

## CHAPTER 21

### CUSTOMARY LAW AFFECTING CHILDREN

#### 21.1 Introduction

In this Chapter we revisit those issues of African customary law affecting children.<sup>1</sup> In particular, we will consider the vexed question of whether to incorporate customary law affecting children in the new children's statute, the manner in which this is to be done if at all, the regulation of circumcision schools, aspects related to the age of majority, and related matters.

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans.<sup>2</sup> However, there is a substantial dissonance between the new-found extolling of individual rights and the promotion of a human rights culture, on the one hand, and several deep-rooted notions of African custom,<sup>3</sup> on the other.<sup>4</sup> African custom is based on the concept of human dignity, derived not necessarily through the relentless pursuit of individual liberty, but rather through membership of a group. This point is stressed by several prominent writers in the field.<sup>5</sup> These writers do not seek to devalue the protection of individual rights in national constitutions and international covenants, but they make us aware that the underlying notions of African custom do not fit altogether well with the rights culture that we are so avidly attempting to promote in our society. The courts, meanwhile, are left to interpret and develop customary law.

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1 See Chapter 8 of Issue Paper 13.

2 See sections 15(3), 30, 39, 181 and Chapter 12 of the Constitution, 1996. For a comparative view, see New Zealand Law Commission **Study Paper 9: Maori Custom and Values in New Zealand Law** (March 2001).

3 It is also important to distinguish between cultural practices and the rules of customary law. See in this regard **Hlophe v Mahlalela and another** 1988 (1) SA 449 (TPD) at 457H - 458B.

4 Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 24.

5 See, for instance, R T Nhlapo 'The African family and women's rights: Friends or foes?' (1991) **Acta Juridica** 135; 'South African family law at the crossroads: From Parliamentary supremacy to constitutionalism' (1994) **International Survey of Family Law** 419; 'Human rights - The African perspective' (1995) 6 **African LR** 38; Ian Currie 'The future of customary law: Lessons from the *lobolo* debate' (1994) **Acta Juridica** 147 at 151; F Kaganas and C Murray 'The contest between culture and gender equality under South Africa's Interim Constitution' (1994) 21 **International Journal of Law and Society** 418; Joan Church 'Constitutional equality and the position of women in a multi-cultural society' (1995) 28 **CILSA** 289; A J Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 **SALJ** 720; 'The Bill of Rights in the new Constitution and customary law' (1997) 114 **SALJ** 346.

## 21.2 Current South African position

By virtue of the provisions of section 1(1) of the Law of Evidence Amendment Act 45 of 1988 any court may take judicial notice of the law of a foreign state or 'indigenous law insofar as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice' and provided further that it shall not be lawful for any court to declare that the custom of *lobolo* is repugnant to such principles.<sup>6</sup> This provision does not preclude a party where the indigenous law is not readily ascertainable from proving it by adducing expert evidence to establish it as fact.<sup>7</sup>

In the past, marriages under customary law have not been recognised in South Africa as full marriages and have been termed 'customary unions' to distinguish them from full marriages. This meant that children born to these marriages were regarded as born out of wedlock.<sup>8</sup>

The Births and Deaths Registration Amendment Act 40 of 1996, however, for the first time provided

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6 See, in this regard, **Thibela v Minister van Wet en Orde en andere** 1995 (3) SA 147 (T).

7 **Hlophe v Mahlalela and another** 1998 (1) SA 449 (TPD).

8 On the legal position of children born of African customary unions, see Brigitte Clark and Belinda van Heerden 'The legal position of children born out of wedlock' in Burman and Preston-Whyte **Questionable Issue** 36 at 43 - 46; Sandra Burman 'The category of illegitimate children in South Africa' in Burman and Preston-Whyte **Questionable Issue** 21; Sandra Burman 'Illegitimacy and the African family in a changing South Africa' (1991) **Acta Juridica** 36 at 40 et seq; CR M Dlamini 'The legal status of illegitimate Black children' (1984) **Obiter** 8.

for children born of African customary unions or marriages by religious rites not to be registered at birth as 'extra-marital' children. This was followed by the Child Care Amendment Act 96 of 1996, which included African customary unions and marriages concluded in accordance with a system of religious law subject to specified procedures as legally recognised marriages for the purposes of the Child Care Act, 1983.

The Recognition of Customary Marriages Act 120 of 1998 now confers full recognition of customary marriages and regulates celebration, registration, proprietary consequences and dissolution.<sup>9</sup> Customary marriages are defined as marriages concluded in accordance with customary law. According to section 3(1) of the Act:

For a customary marriage entered into after the commencement of this Act to be valid-

- (a) the prospective spouses -
  - (i) must both be above the age of 18 years; and
  - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The recognition of customary marriages in section 2(1) of the Act as valid marriages 'for all purposes' has the effect that children born of such marriages are henceforth to be regarded as 'legitimate' children.<sup>10</sup> Section 9 of the Act further provides that 'despite the rules of customary law',

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9 The legislation follows an investigation by the South African Law Commission. See in this regard S A Law Commission **Report on Customary Marriages** (August 1998). For a critical analysis of the Act, see Victoria Bronstein 'Confronting custom in the new South African state: An analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) 16 **SAJHR** 558.

10 Previously, under customary law, if lobolo (bride wealth) has been paid, the child was considered legitimate and part of the father's family; if not, the child belongs to the mother's family. See further Ann Skelton (ed) **Children and the Law**, p. 49.

the age of majority of any person is determined in accordance with the Age of Majority Act, 1972.<sup>11</sup> This means, at least for a woman who enters into a customary marriage, that she will no longer be regarded as being under the marital power of her husband, but as a major in her own right.

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11 See further 4.3.4 above.

Within the field of intestate succession, the rule of male primogeniture, a hallowed principle of African customary law, provides another possibility for conflict between customary law and the equality provision in the Bill of Rights. While there is academic writing to the effect that this rule is discriminatory against women,<sup>12</sup> the court in **Mthembu v Letsela**<sup>13</sup> concluded that the rule differentiates but does not unfairly discriminate.<sup>14</sup> On appeal the Supreme Court of Appeal also rejected the claim that the customary law of succession constituted discrimination on the basis of sex or gender, although the Court did not pursue any inquiry into whether the rules of customary law did not discriminate on the basis of illegitimacy or the child's status by virtue of her birth.<sup>15</sup>

In the case of **Hlophe v Mahlalela and another**<sup>16</sup> the Court had the opportunity to consider the award to a father of custody of his minor daughter after the death of his wife where the *lobolo* had not been paid fully at the time of her death. The Court held, per Van den Heever AJ, that whatever the position might have been in general in indigenous law regarding the custody of children, the basic principles thereof have to a certain extent been excluded in favour of the common law.<sup>17</sup> The Court further provided the following guidelines:<sup>18</sup>

- In custody matters (under customary law) the interests of the child take precedence;
- Conclusion of a civil marriage after a customary marriage has the general effect of imposing a new personal status on the spouses, one governed by the common law;
- 'Any arrangement that smacks of the sale of or trafficking in children will not be enforced'.

12 A J Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 **SALJ** 720 at 725 - 726 observes that 'primogeniture' in itself is not 'unfair discrimination', but that primogeniture 'of males through males' is. He recommends that the rule should provide for the eldest child, male or female, to succeed to the deceased's position, if the Constitution is to be adhered to. See further T W Bennett 'The equality clause and customary law' (1994) 10 **SAJHR** 122 at 128 -9; A J Kerr 'The Bill of Rights in the new Constitution and customary law' (1997) 114 **SALJ** 346 at 350 - 2.

13 1997 (2) SA 936 (T), 1998 (2) SA 675 (T).

14 I P Maihufi 'The constitutionality of the rule of primogeniture in customary law of intestate succession' (1998) 16 **THRHR** 142 at 146 welcomes the decision. Contra Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) p. 24, footnote 72 who say that the arguments on unfair discrimination put forward by the counsel for the appellant are compelling and should have been accepted by Roux J. See also A J Kerr 'Inheritance in customary law under the Interim Constitution and under the present Constitution' (1998) 115 **SALJ** 262.

15 **Mthembu v Letsela and another** 2000 (3) SA 867 (SCA).

16 1998 (1) SA 449 (TPD).

17 At 458F - G.

18 At 458G - 459C.

The Court accordingly held that issues relating to the custody of a minor child cannot be determined by the mere delivery or non-delivery of *lobolo*.

It is worth noting that in terms of section 27 of the Natal Code of Zulu Law<sup>19</sup> a father shall be the legal guardian of his legitimate minor offspring born of his marriage, an unmarried mother shall be the legal guardian of her minor illegitimate child,<sup>20</sup> and a widow shall be the legal guardian of all her minor children. The Natal Code inter alia further provides for the devolution of guardianship where the legal guardian dies or becomes incapacitated<sup>21</sup> and the suspension of guardianship.<sup>22</sup> However, it must be pointed out that the whole of the Guardianship Act 192 of 1993<sup>23</sup> was made applicable to the Self-governing territory of KwaZulu, the area to which the Natal Code of Zulu Law applied, by section 2 of the Justice Laws Rationalisation Act 18 of 1996. Should the provisions of these two Acts conflict, then the Guardianship Act 192 of 1993 will prevail.<sup>24</sup>

In customary law, divorce ends the connection between the families of the couple. The concept of making maintenance payments is therefore generally a foreign one.<sup>25</sup> The rule is that all children belonging to a family group are guaranteed support within the group and by all members acting jointly:<sup>26</sup> customary law is focussed on group rather than individual rights. As far as the children born outside of a customary union or a civil-law marriage are concerned, customary law does not concern itself with the problem of maintenance. Such obligations are imposed on a natural father only if he has acquired guardianship over the child. This lacuna in the customary law has led to an increased reliance on statutory enforcement in terms of the Maintenance Act 23 of 1963, as both the Maintenance Act 1963 and the Child Care Act, 1983 are applicable to all.<sup>27</sup>

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19 Published in Government Gazette 10966 of 9 October 1987 as Proclamation R. 151 of 1987.

20 Subject to the proviso that 'an illegitimate child of a minor daughter shall fall under the guardianship of its mother's guardian until the child's mother attains majority.

21 Section 28.

22 Section 30.

23 This Act grants married mothers and fathers equal guardianship rights in respect of the minor children of their marriages.

24 See also **Prior v Battle and others** 1999 (2) SA 850 (TkD).

25 See e.g. Bennett **Sourcebook of African Customary Law** 277.

26 Issue Paper 13, par. 8.7.

27 Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 257.

There is an institution in African customary law which resembles maintenance in common law and appears to be confused in our law with maintenance. This is the institution of *isondlo*, which enables any person who has raised a child, whether born in or out of wedlock, to claim payment from a parent if the parent demands custody of the child. *Isondlo* constitutes a token of the transfer of the parental rights to the parent tendering the *isondlo*; payment is limited to one beast. Despite some apparent resemblance between *isondlo* and maintenance, the two institutions cannot be equated: there is no duty resting on a parent to pay *isondlo*, nor does it signify any form of reimbursement for past maintenance.

If fact, *isondlo* comes closer to purchase and sale of a child, which is not only illegal in terms of the Child Care Act but also contrary to public policy and the principle of the paramountcy of the best interests of the child which is now enshrined in the Constitution.<sup>28</sup>

Lastly, it must be pointed out that in terms of section 12 of the Black Administration Act 38 of 1927 any Black chief or headman may be authorised to hear and determine civil claims arising out of Black law and custom brought before such chief or headman by a Black person against another Black person resident within his or her area of jurisdiction. It is therefore within the jurisdiction of these courts to inter alia deal with issues related to custody and guardianship of minor children. The power to determine any question of nullity, divorce or separation arising out of a marriage, however, is specifically excluded from the jurisdiction of these courts. In KwaZulu, a similar power is conferred upon the *amakhosi* and *iziphakanyiswa* in terms of section 28 of the KwaZulu Amakoshi and Iziphakanyiswa Act 9 of 1990.

### 21.3 **Comments and submissions received**

Several questions on customary law and its effect on children were posed in Issue Paper 13. One of these was:

Question 84: To what extent should customary law affecting children be directly or indirectly incorporated in the proposed new legislation? And, if it is decided not to incorporate detailed customary law provisions in the new children's statute, to what extent should the

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28 Ibid 257 - 258.

fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?<sup>29</sup>

The SA National Council for Child and Family Welfare recommended that there should be only one set of standards and that customary law can be respected in individual cases. Complications can arise, so it was contended, if this is included in the new children's statute. The phrase 'that in dealing with any case due regard to be given to customary law' can be considered. In this way there would be flexibility in dealing with situations of customary law and above all the principle of the best interests of the child will be the guiding factor.

The NICC called for a process of harmonisation between various laws and pointed out that there is a need for public education in this regard.

The Natal Society of Advocates contended that customary law should not be incorporated in the proposed new legislation. It was submitted that customary law in regard to children should be brought in line with the provisions relating to other children.

With regard to all questions regarding customary law, the Johannesburg Institute of Social Services held the view that customary law should be there to assist children and not to trap them in negative situations. The respondent contended that the life of an individual child cannot be sacrificed to serve cultural concepts and traditions. These concepts and traditions, it was submitted, should be built into preventive community-based programmes to improve family life and child care on that level. The respondent reiterated the need for a family court on different levels. The Appeal Family Court should be wise and strong enough to give proper guidance in matters of this nature and these cannot be written into law. The respondent concluded that what should be written into the children's statute, is the protection of the rights of the child whether inside or outside his or her culture.

The Cape Law Society, supported by the Durban Committee, was of the opinion that all children

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29 See also 2.5.8 above.



should be afforded standardised protection in terms of the new legislation. It was proposed that in the event that a child is raised in accordance with particular customary practices and laws, the new legislation should be flexible enough to be sensitive to the principles and practice of the relevant customary law. Expertise regarding the particular customs and practices should be sought from appropriate resources.

Disabled People South Africa considered the recognition and the appropriate inclusion of customary law as important.

Professor C J Davel contended that the new children's statute should at least be sensitive to existing principles of customary law.

The ATKV was of the opinion that legislation should take into account the traditional laws and customs of cultural groups, but cautioned that these customs may not contradict the spirit of the Constitution or the Child Care Act.

Mr DS Rothman observed that if certain customary principles should be taken into account, these should be clearly embodied within the legislation.

Issue Paper 13 also posed the following question:

Question 85: How can the 'best interests of the individual child', as set out in the Constitution and CRC, best be rendered compatible with traditional African values, bearing in mind the increasing impact of the ideology of individualism on traditional societies?

The SA National Council for Child and Family Welfare pointed out that with the changing norms and values in society it should be borne in mind that children in present day society are very aware of their rights. Further they are actively participating in educational programmes highlighting their rights and responsibilities.

The NICC considered efforts towards harmonisation of traditional values with common law as essential.

The Natal Society of Advocates submitted that the best interests of the individual child are

paramount and whilst traditional African values should be regarded with sensitivity, the paramountcy of the principle cannot be overruled or diluted.

The Cape Law Society, supported by the Durban Committee, referred to the recommendation of the SA Law Commission in Discussion Paper 74 in the investigation **Harmonisation of the Common and the Indigenous Law** where it is recommended that, in accordance with section 28(3) of the Constitution and the CRC, the child's best interests should govern all aspects of custody, guardianship and access to children.

Mr DS Rothman contended that it may be helpful to define the best interests of the child in respect of every area of the child's life, e.g. nutrition, health, education etc in order to arrive at a common ideal applicable to all children regardless of religion, race or culture. Where customary, religious or traditional values are in conflict with these, the best interests principle as defined should take precedence.

Issue Paper 13 invited responses to the following question:

Question 86: Should initiation ceremonies in customary law be regulated by legislation so as to eradicate their potentially harmful effects on children, particularly insofar as children's rights to bodily integrity may be violated during the course of some ceremonies?

Mrs J Smith contended that if circumcision is understood by 'initiation' ceremonies, the person or persons performing the circumcision should be instructed in basic hygiene, and the initiate should be required to visit a health facility after the initiation to ensure that there is no infection. It was further submitted that apart from this, it is not the function of the state to interfere in tribal customs.

The SA National Council for Child and Family Welfare stated that legislation to regulate initiation ceremonies is essential and will also safeguard against persons using this excuse to commit sexual atrocities against children and young persons, especially females, in the name of religion or culture.

The NICC answered the question in the negative as the Constitution provides the right to practice traditional values insofar as they do not limit any other rights. Hence it said that any practice which may potentially harm the child should not be condoned. An extensive awareness program would be required for children to know that there is a choice. Cultural rituals cannot be legislated but should

adhere to the general principles of health and the interests of the child.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society, supported by the Durban Committee, stated that in accordance with South Africa's obligations in respect of the Constitution and the various international instruments to which it is a signatory and in terms of which it is required, *inter alia*, to adopt legislation or other measures necessary to give effect to the obligations in respect of the various documents, South Africa should be active in protecting children against any potentially harmful, degrading practices which may negatively infringe upon the dignity, bodily integrity, health or welfare of the child. The respondents recognised that it is difficult to legislate broadly against such ceremonies and practices, but pointed out that steps should be taken to eradicate the potentially harmful effects of any such ceremonies or practices - perhaps through the criminal courts.

The National Council of Women of South Africa considered the Ugandan clause which provides that it is unlawful to subject a child to social or customary practices that are harmful to his or her health, as an improvement and something that should be incorporated in the new children's statute.

Professor C J Davel submitted that initiation ceremonies should be regulated by legislation so as to eradicate their potentially harmful effects on children. She submitted that it is not only common law but also customary law that has to be interpreted and altered, if necessary, to be in line with the Constitution.

Mr DS Rothman answered the question in the affirmative, adding that where ceremonies and customs militate against the child's best interests, regulations should play a role.

The following question was posed in Issue Paper 13:

Question 87: Should the common law and /or legislation be amended (whether or not in a comprehensive children's statute) so as to embrace African children living under customary law to a greater extent than at present? For instance, should it be spelt out that the determination of the age of majority (whether this is set at 18 years or otherwise) applies to all persons, including those subject to customary law?

The SA National Council for Child and Family Welfare, in response to the first question, stated that this is not necessary as the law should be uniform for everyone but due recognition should be given in broad terms to accommodate children living under African customary law. To overcome this problem, the inclusion of a general and broad clause in the legislation will suffice. It was further contended that the age factor needs to be debated but that pending this the age of 18 should be the norm in respect of all children, including those who are subject to customary law.

The NICC considered one embracing law with cultural and religious sensitivity to be necessary for all children as long as basic rights are not violated.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society contended that the common law and/or legislation should be amended. Minimum ages should be fixed and should apply to all persons including those subject to customary law. The Durban Committee submitted that legislation must be uniform and applicable to and protective of all children without any qualification whatsoever, otherwise the entire purpose of the legislation will be defeated.

Professor C J Davel contended that legislation and the common law should embrace African children. She said the law should spelt out what the age of majority is, that it includes those subject to customary law and that it includes girls.

Mr DS Rothman answered the question in the affirmative, adding that it would be difficult to introduce exceptions to the age of majority because of customary law considerations. There should be no discrimination on those issues which are identified as fundamental to a child's general well-being.

Issue Paper 13 posed the following question:

Question 88: Should legislation attempt to alter customary law so as to remove the remaining distinctions between different classes of children (classified according to the circumstances of their birth) in the field of intestate succession?

The SA National Council for Child and Family Welfare did not consider legislative intervention to be

necessary as there are alternative ways of dealing with the problem, for example the drawing up of a will. As long as there is information disseminated to let people know of the options available without interfering with customary law, one could let the people choose which option to follow.

The NICC answered the question in the affirmative, but added that there will need to be an extensive awareness program for implementation as legislation on its own will not result in better achievements.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society referred to the SA Law Commission's Discussion Papers 74 and 76 which investigate this aspect in detail. The Durban Committee stated that there should be no discrimination against any class of child whatsoever. As far as succession is concerned, it was submitted that it is usually the women who are discriminated against and this perpetuation of discrimination on the basis of gender must be eradicated.

The Durban Child and Family Welfare Society argued that there should be no discrimination against children and that there should be only one law.

Pointing out that the common law position was altered by legislation, Professor C J Davel submitted that the same should be done with customary law. Discrimination between different classes of children classified according to the circumstances of their birth is clearly unconstitutional.

Mr DS Rothman submitted that children should not be penalised by classifications because of the circumstances of their birth. The distinctions in the field of intestate succession should be removed.

Question 89: What is the best way of ensuring that the 'best interests of the child principle' is extended to cover all aspects of the parent-child relationship under customary law?

The SA National Council for Child and Family Welfare submitted that persons marrying under customary law should be aware of the rules pertaining to children born of such marriages. If this works in practice, there should be no law to change this. A person should have a choice or can mutually decide whether they would opt for a change rather than following the customary law. The

Council called for the inclusion of a broad clause that accommodates children born as a result of customary law.

In its response the NICC referred to education and sensitisation on cultural practices.

The Natal Society of Advocates did not consider this aspect to require legislation. It submitted that the only way to do this is sensitively and through education.

The Cape Law Society referred to the appropriate recommendations contained in the SA Law Commission's Discussion Paper 74, while the Durban Committee, agreeing with the Cape Law Society, further submitted that all legislation applicable to family law should be standardised insofar as the protection of rights is concerned.

Professor C J Davel had no doubt that the best interests of the child principle should be extended to cover all aspects of the parent/child relationship under customary law. She pointed out that the Constitution clearly states the importance of that principle and that both common law and customary law should adhere to it.

Question 90: Should the customary law relating to 'adoption' of children be adapted to put the child's interests first, in accordance with the dictates of the Child Care Act, the Constitution and CRC? If so, how best can this be done?

The SA National Council for Child and Family Welfare answered the first question in the affirmative. It further contended that the new children's statute can give guidance by stating that 'due recognition will be given to customary law pertaining to adoption but the overriding factor would always be what is in the best interests of a child'.

Referring to the fact that customary law always dictates in the best interest of the family tree but not that of the child, the NICC answered the question in the affirmative.

The Natal Society of Advocates answered the question in the affirmative, stating that the principle of the best interests of the child is paramount and that customary law relating to the adoption of children should be adapted to come into line with this principle. Again it was reiterated that this

would have to be through education and practical application by the children's court.

The Cape Law Society, supported by the Durban Committee, recommended that the customary law relating to the adoption of children should be recognised subject to the interests of the child being prioritised. It was submitted that it would be most effective if such adoptions were required, in accordance with the provisions of the Child Care Act, to be registered prior to legal effect being given to the adoption. It was submitted further that by actively encouraging the registration of the adoption, checks and balances could be imposed to ensure that the child's best interests are being secured. The respondents held the view that it would be in the best interests of the child if customary adoptions were registered and that generous provision be made for late registrations. The Durban Child and Family Welfare Society stated that in its experience people apply for legal adoption because such people found the traditional or customary forms wanting. The Society called for the child's interests, as opposed to those of the parent, to be the focus and that there should be a shift in emphasis from an authoritarian parental rights approach to a child centred approach.

Mr DS Rothman answered the question in the affirmative, adding that the objective could be achieved by direct reference to the relevant custom in the new children's statute so that it may conveniently be dealt with under the adoption chapter of the Act.

Another question posed in Issue Paper 13 on customary law is the following:

Question 91: Is legislative intervention necessary to ensure that the interests and rights of children in customary law fostering arrangements are protected?

The SA National Council for Child and Family Welfare contended that the law should not intervene when there is a mutually accepted arrangement between parties. It is considered to be best to allow for private arrangements but intervention should take place if there are complaints that the children's needs are not adequately met or that their rights are violated.

The NICC and the Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society, supported by the Durban Committee, was of the view that statutory intervention is necessary. It submitted that any child care legislation should apply universally with standardised norms in respect of all children, whether they are subject to common or customary law. Due regard should be had, where appropriate, to the cultural context of any placement of a child.

The ATKV said legal guidelines are essential for cases where children are placed in the care of a guardian for unusually long periods.

Mr DS Rothman suggested that because of practical considerations it may be a good idea to afford such care-givers a means whereby they could formalise these arrangements at their request. It may not have to be the same kind of foster placement as provided for in the Child Care Act but one that could introduce social workers as observers in an informal way.

Another question posed in Issue Paper 13 on customary law is the following:

Question 92: What are the current social implications of *isondlo* and is legislative intervention in this regard necessary to protect children and their mothers?

The SA National Council for Child and Family Welfare said that the best way to overcome this problem would be to deal with each situation as it arises. The rights of both mother and child must be given due consideration.

The Natal Society of Advocates stated that the social implications of *isondlo* may require legislative intervention to protect children and their mothers.

The Cape Law Society, supported by the Durban Committee, stated that for as long as *isondlo* is viewed in its correct context, i.e. that it is not maintenance, there is no need for legislative intervention. Referring to the recommendations of the Law Commission in its investigation into the harmonisation of the common law and the indigenous law, it was submitted that cultural expectations should, where appropriate, be accommodated by a court making a decision in the instance of a dispute regarding custody and guardianship.



The ATKV held the view that it is unnecessary to control traditional customs by legislation provided such customs do not contradict the spirit of the Constitution.

Mr DS Rothman, who viewed the use of any legal method to ensure that maintenance on behalf of a child is secured positively, said legislative intervention may be necessary because some mothers have come to court for maintenance and fathers have resisted this approach, claiming refuge within the customary law provisions that fall outside the scope of maintenance legislation.

The second-last question posed in Issue Paper 13 on customary law was the following:

Question 93: To what extent does the minor's lack of property rights under customary law violate his or her basic human rights?

The SA National Council for Child and Family Welfare contended that it can violate a minor's right if there is conflict in the family and if the head of the family does not meet his obligation. Therefore, if a case of this nature arises, it should be assessed in terms of the particular situation.

The NICC argued that the Constitution, being above all legal instruments, should be applied in instances where there is a legal practice that is discriminatory.

The Natal Society of Advocates submitted that the minor's lack of proprietary rights under customary law seriously violates his or her basic human rights. The respondent suggested that all minor children should have the same proprietary rights under the Constitution.

The Cape Law Society, supported by the Durban Committee, again referred to Discussion Paper 74, where the recommendation that all persons who have attained the age of majority should have individual proprietary capacity, is supported. The respondents were of the view that legislation is required to amend the existing position in respect of customary law. The positions of persons below the age of majority, whilst subject to customary law, should be afforded the same protection as minors governed by common law.

The ATKV held the view that owning land implies certain financial and other responsibilities. It does not affect a child's basic human rights if the responsibilities are being handled by the guardian on

behalf of the child until the child may legally assume the responsibilities.

Mr DS Rothman did not view the violation referred to as too significant.

The last question posed in Issue Paper 13 on customary law is the following:

Question 94: Does the customary rule of proprietary incapacity go against the child's best interests and, if so, would a child's interests be better served by enabling him or her to own property in his or her own right or rather by making better provision for the administration of family estates?

The SA National Council for Child and Family Welfare submitted that consideration should be given to include section 11(3) of the Black Administration Act 38 of 1927, with amendments, in the new children's statute to meet present day circumstances. Amendments should include better provision for the administration of family estates.

The NICC called for an enquiry into the status of customary law in the country. It was contended that customary law should be afforded the same status as any other law in the country.

The Natal Society of Advocates answered the question in the affirmative, stating that customary proprietary incapacity goes against the best interests of the child and children's interests would be better served by legislation bringing customary law into line with other current legislation relating to the ability of minors to own property.

The Cape Law Society, supported by the Durban Committee, suggested that the property of a minor should be afforded the same protection, whether it is governed by customary or common law. The child's property should be regarded as distinct from the so-called family property and should not be administrated as part thereof. The child as an individual, it was submitted, should be entitled to the full protection of the law as is afforded to children in terms of the common law.

Mr DS Rothman commented that the child's interests would be best served by enabling him or her to both own property and to have an influence in the administration of family estates provided that he or she is old enough for this responsibility - at least 18 years of age.

## 21.4 **Comparative law**

Most African countries prohibit cultural practices which dehumanises or is injurious to the physical and mental well-being of the child in their child care legislation. Section 13(1) of the Ghana Children's Act, 1998, places this prohibition in the same category as the prohibition on torture or other forms of cruel, inhuman or degrading treatment and punishment.<sup>30</sup> Section 5 of the Uganda Children Statute, 1996, on the other hand, frames the prohibition as a protective measure. The section provides as follows:

A child has the right to be protected from any social or customary practices that are dangerous to the child's health.

The Kenya revised Children Bill, 1998, in turn, provides as follows:<sup>31</sup>

No person shall subject a child to cultural rites, customs or traditional practices that are likely to affect the child's life, health, social welfare, dignity or physical or psychological development.

## 21.5 **Evaluation and recommendations**

The Commission accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution, 1996.<sup>32</sup> Given the paramountcy of the best interests of the child principle in section 28 of the Constitution and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of the cultural (or religious) group. The Commission therefore agrees with those commentators who argue, in response to question 84 posed in Issue Paper 13, that certain basic principles regarding children should transcend customary and religious laws and should be protected and enforced in the new children's statute. Such principles should be universal in their

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30 Section 13(1) reads as follows: ' No person shall subject a child to torture or other cruel, inhuman or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child'.

31 Section 13.

32 Section 15(3)(b) of the Constitution, 1996.

application and should apply to all children throughout South Africa. **The Commission has therefore recommended the inclusion of a general non-discrimination clause in the new children's statute.**<sup>33</sup>

The Commission takes cognisance of the provisions of section 1(1) of the Law of Evidence Amendment Act 45 of 1988 which allows for the recognition of customary law insofar as such law can be ascertained readily and with sufficient certainty, subject to the principles of public policy or natural justice and the developments in the case law in this regard. For this reason, **the Commission sees no need to provide for a 'choice of law' provision allowing for the customary law relating to children to be applied in the new children's statute.**

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33 See 5.4 above.

Similar to our approach on corporal punishment and in order to protect children against harmful cultural practices, **the Commission recommends that cultural beliefs and practices should not serve as a defence against any charge of indecent assault or infringement of the right to privacy.** A person would therefore be denied the opportunity to rely on the absence of unlawfulness, a critical element of any criminal offence, because of his or her unreasonable reliance on an alleged cultural practice.<sup>34</sup> Where a girl therefore lays a criminal charge of indecent assault after having been subjected to a virginity test, the person who conducted the test would not be able to say in his or her defence at the criminal trial that virginity testing is an acceptable cultural practice and therefore completely lawful.

However, **the Commission recommends, in addition to removing reliance on customary law practices as a defence to a criminal charge, the introduction of a regulatory approach which combines prohibition of certain abuses and formal protection measures where required. The aim would be to prevent infection and injury, prohibit coercion and provide recourse for children or their caregivers who choose not to participate in such practices.**

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34 Although the accused's bona fide belief in the justification a cultural practice could exclude intent, another critical element of a criminal offence.

**As for female genital mutilation, the Commission has no hesitation in recommending the imposition of severe criminal sanctions for persons and parents who force, coerce or allow girl-children to be circumcised.** In this regard, the Commission points out that female genital mutilation is international recognised as extremely harmful, and appears to have minimal support in South Africa.<sup>35</sup> Criminalising the practice of female genital mutilation would be a preventative step aimed at preventing this practice from becoming established in South Africa, support action being taken in other African countries, and facilitate protective action including refugee status for immigrant children who might be affected. It is also worth recalling that the Commission has recommended that the threat of female genital mutilation should constitute grounds for the granting of refugee status to a non-South African child.<sup>36</sup>

We have also seen that some provinces have adopted or are in the process of adopting legislation to regulate initiation schools.<sup>37</sup> It is further our understanding that the (national) Department of Health is busy drafting legislation regulating circumcision schools. **The Commission supports this move to regulate circumcision schools under the aegis of the Department of Health and accordingly sees no need to regulate male circumcision in the new children's statute.**<sup>38</sup> **However, we have cautioned against certain forms of virginity testing for girl-children masquerading as a customary practice in Chapter 10 above. In this regard, we believe our recommendation for a general provision prohibiting harmful social and customary practices in the new children's statute, coupled to such new health care legislation so as to regulate**

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35 See also J M T Labuschagne 'Circumcision and female genital mutilation: A human rights and antro-po-legal evaluation' (1998) 13 **SAPL** 277 at 307 - 308.

36 See 22.4.5 below.

37 See the Northern Province Circumcision Schools Act 6 of 1996 and the Eastern Cape's Traditional Circumcision Bill, 2001.

38 See also J M T Labuschagne 'Besnydenis en die grense van religieuse en kulturele gebruike in 'n regstaat: 'n Regsantropologiese perspektief' (2000) **SATE** 55.

**circumcision schools, should adequately address the issue.**

The Commission further argues that the Recognition of Customary Marriages Act 120 of 1998 now makes it very clear that, 'despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972'.<sup>39</sup> This includes not only women married according to customary law, but also children born of such unions. **While it should therefore not be necessary to spell out clearly, in the new children's statute, how the age of majority of any person, including those living under customary law, is determined,**<sup>40</sup> given the clear language of the Recognition of Customary Marriages Act, 1998, the Commission nevertheless considers it prudent to include such a provision in the new children's statute to make it absolutely clear that the new children's statute should apply to all children in South Africa. This prudence is warranted given our recommendations on the determination of the age of majority in 4.3.4 above.

The Commission is investigating succession in customary law in its investigation into Customary Law and has published a discussion paper in this regard in August 2000. It is therefore not necessary for us to respond to question 88 of Issue Paper 13 where the question was posed as to whether legislation should attempt to alter customary law so as to remove the remaining distinctions between different classes of children (classified according to the circumstances of their birth) in the field of intestate succession.

Given these recommendations, and the recognition that customary law enjoys in South Africa, the Commission believes that the fundamental principles underpinning the new children's statute should be sensitive to the needs of customary law. At the same time, it should be clear that the best interests of all children, including those living under a system of customary law, are the paramount consideration. **Accordingly the Commission has recommended that children be protected from harmful social and cultural practices.**<sup>41</sup>

Lastly, the Commission wishes to stress that it sees a definite and expanded role for traditional and

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39 Section 9 of the Recognition of Customary Marriages Act 120 of 1998.

40 See question 87 of Issue Paper 13 and the response above.

41 See 5.4 above.

community courts as adjudicators of civil (and criminal) disputes involving children. These aspects are covered in more detail in Chapter 23 below.