Traditional Leaders, a House of Traditional Leaders shall be entitled to advise and make proposals to the Provincial Legislature or Government in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the Province. (See Section 183(2)).

The same function was also envisaged in respect of the Council (i.e. in the later National House) of Traditional Leaders (section 184 (4) (a) (b) (c) and (d).

Meanwhile other Provincial Legislatures, namely Limpopo and Free State have also deemed it fit to regulate the custom. The Northern Province Circumcision Schools [3] Act 1996 of Limpopo provides for the following measures:-

"In terms of this Act a person wishing to run a circumcision school must apply for a permit to the Premier or any person duly authorised by him to issue a permit for the holding of a circumcision school.

Members of the South African Police service are given the power to rescue persons who have been abducted or forcefully taken to a circumcision school.

The Act also enables the Premier to, inter alia, make regulations regarding the issue of permits to run an initiation school; determine the age of the initiates and the duration of the school.

A regulation has been made for the issuing of permits to run initiation schools. According to the regulation "No person is allowed to conduct a circumcision school without a final permit issued by the Premier or authorized officer.

In terms of the same regulation traditional surgeons are prohibited from performing operations in a circumcision school without a final permit issued by the Premier or authorized officer. Traditional nurses are also prohibited from treating initiates without a final permit issued by the Premier or authorized officer.

[3]Northern Province Circumcision Schools Act 6 of 1996.

This regulation specifically prohibits the admission of any person below the age of sixteen to a circumcision school. It also deals with the offence of the abduction of young men for the purposes of taking them to initiation schools and imposes a criminal sanction on anyone found guilty of contravening this provision.

This comprehensive regulation makes it obligatory for the traditional surgeons to submit a list of all initiates to be admitted to the school, proof of their ages, a duly signed parental consent form or an initiate consent form.

The Free State Initiation School Bill, 2003 envisages a situation where permission must be granted before an initiation school is held in the Free State. Moreover the traditional surgeon must also obtain written permission from the District Medical Officer before he is allowed to perform circumcision on the boys.

The Bill also outlines the specific powers and functions of the District Medical Officer. Moreover provision is made for the appointment of an Environmental Health Officer to inspect initiation schools. His duties include, inter alia, ensuring that 'there are no factors in the environment that could have a negative impact on the lives and health of the initiates…..' and that 'the instruments used for circumcision are kept prepared and used in a manner that will not place an initiate at risk or injury, disease or death.'

This Bill, should it be enacted will also make it an offence for an initiation school to admit an initiate without his expressed informed consent or the consent of the parent or guardian. The Bill provides for parental consent to

be obtained for prospective initiates below the age of 18 years. Where the prospective initiate is above the age of 18 he must sign the prescribed consent form.

3.3 Evaluative comment

The members of the Eastern Cape Provincial Legislature and the House of Traditional Leaders made significant comments and contributions regarding the Bill.

It was quite obvious that the age factor and the presence of the Medical Officer of Health were motivated by the cause of the high level of deaths of initiates.

The need to seek permission of the traditional leaders (Chiefs) before a circumcision exercise was conducted was emphasized.

This was coupled with the need for the boys to inform their parents before circumcision.

Briefly everybody participated quite well during the discussions on the subject which in itself was an indication that the new law was accepted as a solution to the problem.

CHAPTER 4

4 Cultural rights and the Bill of Rights

In this chapter the writer looks at the custom of circumcision in the context of chapter 2 of the Constitution. The present writer is in agreement with the following observation by Labuschagne and de Villiers [1] that since the advent of the global impetus to respect and protect the rights of the individual, legal systems in culture, plural societies have continuously been confronted with the problem of the rational and legitimate accommodation of conflicting cultural practices within the confines of a human rights dispensation.

In the new South African dispensation, a person's right to practise one's culture enjoys protection in the context of the Bill of Rights.

Mireku [2] ascribes this phenomenon to the fact that our country is a mosaic of different cultural and linguistic communities. It has a predominantly indigenous African population composed of diverse Bantu tribes with numerous languages and cultures. Moreover, there are British and Afrikaaners who make up the minority white segment of European ancestry. Furthermore, the rest of the population consists of Asiatics as well Coloured (people of mixed blood between the European settlers and African women). One may find that the bottom line of the racial

[1] Labuschagne and de Villiers "Circumcision and female genital mutilation : a human rights and anthropo-legal evaluation" 1998 : 277 at 288.
[2] Mireku 1999 : 439.

composition graphically reveals various pigmentations of black, white and brown as the constitutive colours of the rainbow nation.

According to Mireku, though the constitution makes no explicit reference to the concept of 'rainbow nation,' it contains many provisions that underscore the wisdom underlying this 'commanding and inspiring idea' whenever it addresses the inherent 'rivalry and tension' within the South African multicultural policy. The author quotes with apparent approval the following statement by Devenish:- [3]

> "the 1996 Constitution and its Bill of Rights must be applied and developed in an African political and social context in a country where the vast majority of the inhabitants of South Africa are African people with an indigenous culture that must inevitably influence the manner in which the Constitution finds expression."

In the light of the above remarks Mireku [4] calls upon the South African courts to allow the culture of the indigenous Black people to prevail in the manner in which the Constitution is given effect. "Two consequences of this approach epitomise its inherent flaws. First, the culture of minority communities may be strangulated by that of the dominant African people. Perhaps, as in the case of the San/Khoisan, the culture of some minority

[3] Devenish 1998 : 349.
[4] 1999 *op cit* at 440.

communities would even be annihilated. Second, the African culture would wield an extraordinary influence on the Bill of Rights in particular and constitutional jurisprudence in general."

The new constitutional order has given enough constitutional space for the expression of cultural and religious rights of the South African rainbow nation. The present writer has canvassed the role of culture in chapter two above.

Indeed it would seem that sections 30, 31 and 185 of the new Constitution are harmonious. Recently Parliament has enacted the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act No. 19 of 2002.

The Act has been enacted in compliance with section 185 of the Constitution.

It is not clear what effect the new legislation will have on the approach of the courts with regard to the future constitutional challenges on some aspects of customary law.

Some academic writers have characterized the debate about the compatibility of customary law with human rights as a debate between the right to gender equality versus the right to culture. [5]

[5]See *inter alia*, Pieterse 2000 : 35 at 39; Kaganas and Murray 1994 : 409 – 433.

Some writers see the recognition of culture as both a centripetal force as well as being a recognition of heterogeneity. [6] Mireku [7] sees culture as being recognised in the following important areas:-

(a) The Houses of Traditional Leaders.

(b) Representation by a traditional leader as an ex-officio member of a municipal or rural council.

(c) In the recognition of Customary Marriages Act 120 of 1998.

(d) The eleven principal languages that have been given the status of official languages for the purpose of effective government.

In all the abovementioned areas an element of equality regarding the various cultures is emphasized with regard to their involvement and participation in the South African multi-cultural society.

According to Mireku the government adopted the following strategies in order to broaden the idea of equality:

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- A number of Boards, Commissions and similar institutions have been formed and are designed to promote linguistic and cultural diversity in the country. The board members are drawn from fields of language, planning, translations, interpreting, language teaching, language legislation.

[6] See in this regard Mireku 2002 : 91.
[7] Mireku 2002 *op cit* at 92.

- The establishment of a number of institutions such as the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities is aimed at promoting national unity and respect for the rights of the various communities of the South African Society.

- The judicial system recognizes the traditional courts by permitting customary law to be used where it becomes applicable especially in view of the fact that such courts are closest to the people at grassroots level.

There are, in fact, other areas in which democratic representation has been effected, for example, at national level the Constitution has made provision for a National Council of Traditional Leaders whose function is advisory to Government on matters relating to traditional leadership, customary law and cultures.

Recently Government sent some of our traditional leaders to Uganda and Ghana, a mission aimed at affording opportunity for them to observe the role played by their counterparts in their respective governments.

It is hoped that on their return the traditional leaders will report back to government.

This measure is also aimed at enhancing the status of their role in the government of South Africa.

Section 30 of the Constitution of South Africa Act 108 of 1996 protects interests in culture, religion and language. It speaks of the rights of persons to use their language, practice their religion and enjoy their culture.

In his concluding remarks the author emphasises the fact that the Constitutional rights of all cultural communities are given equal protection, respect and concern.

Such concern is clearly evidenced in:-

1. The establishment of numerous constitutional bodies to protect and promote linguistic and cultural pluralism. Prominent among these are those that involve traditional leaders.
2. The Bill of Rights provides for and guarantees the rights to culture, religion and language of every community.
3. The Constitution recognizes customary law as a unique system and non-governmental source of law and because of such recognition, traditional courts are integrated with the national judiciary.

Finally the Constitution has empowered the Constitutional Court to be the ultimate arbiter on constitutional rights including cultural rights. With reference to culture and the Constitution, Pieterse [8] points out that s 211 (3) of the Constitution regarding the use of customary law does not go far enough.

[8] See Pieterse 2000 : 35 at 39 where he states:- "African Culture is fluid and as an ever developing institution, it should reform itself around the values that are articulated in the Bill of Rights without those values being extremely forced upon it." In other words the African value of "ubuntu" which mirrors the spirit of humanness should be given due consideration in the application of African culture. See also Kaganas and Murray *op cit* at 433.

This section enjoins the courts to apply customary law when that law is applicable subject to the Constitution and any legislation that deals specifically with customary law.

The circumstances envisaged here are similar to those outlined by Schreiner J.A. in Ex Parte Minister of Native Affairs in re Yako v Beyi's case, supra.

The immediate reaction to the provision of this section is the fact that customary law firmly orchestrates patriarchy that is seen to discriminate against women. Discrimination conflicts with the provision of section 9 on the Right to Equality which is regarded as a cornerstone of our democracy.

The debate so far has centred around the burning question of discriminatory practices against women particularly the issue of the principle of male primogeniture.

There is also the question of the Government's international obligations to a number of international treaties to which it is a signatory and some of which it has ratified.

In a few decisions our courts have grappled with the issue of equality and customary law.

In Amod v Multilateral Motor Vehicle Accident Fund [9] the then Chief Justice endorsed the approach of Mr Justice Farlan in Ryland v Edros. [10] where he observed:-

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[9] 1999 (4) SA 1319 (SCA).
[10] 1997 (2) SA 690 (C) : 708 J.

"The values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underline our Constitution. In my view those values irradiate the concepts of public policy and, *boni mores,* that courts have to apply."

In Mabena v Letsoalo [11] the court referred to customary law as "living law" which is practised by the majority of Africans and as such being part of the lives of the African people. Living customary law is opposed to the so-called improved "official version" written by a group to meet its objectives.

As living law, any changes, and improvements are the responsibility of the community for which it is meant. In other words, the people themselves are the ones who determine the change.

Living customary law is involved with customs and practices of the African people as evidenced by our inferior courts which are placed relatively close to the people on the ground because of the courts' appreciation of cultural values.

Living customary law is the law practised by the majority of the South African populace. The importance of the Court's decision in this case lies in the fact that a cultural practice is not static and is subject to change as the occasion demands. [12]

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[11] 1998 (2) SA 1068 (T).

[12] See South African Law Commission Project 90 in the Harmonisation of Common Law and Indigenous Law – a Discussion Paper 75 and 64. This paper discusses the need for the consent of the bride's father and submits that the consent of the mother (in the case of minors) should also be sought.

In Mthembu v Letsela and Another, [13] the court described customary law as a separate legal and cultural system. To this end, the court referred to section 31 of the Interim Constitution which provides for individuals the right to use language, culture and religion of their own choice.

What is significant when analysing the case is the recognition of customary law as a legal system parallel to common law. In this regard it can be chosen by those who desire to apply it. Thus freedom of choice of culture of his/her own is an important constitutional provision.

Our South African Constitution is based on Western values and concepts in which individual rights as against group rights are given priority and respect in the Bill of Rights and which form the basis of the Constitution.

It is important to place Mr Justice le Roux's comments in his judgement in context because he emphasized that, although the system of male primogeniture may be regarded as discriminatory in certain circles, yet the male heir has a concommitant duty to sustain and maintain the rest of the family as well. In this connection it cannot be regarded as discriminatory.

Nevertheless, the fact that there is an element of discrimination against women in principle cannot be overlooked.

Mr Justice le Roux also felt that any rules that required change would best be effected by Parliament.

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[13] 1997 (2) S.A. 936 (T).

Indeed his view is most acceptable following the introduction of the Recognition of Customary Marriages Act 120 of 1998 which defines customary law in a cultural context.

Certainly regulating the custom does not suggest relinquishing the custom, *per se*, but instead it encourages its proper application. In this regard customary law, has the same force of law that is accorded common law.

The Constitution as a whole is founded upon the principle of equality. This is clearly shown in the wording of the preamble which proclaims "the goal of the new dispensation to be a new order in which there is equality between men and women among the people of all races."

Therefore rights relating to the preservation and more importantly culture appear to be of a lesser order.

This is evidenced in the Constitutional principle that our courts when deciding private disputes focussing on cultural practices should be mindful of the central place in the Constitution occupied by the principle of equality.

Our South African society is a free democratic society based on equality.

Emphasis is on freedom and equality and therefore re-asserts the privileged position of the right to equality in the new constitutional dispensation.

In addition to the above-mentioned principles section 35 (1) again accords priority to equality directing courts to interpret the Bill of Rights so as to promote the values which underlie an open and democratic society based on freedom and equality.

It should further be noted that while in section 31 much as it is the individual who has the right to choose a cultural identity and to protest if the expression of that identity is stifled, it is also the individual's right to resist the imposition on her against her wishes of cultural practices that violate the principles of equality and non-discrimination. [14]

In dealing with the cultural rights and the Constitution the sections need to be noted:-

1. Section 30 – Right of an individual to practice his/her own culture.
2. Section 31(2) – that such right may not be exercised in a manner inconsistent with any provision of the Bill of Rights embodied in the Constitution.
3. Section 39(2) – that such right when applied by the courts should reflect the spirit, purport and objects of the Constitution.

It is evident that although groups are free to practise their culture, such cultural practices should not be at the expense or in violation of the Bill of Rights and should not be contrary to international standards. Cultural practices therefore cannot override individual rights.

4.1 The relevance of international human rights instruments [15]

The writer has in mind the 1993 Vienna Declaration Programme of Action.

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[14] Van der Meide, 1999 SALJ : 100.

[15] See other relevant international human rights instruments noted by Labuschagne and de Villiers *op cit* with regard to their comment in relation to female circumcision at pages 293 – 294.

The signatories to this international human rights provision, adopted as a priority the protection of women and girls rather than culture.

Article 38 stresses the importance of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. However the fact that any conflict should be resolved in favour of protecting women is quite clear.

The above instruments are of persuasive force in this country. In dealing with a case involving a clash between cultural rights and the Bill of Rights the aforementioned instruments would be relevant.

It should of course be noted that culture is not static.

In a few decisions that came before the Constitutional Court, the Court has endorsed the notion of legal pluralism in this country thereby accommodating the co-existence of multiculturalism.

In S v Makwanyane and Another, [16] supra, the court went further and acknowledged the role of African values in the adjudicative process.

Mr Justice Sachs in the Makwanyane case, supra, condemned the death penalty as lacking in humaneness, humanity and morality and as such devoid of ubuntu which is an important African value.

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[16] 1995 (3) SA 391 (CC).

He further bemoans the fact that our South African law reports and legal textbooks contain few references to African sources as part of the general law of the country. In his view the courts should not continue to ignore the legal institutions and values of a very large population.

The notion of ubuntu received adequate attention from other justices of the Constitutional Court as well.

For example Ms Justice Mokgoro [17] describes the concept of "ubuntu" as a philosophy of life which in its most fundamental sense represents personhood, humanity, humaneness and morality; as a metaphor that describes group solidarity being central to the survival of communities with a scarcity of resources and the fundamental fact being that:-

"Umntu ngumuntu ngabantu"

"A human being is a human being because of other people"

The concept of ubuntu as an African value was strongly emphasized in the abovementioned case as regards the provision of the death penalty.

It therefore remains to be seen how the effect of circumcision is going to be judicially received when those prejudicially affected by it decide to sue or to prefer crucial charges when there is a strong suspicion of criminal intent on the part of those who supervise the initiates.

The courts have already endorsed the idea of cultural pluralism.

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[17] Buffalo Human Rights Law Review 1993 : 15.

Legal pluralism implies the existence of legal diversity. Legal pluralism also entails the existence of more than one legal system in a country and includes the law of a cultural or religious group, which is practised by the group but not recognised by the State.

The Courts have already endorsed the idea of cultural pluralism. [18]

Having dealt with the current debate concerning the right to equality versus the right to culture the writer in the concluding pages examines the inevitable issues of the custom's compatibility with the provisions of Chapter 2 of the Constitution in particular the right to human dignity as well as the right to life.

The writer's comments will be confined to these specific values as the subject of cultural rights and the Bill of Rights has already been dealt with in this chapter.

The writer is of the view that one's assessment should be guided by the overriding provisions of section 28 of the new Constitution dealing with the principle of the welfare of the children often referred to as the best interests of the child.

The custom, on the other hand, should be seen as part of the moral code of those who practise it. For example, in the new Eastern Cape Legislature

[18] This appears in the following statement by Mr Justice Sachs in S v Makwanyane case :-
"It is a distressing fact that our law reports and legal text books contain few references to African sources as part of the general law of the country. That is no reason for the Court to continue to ignore the legal institutions and values of a very large part of the population, moreover of that section that suffered the most violations of fundamental rights under the previous legal regimes and that perhaps has the most to hope for from the new constitutional order."

there is a reference to “circumcision school” which indicates that the Eastern Cape Government treats circumcision as part of the education process of a child. This is how initiation is viewed in Mozambique as well.

However in the statistical analysis we have presented evidence of apparent abuse of the custom manifesting itself in the loss of penile organs of the initiates and sometimes resulting in deaths. This therefore raises the issue of the violation of the child’s right to human dignity and the right to life. In the Makwanyane case, supra, the right to life received extensive judicial comment.

In further dealing with the question of cultural rights and the constitutional rights, the present writer wishes to select a few cases where he strongly feels that the Bill of Rights on which the Constitution is based is most crucial and supersede the provisions of the Transkei Regional Authorities Act 13 of 1982 and the Transkei Marriages Act 21 of 1978:-

(a) Prior v Battle and Other 1998 (8) BCLR 1013 (Tk).
(b) Bangindawo v Nyanda Regional Authority of Western Pondoland 1998 3 BCLR 314 (Tk).
(c) Mhlekwa v Head of Western Tembuland Regional Authority and Another 2000 (9) BCLR at 1011 (Tk).

In Prior’s case, supra, the main issues that are addressed are the husband’s retention of marital power provided for under section 37 and section 39 (2) of the Transkei Marriages Act 21 of 1978.

According to the Transkei Marriages Act, the husband acquired marital power over the wife married in terms of the Common Law and consequently such a situation was in conflict with provisions of the Constitution of

equality and the right of an individual not to be discriminated against because of age, sex, gender, disability etc.

To be precise, the finding was that the Transkei Marriages Act 21 of 1978 violated section 8 (equality clause) and section 10 (the right to human dignity).

In her submission the Applicant felt that their marriage contracted in 1994, gave her an option not to be bound by such restrictions as provided for in section 37 and 39 (2) of the Transkei Constitution .

1. Section 37 – stated that a Black woman upon marriage was under the tutelage of her husband.
2. Section 39 – dealt with ownership and disposition of property.

In terms of a marital contract under the Transkei Marriages Act, the marital power of the husband placed her in a subordinate position of inequality in status to that enjoyed by the husband. Because of her gender, a situation that was in violation of the Constitution.

The Transkei Marriages Act 21 of 1978 was therefore unconstitutional because it violated section 8 (equality clause) which is the cornerstone of democracy in South Africa. Equality includes the full enjoyment of all rights and freedoms.

The marital power contained in the aforesaid sections became inconsistent since the commencement of the Constitution and consequently the Applicant had been free from the Respondent's guardianship and marital power.

Again the marriage contracted in 1994, gave her an option not to be bound by such restrictions.

Although civil marriages between Black persons in South Africa had been regarded as civil marriages they were not civil marriages until 1988 when they were out of Community of Property because there has always been the customary tradition of lobola as a necessary ancillary traditional requirements.

It is the traditional flavour that distinguishes it from civil marriages contracted by Coloureds, Whites and Indians.

The marital power vests the following powers on the Respondent:-

1. By virtue of being head of the family, he has a decisive say in all matters concerning the common life of the spouses.
2. Has power over her, the property, as well as being its administrator.

The marital power of the first Respondent had a debilitating effect upon the Applicant and violated her fundamental rights as contained in sections 8,10,11 (1), 22, 26 and 28 of the Constitution.

Indeed, the marital power bestowed in him substantial power depriving the Applicant of various rights which she had prior to the marriage. The marital power violated the principle of equality which is the cornerstone of our democracy.

Finally, the provision and retention of the marital power in the Transkei Marriages Act 21 of 1978 indicated adhering to sections of the Matrimonial Property Act 84 of 1988 which had been abolished.

For instance the writer is of the opinion that section 12 of the Matrimonial Act 84 of 1988 provided that such abolition meant doing away with restrictions which the marital power placed on the capacity of the wife to contract and litigate.

In fact in a seminar on Transkei Marriage Law Reform held in August 1989, recommendations were made to the then Military Government to have it reviewed. This indicates that reform was long overdue even before the advent of democratic rule in South Africa. Some points discussed were *inter alia:-*

1. Contractual capacity of women.
2. The incorporation of an ante-nuptial contract for consideration by intending spouses.

Sections 8 (1) (2) and section 10 also featured prominently on the agenda and the general feeling during the seminar was that the abovementioned clauses were inconsistent with the practice of equality.

Following the submission by the Applicant, the application was granted:-

(1) That section 37 and section 39 (2) of the Transkei Marriages Act 21 of 1978 were inconsistent with the Constitution and to have been invalid since the commencement of the Interim Constitution Act 200 of 1993.

In Bangindawo's case the court considered the constitutionality of the Regional Authority Courts whose provisions in many ways were inconsistent with the then Interim Constitution.

For instance section 22 of the Interim Constitution deals with the right to legal representation i.e. a right to professional legal representation.

The provision of section 7 (1) of the Regional Authority Court's Act 13 of 1982 denied parties heard by the Regional Courts the right to legal representation, thus infringing the right to legal representation as provided for in section 22 of the Interim Constitution. Further the right to a fair trial as provided for by the Constitutional provision of section 35 (3) was violated.

In addition the Regional Courts were granted jurisdiction concurrent with Magistrates' Courts in both civil and criminal cases and further enjoyed the power to adjudicate in complex statutory and common law issues and further impose substantial sentences in criminal matters in which the accused were citizens of Transkei respectively.

Again in terms of section 2 (1) of the Regional Authorities Act Tribal Courts such as King's Courts or Chief's Courts of the African customary legal system were granted powers to adjudicate on complex issues because of the wide jurisdiction concurrent with Magistrate's Court.

In the process, Mr Justice Madlanga stated that the African Customary Law has no concept of separation of powers or judicial independence as understood in Western legal thought and such concepts are alien to the political and social organisation and value system underlying customary law.

The fact that the Regional Authority Courts were presided over by persons who exercise not only judicial powers but also executive and legislative powers was also inconsistent with section 96 (2) of the Interim Constitution that the judiciary shall be independent as understood in the context of

separation of powers, would therefore be at variance from sections 31, 33 (3) and 181 of the Interim Constitution.

The issue of Transkei citizenship was raised as one of the provisions of the Act. Transkei citizenship applied only to Transkei citizens.

Counsel for the applicants submitted that it was no more applicable because of the Interim Constitution of the new democratic order.

In this manner the Constitution aimed at unifying all the people with a common citizenship in one sovereign state. The separate citizenship of the Transkei Regional Authorities Act 13 was in conflict with section 5 of the Interim Constitution on citizenship which did not discriminate and in fact had no provision for separate citizenship.

Once more the Regional Authorities Act 13 violated section 35 (3) of the constitutional right of an accused to be accorded a fair trial. In this connection summons was not served properly and proper legal representation was denied.

The presiding officers were also untrained and consequently found it difficult to perform their judicial functions without adequate knowledge in the use and interpretation of statutes, law reports and other books on law.

From the issues stated above, it cannot be disputed that the provisions of the Constitution were violated regarding the sentences imposed which were declared invalid and set aside. The relevant provisions of the Transkei

Regional Authorities Act 13 were unacceptable because of glaring discrimination in them.

In the Mhlekwa's case, supra,_ the constitutional challenge was made in respect of the following issues:-

(a) Legal representation.
(b) Independence or impartiality of the Traditional Courts.

Traditionally customary courts have always had wide ranging powers and functions e.g. legislative, executive and judicial powers.

The Western styled system makes provision for the separation of powers for each area of governance. Each arm has its personnel who operate separately from others.

For example, an officer cannot be expected to perform a dual function of being a legislator, executor and judicial officer at the same time. These are distinctly separate offices from one another in discharging government duties.

The main constitutional challenge of the powers of the Regional Authorities Courts' Act was made by the Applicants declaring them inconsistent on the following grounds:-

1. That they catered only for "Transkei citizens," a category of persons which no longer existed under the New Constitutional Order.
2. That they violated the requirement of section 165 (2) of the Constitution that the judiciary be independent and impartial.

3. That they violated the right of every accused to a fair trial in terms of section 35 (3) of the Constitution.
4. That in the final analysis they created a system of unequal justice in violation of section 9 of the Constitution.

Concerning Transkei citizenship, the Regional Authorities Act 13 reflected inequality of treatment of people or citizens who were supposed to belong to one State (one South Africa). The writer feels that this was a denial of human rights because of the policy of separate development based on cultural and ethnic lines.

All South African Citizens were equally entitled to the rights, privileges and benefits of citizenship.

Regarding the right of every accused to be accorded a fair trial in terms of section 35 (3) of the Constitution, section 7 (1) of the Regional Authorities Act 13 of 1982 prohibited legal representation of accused persons appearing before such courts resulting in conflict with section 35 (3) of the Constitution.

The last point raised by the Applicants that of the problem of unequal system of justice is illustrated by the denial of legal representation for the accused persons. The question of the accused being denied a fair trial in which he could have been legally represented was indeed a miscarriage of justice.

4.2 Evaluative comment

With regard to the three cases discussed above, it is clear beyond any shadow of doubt that the provisions of the Regional Authority Act 13 of 1982 were considerably inconsistent with the Constitution.

To be precise the Regional Authority Act denied Transkei citizens their right to equality in whatever form and consequently violating the Constitutional principle and provision of equality, democracy and freedom.

On the other hand, one can sympathise with the demand for a culturally defined legal system which was advanced in Mhlekwa's case supra, for, as Venter [19] has correctly pointed out in terms of the Constitution, "culture is something which one enjoys (s 31 (1) 1 (a), shares (s 235) and in which one participates (s 30)." The author further points out that although the term "culture" does not appear in Chapter 12 of the Constitution, which deals with traditional leaders and customary law, the cultural undertones are unmistakably implied.

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[19] Francois Venter "The protection of cultural, linguistic and religious rights : the framework provided by the Constitution of the Republic of South Africa 1996" in 1998 : 438 at 439. The author at p 445 argues that the Constitution is the most likely vehicle for the expansion of common ground amidst cultural diversity. "The Constitutional protection of culture is brought about, as one might expect; through a set of rights and obligations. Despite its intensely personal dimensions, culture is essentially social. The Constitutional rights relating to culture therefore take the form both of individual and collective demands and defences" at 448 – 449.

In the writer's opinion, the cases that have been dealt with above, further show how customary law based on African culture required some revision in order to be consistent with the Constitution based on a Bill of Rights that orchestrate the dignity of mankind.

CHAPTER 5

5. The need for protection of children

In this Chapter the writer will comment on the role which traditional leaders should play in protecting children in communities under their jurisdiction as well as the extent to which the United Nation's Convention on the right of the child could be used as a guide in the implementation of the Provincial enactment.

5.1 Justification for the use of a regulatory mechanism or sanction to prevent harm to children who undergo the ritual

In the United Kingdom there has been a heated debate regarding the justification for the use of criminal sanction to enforce morality as such. [1]

The Wolfenden Committee Report referred to below dealt with the broad question about the extent to which State should intervene when some citizens engage in forms of behavioural patterns that appear to be harmful. The report commences by making the following broad comment:-

"The function of the criminal law is to preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special or physical, official or economic dependence." (para 13)

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[1] See Harris 1997 : 132 – The author makes a critical comment on the Report of the Committee on Homosexual offences and prostitution under the Chairmanship of Sir John Wolfenden known as the Wolfenden Report.

In paragraph 61 the following statement appears:-

"Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which in brief and crude terms is not the law's business."

Although the Wolfenden Report was concerned about the problem of sexual morality in the sense of prostitution and homosexuality, the most important aspect of the report relevant to the topic under consideration is the extent to which criminal law sanction could be used to regulate social conduct that appears to be harmful to society.

The committee recommended that prohibition and such prohibition of harmful acts which involve corruption and exploitation is justified.

According to Harris, [2] the Wolfenden Committee's contention that conflict with morality is not enough to warrant legal prohibition was challenged in 1959 by Lord Delvin [3] who put forward the view that Society has a right to punish any kind of act which in the opinion of the right minded man, is grossly immoral. Delvin was in turn severely criticized by Professor H.L. Hart. [4]

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[2] Harris *op cit* at 133.

[3] See his Halymin Lectures on "The Enforcement of Morals."

4 [4] See further Harris *op cit* 134

Harris mentions the case of R v Brown 1994 1 AC 212 [5] in which the House of Lords had to decide on the criminality of homosexual sado-masochistic behaviour in which a group of adults males engaged in acts of genital torture. There was permanent injury but there was no medical treatment needed.

The participants were willing. However the perpetrators were convicted of two crimes under the offences against the Persons Act 1861, assault occasioning actual bodily harm and wounding.

Now Harris raised the following question:-

"If the law should continue to deny the defence of consent to all bodily harm going beyond the transient and trifling, should the existing limit of exceptions (surgery, sport, chastisement, ritual circumcision and tattooing) be excluded so as to include one which would cover the facts of the case?"

It should be noted that circumcision was not considered as conduct against which the participants needed protection.

5.2 The role which traditional leaders should play

Koyana [6] refers to the case of Bali v Lebenya, emanating from the Maluti region in which it transpired that the Xhosa section of the district of Mount Fletcher observed a custom in terms of which parents were required to get prior permission of the local chief before the initiation ceremony would be conducted.

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[5](1994) 1 AC 212.

[6]D.S. Koyana : 1980 : 6.

The Sothos, on the other hand, observed a custom of sending a portion of the carcass of the slaughtered animal to the chief.

In any event rural communities observe the reporting of any important social activity and which again its slaughter would be made to the court, chief or headman. The Chiefs therefore have a customary role to play.

Indeed an indirect role has been given to traditional leaders in Annexure A of the Act where it is stated that a traditional surgeon, who is to perform a circumcision within an area falling under a traditional authority must inform such traditional authority thereof. The question is whether the role envisaged for traditional leadership is sufficient?

They have not been given any supervisory powers in the event of non-observance of this procedure. The definition section creates an impression that traditional authority would have a role to play.

In the draft White Paper on Traditional Leadership and Governance from the Department of Provincial and Local Government dated 31 October 2002 under the heading:- "Vision for the Institution of Traditional Leadership," the document states that traditional leaders should strive to enhance tradition, culture and custom.

In dealing with functions of traditional leadership it is pointed out that they should co-operate with health authorities in circumcision practices.

5.3 Protection of children and the observance of cultural practices

The need for the protection of children received attention as a result of negative reports emanating from East Africa about the position of the girl child who is exposed to harmful rituals involving mutilation. [7]

This is at best illustrated by a remark made by a female university student who stated:-

"Female genital mutilation is a cruel practice which women have to endure its consequences for all their lifetime. It is a practice imposed on a woman by men for their own (men's) advantage and I don't see why one human being should deny the other her sexual right."

In addition to the above peer pressure was the cause of harmful stress to some girls who had not undergone the ritual. The following negative reports were also common by girls:-

"Ah! That one is a reject. She can only be married to a very old man who will have no use for her or a person of low status within the community." [8]

This led to the United Nations adopting an important instrument aimed at the protection of children. Most states are signatories to the United Nations Convention.

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[7] Kabeberi Macharia J, on Female Genital Mutilation Chapter 12 in Kenya Law, Culture Tradition and Children's Rights in Eastern and Southern Africa : 262.
See also an incisive article on this subject by J.M.T. Labuschagne and Angeligne de Villiers 1998 : 277. According to these authors the geographical distribution of the practice of female circumcision is concentrated in the Middle East and the northern and central parts of Africa. The following countries are included: Mauritania, Mali, Sudan, Eritrea, Ivory Coast, Uganda, Kenya, Tanzania, Ethiopia, Ghana, Senegal etc.

[8] Ncube 1998 : 256.

5.4 Convention on the Right of the Child

This Convention was adopted and opened for signature, ratification and accession by the General Assembly of the United Nations Resolution 44/25 of 20 November 1989. Its entry into force was 2 September 1990.

The Preamble, *inter alia,* declares that State Parties to the Convention:-

"Recalling that in the Universal Declaration of Human Rights, the United Nations has proclaimed ……..

Considering that the child shall be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity……..

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child ……"

Have agreed as follows:-

PART 1
ARTICLE 1

"For the purpose of the present Convention a child means every human being below the age of eighteen years unless under the law applicable to the child, minority is attained earlier,

ARTICLE 19

Article 19 directs State Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all

forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

ARTICLE 24 (3) directs State Parties to take all effective and appropriate measure with a view to abolishing traditional practices prejudicial to the health of the children.

ARTICLE 37 directs State Parties to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment.

ARTICLE 39 directs State Parties to take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim."

The observations made by Janet Kabeberi – Macharia with regard to female genital mutilation in Kenya should be seen in this light.

In a recent article Maithufi [9] discusses the protection of children in Customary Law and the Constitution.

The author discusses, among other things, the fundamental rights of children in terms of the Constitution and the United Nations Convention on the Rights of the Child which South Africa ratified on 16 June 1995.

Under the Constitution the children's rights are dealt with in section 28.

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[9] Maithufi 1999 : 198.

In terms of section 28 (2) a child's best interests are of paramount importance in every matter concerning the child. In terms of section 28 (3) a child means a person under the age of 18 years.

The author points out that the constitutional rights relating to children may have horizontal application and as such place a duty on parents to make provisions for what is required and to take necessary steps to protect children from maltreatment, neglect, abuse or degradation.

Maithufi [10]quotes with approval the following statement from Skelton (ed), Children and the Law (1998) 26 – 29:-

"The protection of the children's rights encompasses much more than the recognition of such rights in the Constitution. The obligation rests upon the State to initiate legislation and programmes which will ensure that the rights of children are protected not only, *vis-à-vis*, the State but also between individuals.

The State therefore should not only take steps to ensure that no legislation infringes upon the rights of children, but also other measures to ensure that legal standards are applied in the community."

5.5 The African Charter on the rights and welfare of the child, family law and children's rights

5.5.1 Introduction

According to [11] Davel, The African Charter on the Rights and

[10]Maithufi 1999 : 198.
[11]Davel 2002 at 282.

Welfare of the Child (African Charter or ACRWC) is perhaps a less well-known international treaty. In the writers' view the possible reason for this might be that it has only recently entered into force or, alternatively, that it merely has regional application.[12] In her own words the Centre for Child Law campaigned for the ratification of this convention by the South African government because of its significance in enhancing children's rights in this region. "Driven by a problem of contemporary universal significance, namely children's rights, this supra-national document not only has to reconcile Western juristic thought and African traditional cultural values, but also has to give guidance as to which African cultural practices and traditions are to be abandoned and which should be preserved for effectively protecting the rights and welfare of children in Africa."

Davel [12] pointed out that the contents of this Charter should be carefully studied particularly the contents of Part 1 and 2 thereof.

The author further opines that part I embodies 31 articles, which create and define specific substantive and procedural rights, freedoms and responsibilities of the child together with correlative duties on the part of the parents and State organs.

[12]The treaty came into operation after its ratification by the 15th member state, just before the 10th anniversary of the UN Convention on the Rights of the Child (CRC). South Africa ratified the Charter on 2000-01-07.

The present writer is in full agreement with the following observations made by the author:- [13]

1. That the African Charter codifies a comprehensive set of children's rights and even increases the level of protection for children in a number of important respects, for instance:
2. While the Convention on the Rights of the Child allows for child soldiers to be recruited and to be used in direct hostilities, the African Charter outlaws the use of child soldiers.
3. The scope of the protection of child refugees is broader under the Charter, which allows for "internally displaced" children to qualify for refugee protection. The causes of internal dislocation are not restricted and include a breakdown of the economic or social order.
4. According to the Convention on the Rights of the Child, the best interests of the child is *a* primary consideration in all actions concerning children.
5. The Charter contains the more powerful statement, namely that the best interests of the child shall be *the* primary consideration.

"These aspects resonate with the precarious position in which children find themselves in Africa. Although not restricted to

[13] Davel *op cit* at 282.

Africa, child soldiers, child refugees and displaced children are recurring problems on the African continent."

5.5.2 HIV/AIDS

Davel discusses the issue of HIV/AIDS epidemic. In the context of circumcision there is a grave risk that the observance of the custom could be a breeding ground for the disease because there is likelihood of the surgical instrument being used to more than one boy at a time without being sterilised. This is so because boys are circumcised in groups of ten – sometimes the number can be more. This is where the statutory regulation should be aimed at.

Davel shows that South Africa is one of the countries with the highest numbers of children living with HIV/AIDS. "At the end of 1997, 80 000 children below the age of fifteen years were estimated to be infected. Between 1994 and 1997 the number of children infected tripled. Current estimates show that at least one-quarter of all children in hospital in South Africa are HIV positive. In some hospitals 70 to 80 per cent of paediatric beds are occupied by HIV-positive infants.

Furthermore, the disease itself, the resultant illness and premature death do not paint the full picture of the devastation that so many children have to face. By the end of 1999, the number of children under the age of fifteen years who had lost either their mother or both parents was 180 000."

According to the author Article 5 provides that every child "has an inherent right to life." State parties have to "ensure, to their maximum extent possible, the survival, protection and development" of the child. "Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health." State parties have to take measures "to reduce infant and child mortality rate."

Labuschagne and de Villiers *op cit* at 297 - 300 mention the following rights which they discuss in the context of female circumcision.

Davel correctly points out that section 1(1) of the African Charter obliges states to recognise the rights, freedoms and duties enshrined in this Charter. "States have to undertake the necessary steps, in accordance with their own Constitutions and the provisions of this Charter, to adopt legislative or other measures as may be necessary to give effect to the provisions of the Charter. The African Charter sets a theoretical model for effectively protecting children's rights in Africa. In South Africa much has been achieved by reforming child justice and reviewing the Child Care Act. Furthermore, our Constitution enjoins the courts, tribunals and forums to consider international law when interpreting the Bill of Rights. The Constitutional Court also ruled that international law includes non-binding as well as binding law. A firm framework has been established in South Africa to fulfil its obligations in terms of the

> African Charter. But it is not only through courts and legislative processes that children's rights are realised. Member states will have to demonstrate the political will to revisit policies and adapt budgets to give context to children's rights.

Still with reference to the violation of children's rights the media reports on serious injuries and deaths at the initiation schools make the point quite clear.

This is best illustrated in the statistical representation of incidents reported in the Daily Dispatch.

The reports involve deaths, excessive bleeding, gangrene and septic wounds in some areas of the Eastern Cape.

For example, several cases were reported in Mdantsane, Queenstown, Whittlesea, Umtata, Lusikisiki and Bizana.

On the 27/07/2000, 15 boys died in the Ngqeleni area of the Transkei.

On the 01/09/2000, 143 initiates were admitted at Umtata General Hospital from which 24 were reported dead.

However the media did not only report on serious injuries and deaths alone, but also reacted making suggestions wherever possible.

In the Daily Dispatch of the 24/04/2000 the AmaRharabe and Gcaleka tribes there reported to have rejected the use of the "Tara Clamp" saying it would undermine the sacredness of traditional circumcision.

The Daily Dispatch of the 24/12/1994 suggested that liquor be banned during circumcision and that workshops and seminars at which practitioners could be taught better ways of dealing with the problem be mounted.

Briefly the media reports were helpful in creating awareness concerning the extent of the problem. See also Funani L – "Life among the AmaXhosa" at 37 - 45.

In Kenya, for example, the former President Jomo Kenyatta is said to have been one such strong advocate of female circumcision.

Labuschagne and de Villiers [14] quote the following statement made in defence of female circumcision:-

"The real argument lies not in the defence of the surgical operation but in the understanding that this operation is still regarded as the very essence of an institution which has enormous education, social, moral and religious implications quite apart from the operation itself. Therefore the abolition of the surgical element in this custom means to the K(g)ikuyu the abolition of the whole institution……"

Bennett [15] thinks that South Africa, "a country of diverse cultures, is in no position to reject a cultural relativism. The 1993 Constitution in fact supports it, but only in broad terms and without reference to customary law."

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[14] 1998 : 289.

[15] 1995 : 9. The author argues that a leitmotif of postmodernism, the philosophy that has come to dominate thinking in the late twentieth century, is tolerance of diversity. "As a systematic doctrine, cultural relativism has never been easy to defend. Apart from threatening to subvert all that we hold as fixed, true and certain, it contains the need of its own destination ……."

5.6 Conclusion

This chapter seeks to demonstrate the extent to which the State should intervene in preventing cultural practices that are harmful to children thus gives content to the notion of the "best interests of the children" referred to in s 28 of the new Constitution. There is a disturbing issue of cultural relativism which is sometimes raised by the advocates of these harmful cultural practices.

CHAPTER 6

6. Effectiveness of the new statutory measures governing circumcision

As has been stated in Chapter 1, the new law has been a dismal failure.

In this Chapter the writer will comment on the possible reasons for the failure of the new law.

The comments made hereunder were generated from the interviews which the writer has had with the various stakeholders in the Province as well as the information which has been gleaned from the media. From these discussions it became clear that the following were some of the causative factors:-

1. Problems associated with making the law sufficiently known to the public.
2. Lack of co-ordination in the enforcement of the law.
3. Location of the administration of the Statute.

6.1 Problems associated with the promulgation of the new law

As regards lack of publicity we felt that although intensive measures had already been taken as a matter of urgency to introduce the law, there was lack of awareness by some stake-holders.

In this connection, more workshops could be organized in conjunction with the Justice Department including safety and security officers (police) in order to effectively deal with the presentation and observance of the law.

It was felt that the provisions of the statutory act required periodical revisiting in order to conscientize both government officers and the public.

Such a measure would require mounting more workshops for the stakeholders until positive results were achieved.

A good example was the method of control measures devised by the Department of Transport (Traffic) during the festive seasons such as Easter, Christmas and New Year.

During the abovementioned periods, more traffic officers are usually deployed all over where there is heavy traffic. Lately, the Department of Justice has lended good support by establishing temporary court structures at strategic points along the national highways to try and impose penalties on the spot for certain traffic offences.

A similar method could also be adopted during the circumcision period to create awareness of the need to comply with the requirements of the Statute.

Random visits could be introduced by officials of the Departments aforementioned, checking some of the lodges to promote compliance with the law. Penalties would obviously be imposed for defaulters.

Discussing the issue further, there was a feeling that the new legislation could be more effective by:-

1. Providing more medical officers for the various districts in order to cope with the volume of work during the circumcision period.

2. In view of the fact that some areas are not easily accessible especially the rural areas, such districts would have to be provided with transport facilities to enable medical officers to provide prompt assistance whenever there was need.
3. As mentioned earlier, some officers could be trained and deployed temporarily to deal with problems that are most common during the period of circumcision.

Because of the high rate of cases of death and loss of penile organs following circumcision, the constitutional right, individual rights to life and human dignity are violated and as such the state needs to assist the public in ensuring that they are not denied their legitimate democratic rights.

6.2 Lack of co-ordination between traditional leaders and government officials

Another meeting was organized by the writer for an interview with the Head of the Traditional Leaders for the Eastern Cape and the Chief of the Maluti region being present as well.

After outlining the purpose and scope of my interview, the Head of the Traditional leaders for the Eastern Cape made the following remarks.

1. “That basically there was nothing wrong with the custom as such and attributed the current awful state of affairs to:- A general “MORAL DECAY” among the people caused by a great deal of factors such as:-

2. Lack of traditional briefing of initiates by parents and most importantly the traditional chiefs prior attending the initiation school. This aspect of the custom was no longer observed especially in urban areas where chiefs did not operate. The pre-initiation briefing is most crucial for the success of the ritual.

   Pertinent questions of a personal nature are usually asked by relatives and elders such as:-

3 His sexual activities and whether he even had been involved intimately with a woman who had had a child before.

4 Questions involving “ukuphondla” and “ukuqhawula” aimed at getting information about the condition of the penile organ.”

In this regard special ceremonial rites would be performed beforehand at home to cleanse the boy of any evil spirits (some kind of strong belief in ancestral spirits expected to provide protection).

Previously and especially in rural areas, the boys would gather at the chief’s kraal a month before the date of circumcision to get such briefing involving a variety of issues. Such a meeting was common if one of the would be initiates was of royal blood.

It was also in this way that the age factor would be addressed or determined because the presence of the child of a royalist was of significance among members of the tribe and therefore not easy to forget.

Briefly, such preparations made beforehand were of significance in preparing the boys for the final date of circumcision.

Another feeling expressed at this interview was that of lack of proper consultation of traditional leaders.

Chiefs had not been actively involved from the very beginning. Quite a number of issues were discussed and resolved by Government without seeking an input from them at such an early stage where perhaps it would have been helpful.

The Chiefs also felt that the stigma of being labelled as government stooges of the previous political dispensation required of government to restore credibility lost by according them respect and dignity. In this regard, the attitude of the people would change towards them as traditional leaders.

Lack of proper consultation was one of the causes for the breakdown of communication resulting to Chiefs being unable to play their effective role as leaders of the people on the ground in their respective tribal areas.

It was also stated that most public hearings by Government Officials were conducted in urban areas involving active participation by women in a custom they culturally as chiefs consider sacred and to which women are not involved at that level.

If proper communication channels had been followed, perhaps a better method of approaching the exercise could have been devised to produce effective results.

Finally regarding the location of the statute and its administration it would be made available in the offices of the Justice Department in the form of statutory instruments.

The Department of Health would use health magazines/pamphlets available at all health posts and clinics which would be published in the languages used in the Eastern Cape region for easy consumption by the public.

6.3 Statistical Analysis

In this section, read together with Annexure H, the writer gives a birds eye view of the statistical analysis showing the extent of the problem of botched circumcisions.

This sub-section has been further divided into three columns *viz* column A, column B, and column C in Annexure H.

COLUMN A

This column indicates the total number of admissions each year commencing from 1995 – 2002. It is quite significant that the total number of admissions was high as compared with the admissions between 1996 – 2002.

Nevertheless, as the table shows, the drop in the number of admissions during the subsequent years could be attributed to efforts by government

authorities of the Eastern Cape Province to have the situation under control. See Annexure H.

COLUMN B

Column B shows the total number of mutilations each year commencing from 1995 – 2002. The total number of 42 mutilated cases in 1995 is indeed cause for concern and the situation compels one to ask questions, as to why things were so bad.

However the intensive research that was conducted revealed the following as some of the causes for the high figure of mutilations:-

1. Septic wounds as a result of lack of physical fitness possibly owing to chronic diseases before circumcision.
2. Carelessness of traditional surgeons because of inexperience in performing such operations that require a high level of skill.
3. Post operative care which involves generally, careful dressing of the wound and the application of proper medication. This obviously is a delicate task that is assigned to traditional nurses.
4. Dehydration, especially during the first seven days following circumcision. In most cases during this period, the initiates in certain instances are even not allowed to drink water. Dehydration weakens the body's resistance to infection.

There are various kinds of mutilations, but generally some initiates are forced to lose their penile organs in the process.

See also the graphical representation of Column B in Annexure I.

COLUMN C

This column indicates the total number of deaths which occurred each year between 1995 – 2002. Once more the figures dropped significantly during the following three years to seventeen in number. The situation was caused by the public reaction following negative reports by the media which already had compelled the government authorities to devise ways and means of regulating the situation.

Regrettably, reported cases of deaths by the media have continued to present a bleak picture of the situation as regards the ritual.

See also the graphical representation of Column C in Annexure J.

6.4 Evaluative comment

The figures clearly indicate the violation of the provisions of the right to human dignity and the right to life.

The importance of the right to dignity and the right to life are treated alongside each other and are regarded as pillars of the Constitution.

This is captured in the following comment by [1] O'Ragan J in S v Makwanyane where she states:-

"That the importance of dignity as a founding value of the new Constitution cannot be over-emphasized. Recognizing the right to dignity is an acknowledgement of the intrinsic worth of human beings.

[1] 1995 (3) SA 391 (CC).

Human beings are entitled to be treated as worthy of respect and concern. The right therefore is the foundation of many other rights that are specifically entrenched in Chapter 3 of the Constitution.

Respect for the dignity of all human beings is particularly important in South Africa.

In a paper presented at the Society of Law Teachers of South Africa Conference held in Windhoek, Namibia in July 2003, Advocate Dorothy Moila in her critical assessment of the two Acts and the Bill highlighted the following points:-

"Although the provinces concerned may be frowned upon for interfering with custom, their legislation is clearly directed at ensuring that the custom is not only preserved, but that the rights of initiates are protected from possible abuse or infringement.

The provision of the minimum age requirement in the Limpopo Act is to be commended as it will ensure that the boys have reached an age where they understand the cultural practice that they will be participating in. Both Acts and the Bill also make provision for consent to be made by initiates or by their parents. Where it is the parents who are required to give consent for their sons to attend initiation schools, this may be problematic. The South African constitution specifically grants everyone the right to participate in the cultural life of their own choice. If parents give consent on behalf of their sons, the boys are deprived of making the choice to participate or not to participate in traditional circumcisions. Although consent does not provide a

defence where an initiate is injured or dies as a result of a botched circumcision, boys must not be forced to succumb to their parents' wishes. There are situations where sons who do not wish to take part in the traditional passage to manhood, are forced to attend initiation schools unwillingly simply because their parents have given the necessary consent. The issue of consent should be left in the hands of the boys, as they are the ones who have to physically undergo the ritual. In situations where the son wishes to participate and the parents refuse to give consent, the boy can always attend when he has attained the age of majority. However, where the initiate does not wish to take part and the parents give consent, that situation is irreversible.

The provisions for medical officer to have access to the initiation school are aimed at ensuring that acceptable health standards are maintained at the schools. Allowing outsiders to gain entry and have access to the initiation schools is completely foreign to the African custom of traditional circumcision but, given the high number of reported cases of botched circumcisions it is a welcomed measure in ensuring the safety of the initiates.

The requirement for traditional surgeons to apply and obtain written permits to run the schools serves as a deterrent for those bogus surgeons who run such schools for monetary gain. Provided that the authorized officials and inspectors ensure that the laws regarding the initiation schools are observed, the problem of bogus/fly-by-night initiation schools will be greatly reduced. This will decrease the number of deaths resulting from botched

circumcisions. It will also reduce the number of abductions, as these are normally done with a view to obtaining money from the parents of initiates.

When reading the two provincial legislations it is clear that the provincial legislatures' primary concern was the maintenance of health standards at the initiation schools. Although some legal issues have been addressed, the Acts do not particularly address the issues such as the infringements of the right to life and human dignity. As long as the traditional surgeons have been duly permitted to run the initiation schools, they may continue to mete out corporal and inhumane punishment on the boys who are allegedly misbehaving. As it would be unmanly or dishonourable for the initiate to report the traditional surgeons to the relevant officials for assault or assault with intention to do grievous bodily harm, the initiates simply endure the torture and literally have no recourse to the law."

The present writer is of the opinion that the views held by Advocate Moila to the effect that the South African Legislature ought to enact a National Statute, requires the support of the remaining provinces especially where similar incidents have been experienced.

ABBREVIATIONS AND LIST OF JOURNALS

1. ACTA JURIDICA	House Journal of the University of Cape Town Law School.
2. BUFFALO HUMAN RIGHTS LAW REVIEW	Vol 14 : 19.
3. CILSA	Comparative International Law Journal of Southern Africa published by the University of South Africa.
4. DE JURE	House Journal of the University of Pretoria Law Faculty.
5. JOURNAL FOR JURIDICAL SCIENCE	Faculty of Law Journal of the University of the Orange Free State.
6 OBITER	Faculty of Law Journal for the University of Port Elizabeth.
7. SALJ	South African Law Journal published by Juta & Co.
8. SAJHR	South African Law Journal for Human Rights.
9. SPECULUM JURIS	Joint Publication of Fort Hare Nelson Mandela Law School and Rhodes University.
10. THRHR	Tyds vir Hedendaagse Romeins Hollandse Reg.

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GLOSSARY

1. Amacamba – water
2. Ibengeta - dog
3. Ibhuma/ithonto - lodge
4. Iceya - a guessing game played by initiates at the lodge
5. Icici - good appearance of the surgical operation
6. Ijwabi - foreskin, prepuce
7. Ikhankatha - traditional nurse
8. Ikrwala - a graduate from the initiation school
9. Imbola - red ochre
10. Ingceke - white clay used for smearing body and face
11. Ingcbi - a traditional surgeon
12. Ingema – girl
13. Ingokra - a wooden spoon used at the lodge
14. Inkobe - cooked mealie grains mainly used as the main diet during the first seven days following circumcision
15. Inqalathi - a young boy who assists a traditional nurse
16. Isibindi - dark-brown ochre made from a plant
17. Isichwe - traditional bandage
18. Isidlokolo - a head-dress made of animal skin of a hare
19. Isigqwathikazi – a woman

20 Ithafa - a broad/wide cut upon circumcision

21. Ityeba - a traditional bandage
22. Ixhonxo - a headdress used when dancing
23. Izingqwashu – Iingubo
24. Ubulunga - necklace

25. Umdlanga - a traditional operating scalpel/instrument

26. Umguyo - a traditional dance held a day before the circumcision of the boys

27. Umhlambi - a traditional kilt worn when dancing

28. Ukojisa - a ceremony performed after seven days following circumcision

29. Ukudumisa - to alert the initiates that someone is approaching the lodge and they should be in readiness to receive him

30. Ukugaza - an erection

31. Ukagqishela - dressing a healed penile organ

32. Ukungcamisa - the eating of the shoulder part of a goat by an initiate before circumcision

33. Ukuthambisa - anointing an initiate

34. Ukutshila - to dance traditionally

35. Ukusoka - presentation of gifts to the graduate initiates on returning home from the initiation school

36. Ukuphuma (umphumo) - returning from the bush at the end of the initiation period

37. UkuXhosa - an appearance suggesting the re-application of the white clay on the face and body of an initiate

38. Ukuyalwa - admonition

39. Usosuthu - an official host

ANNEXURE A

An ox is slaughtered on the occasion of the pre-briefing exercise of the boys at the residence of the official host (usosuthu).

This photo is from a slide obtained in the East London Museum.

ANNEXURE B

Umkweta with hut in the background.

Taken from J.H. Soga 1931 : 252

ANNEXURE C

The boys smear their faces and body with white clay called (ifutha) or (ingceke)

The picture was in an advert of the Daily Dispatch, East London.

ANNEXURE D

Circumcision boys' dance.

Picture taken from Soga *op cit* at 257

ANNEXURE E

Abakweta dance.

Picture taken from Soga *op cit* at 258

ANNEXURE F

Journey home singing “usomagwaza” all the way.

The slide was obtained from the East London Museum and a photograph made

ANNEXURE G

The seclusion hut (ithonto/ibhuma) is burnt down at the end of the initiation/seclusion period.

The photo is from a slide obtained from the East London Museum