

An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa

2011



A study commissioned by Save the Children Sweden
Southern Africa Regional Office

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Acknowledgements

The authors acknowledge, with thanks, the participation of the various government departments, both nationally and provincially, including the Departments of Social Development, Health, and Justice and Constitutional Development.

In addition, the NGOs that shared their views and assisted the research team in connecting with communities are acknowledged.

More specifically, heartfelt thanks go to Jacob Matakanye and Tshifiwe Ratshisususu from the Musina Advice Centre for their assistance in engaging with our Limpopo respondents. In addition, the Umthata Child Abuse Resource Centre is acknowledged for arranging all focus group sessions and workshops in the Eastern Cape, as is Ms Lungile Mazibuko from Mpolweni Child Welfare who assisted in connecting with communities in KZN. Gugu Mthmebu was a source of great support in running and documenting the focus groups in KZN.

The preliminary findings and draft report were thoroughly reviewed by a number of reference team members, including Judith Mulenga, Petronella Mayeya, Professor Hansungule, Thoko Mkhwanaza-Xaluva, Joan Van Niekerk and Carol Bower. The research team thanks them for their sustained engagement and constructive inputs which strengthened the research report significantly.

Finally, thanks are extended to Deidre Kleynhans from Save the Children Sweden's regional office for her continued support, guidance and patience for the duration of the study.

Acronyms and abbreviations

African Charter on the Rights and Welfare of the Child	ACRWC
Campaign for female education	CAMFED
Child Support Grant	CSG
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistics Communities	CRLC
Department of Co-operative Governance and Traditional Affairs	COGTA
Early Learning Resource Unit	ELRU
KwaZulu Natal	KZN
National Association of Child Care Workers	NACCW
South African Police Services	SAPS
Umthatha Child Abuse Resource Centre	UCARC
United Nations Convention on the Rights of the Child	UNCRC
United Nations	UN
Women in Law in Southern Africa	WILSA
South Africa Congress of Traditional Leaders	CONTRALESA
Female genital mutilation	FGM
Gender based violence and sexual violence	SGBV
Zambia Interfaith Networking Group on HIV and AIDS	ZINGO
National Development Agency	NDA
United Nations Children’s Fund	UNICEF
Ministry of Community Development and Social Services	MCDSS
Department of Social Development	DSD
South African National Aids Council	SANAC
South African Law Reform Commission	SALRC
Commission for Gender Equality	CGE
African Union	AU
Zambia Law Development Commission	ZLDC
Zambia Civic Education Association	ZCEA

Executive summary

1. Securing child protection through an interrogation of custom

International and continental rights instruments impose obligations on State Parties to create a protective environment for children where they may be free from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse which is intentionally inflicted, either threatened or actual, which results in, or is highly likely to result in actual or potential harm to child’s health, survival, development or dignity”. (United Nations, 2006: page 6)

This protective environment is influenced by the socio-economic as well as the socio-cultural context in which children live and develop. The Southern Africa Regional Office of Save the Children Sweden commissioned a review of the National Child Protection Systems in South Africa, Swaziland and Zambia. The review found evidence that, inter alia, customary, cultural and religious practices impact on the strength of child protection systems; that some of these practices strengthen and some of the them tend to weaken National Child Protection Systems in the countries in question.

Save the Children Sweden commissioned this follow-up study to explore these observations in further detail; to explore to what extent in South Africa, African customary law and practice promotes and/or inhibits the protection of children; how the positive impacts can be harnessed for the greater protection of more children; how the negative impacts can be mitigated; and finally how and who should be at the helm of any necessary developments of African customary law.

This study recognises that these questions are relevant to a wide range of religious and cultural practices, not just African customary law. In South Africa, Muslim law, Christianity and cultural practices within the traditional Afrikaans communities for example, have likewise been noted to afford both protection and create risks for children. Ideally a study of this nature would engage in identifying and analysing practices across the full socio-cultural range. Unfortunately the scope of the budget and time available for the study made a comprehensive study of this nature impossible. A choice was made to start the inquiry by considering the interplay between African customary law and practices and children’s protection rights with the objective of encouraging similar inquiries, within a similar framework constructed during the course of this study, covering all other relevant religious and cultural systems.

This study could not explore the impact of practices on the full scope of children’s rights, or for that matter the full scope of children’s protection rights. The analytical emphasis is on the rights considered most proximate to the realisation of a protective environment for children as per guidance provided by Save the Children and UNICEF’s principles of an enabling protective environment. This study thus focuses on the interplay between African custom and the following protection domains:

- Customary upbringing and parenting practices and community protection mechanisms
- gender sensitive practices and attitudes
- children’s health, including their sexual health and wellbeing
- criminal offences by and against children
- status and participation of children.

2. Methodology and limitations of the study

The research for this study was undertaken in a limited number of communities in South Africa in 2011 characterized by a significant number of people living under customary jurisdiction. In addition, there is significant variation in terms of how the same or similar customs are practiced within and across provinces and communities. This study was therefore exploratory rather than an exhaustive review of customary practices that impact on children's rights. It involved a combination of procedures: a literature review, the use of focus groups, and the conducting of semi-structured interviews. In terms of sampling, two rural communities in the Eastern Cape, one in KwaZulu Natal (KZN), and one in Limpopo Province were visited. The limited number of sites, determined by the comparatively limited budget, time and brief for the study can be best described as indicative rather than representative; that is, they are held to be indicative of the situation in other communities subject to customary jurisdictions and governed by tribal authorities.

The primary limitation of the study was the limited reach of the field work. The project budget and time-lines were comparatively modest when set against the geographical size and social complexity of the targeted communities as well as, more broadly, the rich variation that exists in the way that customs are practiced on the ground. Two steps were taken to address this limitation. Indicative sites were chosen for the field work and the data that emerged was supplemented with information derived from other research projects dealing with similar subject matter, but covering a wider geographical range within the country.

3. The situation of children subject to customary law

The majority of people in South Africa live under customary law, especially so in rural communities. Many children living in customary law communities are found to be vulnerable due to high levels of poverty and entrenched gender disparities. These high levels of vulnerability often manifest in relatively low levels of enjoyment of rights by children living under customary law. However, the observed co-existence of customary practices and heightened vulnerability does not necessarily imply a link between the two. This report seeks to explore to what extent this connection can be made; to what extent custom has limited the extent of the realisation and protection of the rights; as well as looking at any unrealised potential within customary law to advance the realisation and protection of the rights of children living under customary law.

4. Key findings

African customary law in South Africa has a fundamental child protection core. Whilst it is a quintessentially patriarchal system which gives pre-eminence to the interests and well-being of the dominant social structure – the extended family - over and above the interests of the individual family members, both customary institutions - patriarchy and the extended family - implicitly require the protection and nurturing of the individual family members, including the children.

Many African customary practices and laws were protective of children. African customary law is not static; it is organic; laws and practices have changed over time, responding to external social, economic and legal pressures that have been brought to bear on customary communities. This has resulted in some protective laws and practices falling into disuse; some no longer provide the same level of protection in the modern-day changed environment in which they now operate as they were able to in earlier times; some practices and laws have changed so as to indeed create a risk for

children; some practices and laws have not changed, but the legal and related child protection environment has changed resulting in a practice or law that was in years before not viewed as harmful, now constituting a transgression of legal prohibitions or obligations.

The international, continental and national legal frameworks call for continued evolution of African customary law; for the ongoing review, promotion and evolution of customary practices. Rights instruments require that African customary law remains dynamic; that positive customary practices that promote children's rights be promoted and those cultural practices that create a risk for children be changed or abolished. South Africa has a dual legal system which simultaneously recognises statutory and customary law, provided the relevant customary laws are not harmful to children. In effect, what is required of customary law is that it continually shifts closer back towards its original core, which is the protection and nurturing of children.

Indeed, the strength of customary law lies in its malleability. Its inherent responsiveness to external pressures creates the space for future development of the law so as to maximize its protective benefit for children. The constitutional recognition of customary law in South Africa provides strong motivation for the pro-active utilization of this space to develop customary law for the benefit of children. The requisite development of the law connotes a host of interventions ranging from recognition, rediscovery and resuscitation of positive practices to the adaptation or prohibition of harmful practices.

Responsibility for the ongoing review and evolution of customary law and practice lies with a range of role players, as is the case with the review and evolution of any other source of law. Constitutionally, logically and practically, the responsibility primarily lies with the custodians of customary law, including traditional leaders, traditional courts, traditional healers as well as the legislative, national judicial and the executive branches of government. Special mention must be made of the role of traditional leaders. Traditional leaders are the custodians, the source, the interpreters and the enforcers of customary law. They are legally mandated to develop, enforce and monitor customary law, and to advise and engage with government in the development of legislation that impacts on customary laws and practices. The exercise of this power is contested by "modernists" on the grounds that traditional authorities are undemocratic. In South Africa these criticisms are met by a number of laws compelling the democratization of the institution. This is coupled with traditional leaders enjoying high levels of recognition, credibility and legitimacy to develop laws among their constituencies.

As with any other democratic legal development process, customary law-making cannot and should not be the preserve of government and political leaders, it is a domain that requires public participation by those affected by the laws including children, the family, and the community. Similarly, institutions mandated to promote rights such as the South African Law Development Commission, the South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistics Communities, the Human Rights Commission and of course civil society organisations such as NGOs, community based, and faith based organisations have a key role to play. Continental and regional structures such as the African Union and the Southern African Development Community (SADC) equally have an oversight and advocacy role to play in this regard.

Various customary practices and laws were identified during the course of this study which to varying degrees either promote or detract from the realisation of the following core protection rights recognised by international, continental and national legal instruments:- The rights to a name and nationality; parental care and protection; protection from all forms of abuse (including sexual abuse and corporal punishment), neglect and exploitation; protection from forced and under-age marriages; protection from child labour; the right to health care; to be protected from harmful customary practices; to lawful and appropriate treatment when in conflict with the law; the right to participation and the right to freedom from discrimination and to equal enjoyment of all other rights regardless of cultural background or gender.

4.1 *Upbringing, parenting practices and community-based child protection mechanisms*

There are numerous positive customary parenting and upbringing practices and child protection mechanisms in the African customary tradition. These include:

- a. Deeply significant naming practices and ceremonies which are closely aligned to the rights of children to know and be cared for by their parents and/or families as well as their right to a name.
- b. The extended family which secures children's full continuum of developmental needs, including their material, intellectual and psychosocial needs.
- c. The communal approach to the care of children which is summed up by the folkway that each child is everyone's child, promotes the safety and well-being of children in traditional communities. This practice is the foundation for customary adoptions and foster care arrangements, or more specifically, kinship care arrangements which have provided support to many children orphaned by the HIV and AIDS pandemic in South Africa.
- d. One specific aspect of communal care is the traditional communal assumption of the disciplinary role in the community which provides an example of an alternative positive form of discipline.
- e. The role of the African father embodies a number of very positive elements, least of which is the assumption of responsibilities that will ensure the child's protection.
- f. Peer-based and inter-generational communication practices between children and their grandparents provide an essential form of psychosocial support sought to be mimicked by many a modern-day programmes seeking to ensure the well-being of children who have experienced trauma or loss in their lives.
- g. The education and development of children in traditional settings starts from an early age, giving life to the importance of early childhood development. Children's education and stimulation is facilitated in traditional communities through the playing of developmental games as well as role-playing imitating adult roles and responsibilities.

Whilst there are a significant number of positive upbringing practices, it must be noted that many of these are on the decline; modern traditional communities no longer apply these practices routinely. In addition, there are a number of upbringing and parenting practices which, for varying reasons, are detrimental to the protection rights of children. These include:

- a. A lack of appreciation of the importance of the national birth registration processes.
- b. Whilst the extended family arrangement ensures a continuum of care, it engenders unequal gendered divisions of labour, with fathers assuming a largely hands-off provider role which

contributes to poor relationships between children and their fathers and inequitable sharing of parenting responsibilities between the genders.

- c. There is a risk of subordinating the interests and protection rights of the child to the broader family interests. This risk is especially pronounced where the conflict revolves around the financial security of the family.
- d. Whilst customary adoptions and foster care fill an important protection role in communities, they are unregulated and unmonitored, creating a risk of abuse and exploitation of vulnerable children.
- e. Grandparents and older siblings play a critical communication role in the lives of children in traditional communities. Unfortunately it is equally common for communication between children and their parents to be poor, especially in matters related to sexual and reproductive health.
- f. Parental disciplinary practices tend to be authoritarian and this often finds expression in the routine use of corporal punishment.
- g. Child labour is prevalent in traditional households and communities. This is driven in part by the view of the role of children in the family and community as well as by high levels of poverty in rural areas.
- h. Whilst early education is an organic part of a child's early life and family relations, the content of the teachings is problematic as it serves to socialize children, from an early age, into stereotyped gender roles.

4.2 *Gender sensitive practices impacting on children*

Despite the clear prohibition against gender-based discrimination, many girls and women in rural customary communities do not enjoy equal access to their rights, do not benefit from equal division of parenting roles and responsibilities and are subject to high levels of violence and exploitation.

Gender divisions and the subordination of women to men are central to African Customary law. Many commentators argue however that this traditional order did not equate to the harmful gender-linked consequences that we see today, such as high levels of gender-based violence, poor health outcomes and powerlessness of women. Many argue that while African custom is highly patriarchal, traditionally, protection and respect of women were implicit elements of patriarchy as women were seen as a valuable member of the family and community.

Many early traditional patriarchal practices have today, in consequence of changing social and economic pressures lost their protective core and present risks for women. In addition, some practices which are in effect archaic, have either been retained for economic reasons linked to poverty in rural areas or have become distorted over time and are practiced in a form alien to the practice of earlier years, resulting in untraditional harm to women, the girl-child and children more generally.

A further relevant observation is that many practices which are driven by entrenched gender divisions are waning as issues of gender disparity become less prevalent in modern traditional communities.

Some of the gender sensitive practices identified during this study include:

- a. Traditional rituals marking the transition of children to adulthood commonly known as initiation ceremonies. They traditionally involve a strong educational component, a period of isolation and a medical circumcision for the boys. Numerous commentators have expressed concern about the significant gender socialization role played by these rituals thereby perpetuating a deeply unequal patriarchal social order. In addition, these ceremonies harbor health and abuse risks.
- b. In South Africa, a form of forced child marriage called *ukuthwala*, which bears little resemblance to the *ukuthwala* of old, has resurfaced in recent years in a few rural districts. Child marriage has a strong class element to it; it is common amongst rural poor families who see the increasingly commercialized *lobola* or bride price as a source of much-needed income.
- c. Polygamy has significant protection and health consequences for children born to polygamous parents.
- d. Virginity testing is regulated by the Children's Act NO 38 of 2005. Girls under the age of 16 may not be tested and if they are tested there are numerous regulatory requirements imposed to protect their dignity, equality, privacy and health. There is anecdotal evidence that it is being practiced contrary to the requirements of the Children's Act and is justified on the grounds of its purported health benefits. Child rights advocates oppose the practice on the grounds that it violates the rights of girls. This conflict requires committed and meaningful engagement between the different camps with a view to finding a legally equitable solution to the looming standoff.

4.3 Practices impacting on children's health, including sexual health and well-being

Many of the practices identified under parenting and gender sensitive practices have an impact on the health of children, including child marriages, initiation ceremonies and poor communication practices.

There are a number of further practices which, whilst having deep spiritual significance in traditional communities, have been noted to pose some health risks to children. As such they require further discussion and engagement to assess the level of risk and possible solutions to address these in moving forward. These practices include traditional ante-natal remedies such as herbal cleansing, traditional infant and child care remedies, nutritional and feeding practices and facial scarification and digit amputation.

It must be noted that there are a number of very positive ante-natal and infant practices such as lengthy spacing between pregnancies and breastfeeding which have declined in prevalence, but are of potentially significant benefit in improving the well-being of children.

4.4 Practices pertaining to criminal offences against/by children

Traditional restorative and communal approaches to child justice are positive practices which have in fact been integrated into the recently enacted Child Justice Act in South Africa.

Unfortunately, various customary practices and attitudes do contribute, in rural communities, to the poor reporting and prosecution of crimes against children. These include the entrenched child-adult authority relationship which calls for total obedience and traditional remedies for child abuse which saw the matter as an issue for resolution between two families, rather than a crime.

4.5 *The status, participation and voice of children*

It is commonly accepted that children do not enjoy a high status in African customary law. The low status of children is entrenched by, and at the same time manifests in a culture of silence and non-participation that permeates customary law. Traditionally children were brought up and educated to keep quiet and not to express an opinion. Any unsolicited opinion by the child was regarded as disrespect for adults.

Participation was reserved largely for peer-related activities such as games and theatrical performances. There were few, if any, spaces for children to participate in decision-making in the home or community. However, children are beginning to have a voice in mundane domestic affairs that directly impact on them.

5. Moving forward - recommendations

This study has clearly shown that African customary law harbors the potential to protect children as well as a number of risks for children. Internationally, continentally and nationally there are clear obligations on the full spectrum of mandated and appropriate role-players previously identified, to revive or otherwise develop customary law and practice so as to make it more protective of children and their rights. The following recommendations embody a number of suggestions as to how, through advocacy, various stakeholders can support, facilitate and expedite this process of change.

5.1 *Traditional institutions*

A number of traditional institutions have shown a willingness to challenge and change certain customary practices for the benefit of children. This provides evidence of potential advocacy space to foster organic change from within communities. Recommendations for promoting this change are numerous and include strategies to empower, capacitate, educate and sensitise traditional role players to their potential role, and how best to fulfill these so as to ensure children's best interests are paramount in the case of conflict of custom and rights.

5.2 *Legislative and executive advocacy*

Advocacy ought to be directed to promoting the necessary national legislative and executive action to systematize and allow for implementation, allocation of budgets and enforcement of customary law developments. A number of recommendations call for stronger legislative regulation of harmful practices, as well as more constructive partnerships between the legislature and the executive and traditional institutions in the development of responsive and legitimate laws which will be well-received and implemented at a grass-roots levels.

5.3 *Recommendations related to upbringing and parenting practices*

Positive traditional parenting practices that contribute to the care and protection of children must be identified, recognised, and promoted by national laws and programmes.

For example:

- a. The communal care ethic and care by extended family members should be revived and revitalized.
- b. Positive stimulation and development practices such as traditional games and folktales should be integrated into early childhood development programmes and the education curriculum.

- c. Messaging to promote positive and protective parenting should be as closely aligned as possible with traditional attitudes, knowledge and customs to improve intelligibility and acceptability.
- d. Advocacy, parenting programmes and traditional institutions should restore and instil the positive customary vision of fatherhood which emphasised rights and responsibilities.

Advocacy efforts should also seek to overcome negative attitudes and practices creating a risk for children. These efforts should include:

- a. Parenting and awareness-raising interventions that focus on the importance of equal sharing of parenting responsibilities.
- b. Targeting the elimination of communication taboos around sensitive information of a sexual nature in the relationship between children and their parents.
- c. Communication campaigns must be designed to reach grandparents as well as the young men and women that provide guidance to their younger counterparts.
- d. Advocacy should seek to undo the cultural validation of violence by emphasising the harmful consequences of corporal punishment and other forms of violence against children. At the same time, alternative forms of positive discipline must be promoted.
- e. Child labour can ultimately be addressed through education; efforts to improve the socio-economic well-being of families; and through law reform.

5.4 *Advocacy to promote gender-sensitive attitudes and practices*

Advocacy to address gender-stereotypes and practices which serve to perpetuate dominant patriarchal social arrangements must, as in the case of traditional socialization, start in the early years.

- a. Early childhood development programmes and school curricula as well as parenting programmes ought to challenge, rather than perpetuate stereotypical gendered roles.
- b. The prevention of *ukuthwala* can be achieved through a range of advocacy initiatives targeting different traditional institutions as well as the legislative and executive branches of government.
- c. Given that the practice of child marriages is so closely aligned with family poverty, it is important that advocacy should emphasise the positive benefits for children, as well as the family's well-being if girls do not marry early. At the same time it is important that advocacy initiatives provide social security alternatives to supplement family incomes.
- d. *Lobola* and polygamy ought to be addressed through closer working relationships between the children and gender sectors which could join efforts in raising awareness about the harmful consequences of these practices for the girl child.
- e. There is a need to advocate for different messaging and education to be provided to children during their initiation ceremonies. The education space offered through the various initiation ceremonies offers a unique and potentially positive space to properly prepare children for the challenges they will face in the next stage of their life and how to deal with them, as well as to provide them with information about their rights and responsibilities.

5.5 *Advocacy to address children's health*

- a. Parenting programmes should include and promote positive health practices such as extended breastfeeding of infants.

- b. It is essential that dialogue be promoted to interrogate the cultural validation of scarification and similar spiritually significant practices that have the potential to cause harm to children.
- c. Sustained efforts should be made to break down the taboos around open communication about sexual and reproductive health between children and their parents.
- d. The longer-term objective should be to raise awareness of appropriate information about matters related to sexual and reproductive health amongst children directly.

5.6 *Advocacy related to criminal offences against and by children*

- a. All efforts must be made to raise awareness and the knowledge levels of all stakeholders of the laws and sanctions against child abuse, neglect and exploitation.
- b. Traditional courts must be capacitated and enabled to be an effective link within broader community referral networks to support children that are abused.
- c. In order to address the risk of children in authoritarian families being too afraid to report abuse, safe alternate reporting mechanisms ought to be provided.
- d. Revitalize restorative non-adversarial justice forums through capacity building of traditional institutions on mediation and similar skills, including families, traditional leaders and courts.

5.7 *Advocacy to promote the status and participation of children*

- a. Advocacy must seek to create a space and responsiveness to children's participation within the family, community and traditional leadership forums.
- b. Schools, religious and youth programmes should encourage and institutionalize participation in, and presentation of customary-inspired plays and dances by children as a form of expression of their needs, rights and concerns.

6. Conclusion

The preceding recommendations are but a few of many that could facilitate and expedite the organic development of customary law and practice. A closing recommendation is that a project of this nature should not seek to develop a comprehensive body of recommendations to be implemented by outsiders seeking change; instead the process of developing recommendations should itself be a consultative process through which all role players, especially the traditional institution representatives, deliberately engage in a collective process of plotting a way forward that is both meaningful for all, as well as effective to improve the protection of children in traditional communities. This will lay a sound foundation for the ensuing partnerships and processes through which the organic development of customary law and practice will be facilitated so as to ensure a protective environment for all children living in customary jurisdictions.

It is hoped that this study will serve to found a number of the requisite discussions and engagements between the respective stakeholders, especially between the children's and cultural sector with a view to facilitating collaboration and partnerships in moving towards a more protective society for children in South Africa.

Chapter 1: Introduction

1.1 Securing child protection through a balanced review of custom

Guaranteeing a child's right to protection means securing the child's life, physical and mental health and integrity, well-being and development. Internationally and regionally, various treaties have imposed obligations on role players to create the protective environment necessary for the realisation of this right. In such an environment, children are free and protected from violence as it is defined by the United Nations independent experts' report on the study on violence against children ("the UN's Study on Violence against Children"). This definition – which in turn is drawn from Article 19 of the United Nations Convention on the Rights of the Child ("UNCRC") and the World Report on Violence and Health (2002) – includes "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse which is intentionally inflicted, either threatened or actual, which results in, or is highly likely to result in actual or potential harm to child's health, survival, development or dignity". (United Nations, 2006: page 6)

A protective environment, by implication, is one in which children can and do live in:

... safety and dignity ... [one which] ensures that children are in school, laws are in place to punish those who exploit children, governments are truly committed to protection, communities are aware of the risks which children face, civil society addresses certain "taboo" issues and monitoring is in place to identify children who are at risk of exploitation. (UNICEF, undated)

From this description it is clear that a protective environment depends on a range of players fulfilling their assigned roles. Whilst the State, civil society and communities are central to protecting children from violence, parents are their first line of defence. Both the UNCRC¹ and the African Charter on the Rights and Welfare of the Child² ("ACRWC") identify parents as the primary duty bearers in the upbringing and development of their children; however, both require that the State assist parents and families in meeting their obligations.³

Various sectors, over and above the specialist protection sector,⁴ must work collectively to stitch together a multi-faceted child protection system which can act as a safety net through the provision of direct protection as well as supplementary support services and which is inclusive of protective and supporting positive family life.

UNICEF and Save the Children have identified a very similar collective of key elements that must be present in an effective child protection system, elements which if absent leave a large hole in the protective safety net. (UNICEF, undated and Save the Children Sweden Southern African Regional Office, 2010)

¹ Article 18.

² Article 20.

³ Articles 18(2) and 20 (2).

⁴ Save the Children defines it as the sector that works specifically to prevent, respond and resolve the abuse, neglect, exploitation. (Save the Children, Undated)

These are:

1. Appropriate attitudes, traditions, customs, behaviour and practices. UNICEF (undated) points out that a protective environment is not possible in a society where attitudes or traditions encourage or excuse abuse. Save the Children includes corporal punishment within the definition of all forms of violence.
2. Government commitment to fulfilling protection rights.
3. Open engagement on child protection issues with all stakeholders.
4. Protective legislation and adequate enforcement of the laws.
5. The provision of preventive and responsive services.
6. Support to ensure that those present around children have the capacity to protect them.
7. An aware and supportive public.
8. Children's life skills, knowledge and participation.
9. Monitoring and reporting of child protection issues as well adequate data collection, knowledge generation and dissemination.
10. Meaningful coordination.

The Southern Africa regional Office of Save the Children Sweden recently commissioned a review of the adequacy of the National Child Protection Systems in South Africa, Swaziland and Zambia. (Save the Children Sweden Southern African Regional Office, 2010) The report noted that a number of religious and customary traditions, practices and attitudes, whilst capable of strengthening national child protection systems, also created risks for the protection of children. Save the Children Sweden is now seeking to explore these observations in further detail; to explore to what extent in South Africa:

customary laws and practices are[in line] and not in line with the national laws and international instruments pertaining to children's rights [and to what extent].. Negative adult attitudes contribute to a protective environment for children. [and to what extent]These adult attitudes mostly stem from cultural norms and practices (Save the Children Sweden Terms of Reference, 2011)

Save the Children Sweden and the authors of this study recognise that this inquiry is relevant to a wide range of religious and cultural practices. In South Africa for example, Muslim law, Christianity and cultural practices within the traditional Afrikaans community and within traditional African communities have been noted to afford both protection and create risks for children. Ideally a study of this nature would engage in identifying and analysing practices across the full range of religions and cultures in question. Unfortunately the scope of the budget and time available for the study made a comprehensive study of this nature impossible. A choice was made to start the inquiry by considering the interplay between African customary law and practices and children's protection rights with the objective of encouraging similar inquiries covering all other relevant religious and cultural systems. It is hoped that this study will encourage debate on the interplay between religious and customary practices and children's rights more broadly.

1.2 Objectives of the study

One of the primary objectives of this study was to interrogate the interplay between African custom and children's protection by identifying and analysing historic and current customary law and practices, structures and institutions that impact, both positively and negatively, on the protection

rights of children as provided for in the UNCRC and the ACRWC. Whilst it is the case that a host of customary laws and practices impact on these rights, this inquiry focused on:

1. upbringing and parenting practices;
2. protection mechanisms for children in communities;
3. gender-sensitive attitudes and practices;
4. practices relating to children's health, including sexual health and well-being;
5. practices pertaining to criminal offences against/by children;
6. the status and participation of children in customary law

This analysis was conducted within the legal framework provided by the UNCRC and the ACRWC, both of which (alongside numerous other international instruments)⁵ simultaneously protect cultural rights as well as children's protection rights. The ACRWC (and other instruments) recognises a dynamic relationship between these two rights. On the one hand, it recognises that customs can play a positive rights-promotion role, and to this end stipulates that the virtues of cultural heritage and the values of African civilization be taken into account in the understanding and realisation of children's rights.⁶ On the other hand, both the UNCRC and the ACRWC recognise that culture and custom can be harmful, and subject the dual recognition of cultural and children's rights to the overriding proviso that any harmful social and cultural practices which affect the health,⁷ welfare, dignity, normal growth and development⁸ of the child should be eliminated.

This analysis sought to identify African customary practices that, on the one hand, promote and which, on the other, limit or potentially harm children's protection rights. Where positive practices were identified, the analysis sought to assess the extent to which they have been or can be, harnessed for the advancement of children's rights. However, as required by the various governing international and continental child rights legal instruments, when this study found practices that "disadvantaged or disproportionately burdened" children, it sought to weigh the "benefits of the cultural practice and the harm of the rights violation against each other" in anticipation of discussions around future actions necessary to improve the "balance between culture and children's rights".

This approach has sought to lay a foundation for further discussions in the report (and after publication of the report) about appropriate responses that may be expected in terms of the obligations created to promote positive African customary practices and to promote and protect children's rights. Doing so will require close examination of the roles and responsibilities of the various stakeholders who are endowed with the mandate and authority to develop, limit, monitor and otherwise oversee the lawful implementation of customary law and practices with a view to improving the protective environment for children in South Africa.

Several key matters need to be understood: the reasons why the various customs are practiced in their current form; the reasons why they have changed over time (if this is what has happened); and the nature and scope of their impact on children. In order to achieve this understanding, the analysis

⁵ The relevant international instruments are discussed in detail in the next chapter.

⁶ Preamble

⁷ UNCRC, Article 24(3).

⁸ ACRWC, Article 21(1).

had to take into account broader socio-economic contexts. As pointed out by Townsend and Dawes, it is necessary to adopt an ecological approach to identifying the drivers of child abuse as there is never any one causative factor, but always a multitude of pathways of influence. “In addition to the proclivities of abusing individuals, there are a number of environmental factors that increase the risk of abuse to a child....Individual characteristics are nested within subsets of interpersonal relationships, which in turn are nested within socio-cultural and economic macrosystems.” At the macro-systemic level, socio-cultural and economic influences may range from the effects of poverty to cultural acceptance of violence, and/or patriarchal values.” (Townsend & Dawes, 2004 Page 70) This study explored the co-existing circumstances of customary practices and poverty in rural areas with a view to establishing their individual and collective impact on the high prevalence of child violence in southern Africa. Poverty is widely recognised as an environmental factor contributing to the heightened risk of child abuse, neglect and exploitation. At the same time, it is seen as a core driver behind the retention and shape of various African customary practices deemed harmful to children. Because both poverty and African customary practices are prevalent in communities under customary jurisdiction, they overlap in the manner and extent to which they drive child abuse, neglect and exploitation. It is critical to understand this relationship if one is to develop effective, appropriately targeted advocacy campaigns for promoting an improved protective environment for children in these areas.

By taking into account the dominant driving forces behind the erosion of the protective environment for children living in traditional communities⁹, this report has sought to provide an information platform to aid in the development of advocacy interventions to improve the protective environment of children living within customary jurisdictions.

1.3 Methodology, Scope and Limitations

This study was undertaken in a number of rural communities in South Africa and involved a combination of procedures: a literature review, the use of focus groups and semi-structured in-person, telephonic or written interviews.

The study is an exploratory, rather than exhaustive review of the customary practices in South Africa. The reason for this is due in part to the magnitude of the field of study in relation to the comparatively limited budget, time and brief established for the project. In South Africa, between 14 and 22 million people live under customary jurisdiction. Moreover, there is significant variation in terms of how the same or similar customs are practiced. The geographical terrain, too, is large. Given that it was neither practical nor required by the brief to cover all practices, all variations or the full geographical breadth of South Africa, the consultant and Save the Children Sweden agreed to the methodology outlined below.

⁹ The fieldwork for the study was conducted amongst traditional rural communities and households. Whilst many urban households do practice customary law, readers should apply caution in assuming the findings of this study in their entirety to an urban setting because of the different social and economic pressures which may have resulted in differences in the way the practices are exercised and in the way in which they have evolved over time in the rural/urban transitional context.

The literature review sought to identify reports documenting the findings of any similar studies that mapped out relevant customs in South Africa. The review also covered commentary on, or analysis of, the interplay between custom and children's rights.

Furthermore, fieldwork was conducted in selected rural communities subject to customary jurisdictions and governed by tribal authorities. Two rural communities were chosen in the Eastern Cape, one in KZN, and one in Limpopo Province. (See Annexure A for a description of these communities.) In each, the research team facilitated small focus-group discussions with a selection of: male and female children between the ages of 8 and 18 years; male and female caregivers (both biological and non-biological); and traditional authorities, including chiefs, headmen and traditional council members (both male and female). The limited reach of the fieldwork is recognised as being problematic, given that customary law and practice in South Africa differs from province to province and from tribe to tribe. The study team sought to mitigate the consequences of the limited fieldwork by choosing indicative sites for data collection and supplementing the data and findings from these sites with information derived from the literature reviewed.

In-depth interviews were held with various informants, including researchers, representatives from government departments with either a cultural, gender or children's mandate, and civil society organisations advocating for improved child protection environments for women and children in the relevant rural jurisdictions. (See Annexure B for the list of informants.) This component of the fieldwork was limited by the sluggish response to requests for interviews and information. Despite the study team's persistence in following up with key informants, this created delays in the starting date of the field work and, ultimately, knock-on delays in the study's completion

The scope of the study was determined by a combination of the relatively limited budget and the objectives of the study. Using this combination of literature review, focus group discussions and interviews, the study set out to identify salient customary practices, the manner in which they have changed historically, and the levers of change in each case. Rather than exhaustively detailing each of the identified customs in its individual localised particularity, this study has sought to analyse the data by examining what is common to, common within, and cross-cutting between, the relevant practices. This has resulted in a more global documentation and analysis of various customary practices. The authors acknowledge that this method is not ideal; that it does prevent the full documentation of the richness of the manner in which similar customs are practiced differently in different communities. However, given that the objective of the study was to map as full a range of practices as possible, it proved necessary to adopt the more global approach. It is hoped that the preliminary observations documented in this report will encourage further in-depth studies focussing on one or more specific practices; which studies will be necessary to further some of the recommendations of this study.

In addition, the study sought to identify both the custodians of custom and the custodians of children's rights. This was done with a view to mapping out the ways in which these two groupings may work together in order to balance children's cultural interests with their protection interests.

Chapter 2: The legal framework: Children’s cultural and protection rights

2.1 The international and regional framework

South Africa is a signatory to a number of international and regional legal instruments in terms of which it has undertaken to promote and protect a host of children’s rights. The practical realisation of these rights is, necessarily, carried out in material circumstances – circumstances which involve the sometimes fraught interplay between custom and children’s protection rights and which have compounding implications for a number of related matters: the rights to parental care; to health; to protection from abuse, neglect, exploitation and cruel, inhuman or degrading treatment or punishment; to appropriate treatment when in conflict with the law; and to equality and participation.

Among the most pertinent of the instruments are:

- the Universal Declaration of Human Rights (1948);
- the International Covenant on Economic, Social and Cultural Rights (1966) (“the ICESCR”);
- the African Charter on Human and People’s Rights (1986);
- the Convention on the Elimination of all Forms of Discrimination against Women (1999) (“CEDAW”);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention against Torture”);
- the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) (“the Protocol on Women’s Rights in Africa”);
- the SADC Protocol on Gender and Development (2008) (“the SADC Gender Protocol”);
- the ILO’s Conventions Concerning Minimum Age for Admission to Employment (1973) and on the Worst Forms of Child Labour (1999);
- the United Nations Convention on the Rights of the Child (1989) (“the UNCRC”); and
- the African Charter on the Rights and Welfare of the Child (1990) (“the ACRWC”).

South Africa has signed and ratified all of these, except for the ICESCR and the SADC Gender Protocol; it has signed but not yet ratified the latter documents. Collectively, these instruments protect children’s (and adults’) cultural rights, as well as their protection, social and economic, civil and political rights.

2.1.1 Protection of cultural rights: the scope of the right and correlating obligations

The international and regional legal framework not only recognises the right to cultural diversity; it goes as far as to require the active promotion of positive cultural practices by subscribing states.

Instruments such as the Universal Declaration of Human Rights (Article 27), the ICESCR (Article 15), and the African Charter on Human and People’s Rights (Article 17) recognise the rights of all people

to take part in the cultural life of their communities. The ACRWC and the UNCRC expressly recognise the rights of children to “participate freely [and fully] in cultural life”¹⁰ and states that children of indigenous communities should “not to be deprived of the right to enjoy [their] own culture.”¹¹

The ambit of this cultural right is extensive. It goes beyond being a “negative” right – that is, it is more than an entitlement by rights-holders to non-interference and a correlative injunction to the State to desist from preventing the practice of cultural rituals. It extends to a positive obligation upon the State, the individual, educators and children to actively promote the conservation, preservation, strengthening and development of positive African cultural practices, values and customs.¹²

The positive obligation that is created has a dual nature. On the one hand, it requires the protection and preservation of positive past practices; on the other, it requires the change or “development” of custom and culture, that is harmful, to ensure the well-being of society. This crucial notion of “development” is explored in detail by Mwambene and Sloth-Nielsen, who argue that “development implies some departure from past practice - a change/evolution or forward movement on a continuum”. (Mwanbene & Sloth-Nielsen, 2010: page 5) By implication, there is an obligation on the State as well as individuals and children to engage in dialogue and review, or reflect on, customary practices to assess their compability with, and capacity to promote rights protected in the various instruments. The further implication is that where they are found wanting, there is an obligation to change the customary law in appropriate ways.

The yardstick for assessment of cultural practices is rights-based. The instruments in question expressly prescribe the development – the “change/evolution or forward movement” – of cultural practices that are harmful to the rights of, especially women and children.¹³ Conversely, they call for the promotion of practices that promote the rights of children and women.

For example, articles 1(3) and 21 of the ACRWC require that:

Any custom, tradition, cultural or religious practise that is inconsistent with the rights, duties and obligations contained in the present Charter ...to the extent of such inconsistency be discouraged; and [that]

State Parties..... take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular ...customs and practices (a) prejudicial to the health or life of the child, and (b) discriminatory to the child on the grounds of sex or other status.

2.1.2 The protection rights of children: International and regional obligations

Although customary and cultural practices enjoy international and regional legal protection, the existence and extent of that protection depends on the extent to which the practices promote the

¹⁰ ACRWC, Article 12(1) and (2).

¹¹ UNCRC, Article 30.

¹² ACRWC, Articles 11(2); ICESCR, Article 15(2); The African Charter on Human and People’s Rights, Articles 17(3), 22(1) and 29(7).

¹³ Articles 1(3) and 21 of the ACRWC; Article 24 (3) of the UNCRC and Article 4 of the SADC Gender Protocol

other rights children enjoy under the various instruments. Customs that are conducive to children's rights are not only protected but actively promoted; those that infringe them must be discouraged, outlawed and sanctioned.

This section will briefly outline the international and regional children's protection rights against which customs are to be tested against.

2.1.2.1 Who qualifies for protection? The age of a child

The various instruments, including the UNCRC, the ACRWC and the SADC Gender Protocol, all adopt a similar definition of a child; that is, every human being under the age of 18 years.¹⁴

2.1.2.2 The right to parental care and protection

Article 19 of the ACRWC and Article 7 of the UNCRC guarantee every child the right to parental care and protection. This right encompasses the right to know, live with, and be cared for by one's parents. Articles 20 of the ACRWC and 18 of the UNCRC provide further detail as to the parental responsibilities correlative to this right. Parents are the primary repositories of responsibility for the upbringing and development of their children, and in fulfilling this responsibility are required to be guided, in the making of decisions and the actions they take, by the best interests of the child. The ACRWC further requires that parents secure, within their available means, the material and other needs of children; in other words, the "conditions of living necessary to the child's development".¹⁵ These conditions include, but are not limited to, the provision of nutrition, health care, education, clothing and housing; however. Article 20(2) calls on State Parties in turn to support parents in and to provide children with these material essentials where parents themselves are unable to do so.

2.1.2.3 Protection from violence, abuse, neglect, maltreatment, exploitation

The UNCRC and ACRWC guarantee children protection from all forms of physical or mental violence, injury or abuse (including sexual abuse), neglect or negligent treatment or exploitation (including sexual and economic exploitation).¹⁶

Child marriages are expressly outlawed by the ACRWC, the CEDAW and the SADC Gender Protocol. They all specify that State Parties are obliged to set a minimum age for a lawful marriage; the ACRWC and the SADC protocol set the age as no younger than 18 years. The SADC protocol expressly requires all marriages to be concluded with the full consent of both parties.¹⁷

The UN's General Comment 8 provides that the right to protection from abuse includes the right to be protected from corporal punishment.¹⁸ State Parties are therefore obliged to prohibit and eliminate all corporal punishment. The realisation of this right requires that states address the widespread acceptance of corporal punishment in the family, schools and other settings through legislation prohibiting all forms of violence within the family, and schools, including the use thereof as a form of discipline. The ACRWC stops short of requiring the abolition of domestic corporal

¹⁴ UNCRC, Article 1; ACRWC Article 2; SADC Gender Protocol, Article 1.

¹⁵ Article 20(1)(b).

¹⁶ UNCRC, Articles 19(1) and Article 35; ACRWC, Articles 15 and 27.

¹⁷ ACRWC, Article 21(2); CEDAW, Article 16(2) and the SADC Gender Protocol, Article 18(2).

¹⁸ UNCRC, Article 37 and General Comment 8/2006

punishment. It merely places a duty on all parents to ensure that the discipline of children “is administered with humanity” and is consistent with the dignity of the child.¹⁹

The right to protection from economic exploitation is further amplified by the ILO’s Conventions on the Elimination of the Worst Forms of Child Labour and Concerning the Minimum Age for Admission to Employment, as well as the ICSECR, which requires the legislative regulation of 15 years as the minimum age of employment. The latter also calls for the prohibition of the worst forms of child labour which hamper the child’s normal development, health, safety or morals.²⁰

2.1.2.4 The right to health

The UNCRC and the ACRWC guarantee all children the right to the highest attainable standards of physical, mental and spiritual health.²¹ This requires that State Parties take appropriate measures to:

1. reduce infant and child mortality;
2. provide all necessary medical and health care for children;
3. combat disease and malnutrition through the provision of adequate nutritious food, clean drinking water²² and through the implementation of appropriate education and awareness-raising campaigns with respect to child health and nutrition, the advantages of breastfeeding and hygiene;²³
4. include NGOs, local communities and beneficiaries in health programmes for children;²⁴ and
5. abolish traditional practices prejudicial to the health of children.²⁵

2.1.2.5 The right to appropriate and lawful treatment when in conflict with the law

Both the ACRWC and the UNCRC recognise and protect the rights of children in conflict with the law to special treatment which respects the child’s dignity and worth.²⁶ This right imposes a range of responsibilities on those responsible for the administration of policing and justice, including:

1. Not to subject children in detention to torture, inhuman or degrading treatment or punishment. This includes a prohibition against the use of corporal punishment. (Sloth-Nielsen and Gallinetti; page 23)
2. An obligation to provide children with an opportunity to participate in all criminal proceedings.²⁷
3. An obligation to ensure that sentences are designed to achieve the social rehabilitation and re-integration of the child into the family.²⁸ Detention should be a measure of last resort, and where it is imposed, the child must be detained for the shortest possible time.²⁹

¹⁹ Article 20(1)(c).

²⁰ ICSECR, Article 10(3); ILO Convention; Article 3.

²¹ UNCRC, Article 24; ACRWC, Article 14.

²² UNCRC, Article 24(2)(c).

²³ ACRWC, Article 14(2)(h); UNCRC, Article 24(2)(f).

²⁴ ACRWC, Article 14(2)(j).

²⁵ UNCRC, Article 24(3).

²⁶ ACRWC, Article 17; UNCRC, Article 37 and 40.

²⁷ Article 12(2) of the UNCRC

²⁸ ACRWC, Article 17(3).

²⁹ UNCRC, Article 37(b).

4. An obligation to establish a minimum age below which a child is deemed to lack criminal capacity to infringe the penal law.³⁰

2.1.2.6 The right to a name and nationality

The rights to a name and nationality are key to child protection as they are central to the realisation of all the other rights protected at international and regional level. The UNCRC and the ACRWC recognise and protect the child's right to a name, nationality and registration immediately after birth, and require State Parties to realise this right through appropriate legislative measures.³¹

2.1.2.7 The right to participation

While the right to participation might not be regarded as a direct protection right, it is nonetheless essential for the practical realisation the full range of protection rights. Ehlers and Frank argue that the UNCRC and the ACRWC work together in a complementary way to confer on all African children the right to participation. (Ehlers and Frank, 2008: page 113) They point specifically to Articles 12 and 13 of the UNCRC and Article 7 of the ACRWC, which together impose an obligation to:

1. respect and promote the right of all children capable of expressing their own views to express those views in all matters affecting the child, and to give due weight to the child's views in accordance with the age and maturity of the child; and
2. ensure the right of all children to freely seek, receive and impart information and ideas of all kind in realisation of their right to freedom of expression.

2.1.2.8 Protection against discrimination; the right to equality

Article 3 of the ACRWC guarantees the protection of all children's rights irrespective of "*the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex or language, religion, political or other opinion, national and social origin, fortune, birth or other status*". Article 2 of the UNCRC imposes an obligation on State Parties to respect and ensure the full complement of children's rights without discrimination on the following additional grounds; language, ethnic origin, property, or disability. In addition, the UNCRC requires the protection of children against all forms of discrimination on the basis of their parent's opinions or beliefs.³²

In addition to the general discrimination clauses, the various treaties single out certain manifestations of discrimination that demand special attention. The ACRWC, CEDAW and the SADC Gender Protocol all prohibit and require appropriate remedial action in the case of laws, regulations, customs and practices that constitute discrimination against women. There are three areas in particular where the instruments require deliberate action. Article 5 of the CEDAW targets the elimination of customary practices which entrench stereotyped roles of men and women and undermine the recognition of the common responsibility of men and women in the upbringing of their children. The latter obligation is similarly imposed by Article 18(2) of the ACRWC. The assurance of gender equality specifically for the girl child is required by the CEDAW and, more explicitly, by SADC Gender Protocol, which requires State Parties to adopt laws, policies and programmes that: (a.) eliminate all forms of discrimination against the girl child in the family, community, institutions and at State level; (b.) ensure that girl children have equal access to education, health care and are not

³⁰ UNCRC, Article 40(3)(a); ACRWC, Article 17(4).

³¹ UNCRC, Article 7; ACRWC, Article 6.

³² Article 2(2).

subjected to treatment which causes them to develop a negative self-image; (c.) ensure that girls are protected from harmful cultural practices and enjoy the same rights as boys; and (d.) protect girls from economic exploitation and all forms of violence.³³

The guarantee of equal access to education receives further attention in the ACRWC and CEDAW, which require states to take special measures to ensure access for female and disadvantaged children.³⁴

2.2 The national legal framework

South Africa has sought to accommodate the dual obligations to protect children's protection rights and cultural rights through the adoption of a dual legal system; a system which simultaneously recognises both customary law on the one hand, and the common and statutory laws on the other.

The Constitution protects cultural rights.³⁵ In addition, it requires that courts apply customary law; but when interpreting it, courts and tribunals must harmonise it with the spirit, purport and objects of the Bill of Rights.³⁶ The Constitution also requires that where there is any conflict between customary law and children's right, that the best interests of the child will prevail. Sections 30 and 31 impose an obligation on all forums to abolish or change customary law that is harmful to children and women's rights.

Children's rights, including their protection rights are guaranteed by the Constitution (section 28). These include, inter alia, the right to family and parental care; to be protected from maltreatment, neglect, abuse or degradation, and from exploitative labour practices; to appropriate treatment when in conflict with the law; to a name and nationality and basic nutrition, shelter, health care and social services. In addition, these rights find expression in a complex and sophisticated tapestry of protection legislation which seeks to balance a range of, at times competing interests, including customary law and practices that impact on children's protection rights. There are three foundational laws upon which much of the national child protection system rests; these are the Children's Act³⁷; the Criminal Law (Sexual Offences and Related Matters) Amendment Act³⁸ (hereinafter referred to as the Sexual Offences Act) and the Child Justice Act, No 75 of 2008. The Children's Act, in particular, expressly seeks to balance children's cultural and protection rights in a section dedicated to the matter at hand. Section 12(1) broadly provides that "Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being". It goes on to either prohibit or regulate a number of practices that are deemed harmful to children, including child marriages, forced marriages, genital mutilation, virginity testing and circumcision of male children.

³³ Article 11.

³⁴ ACRWC, Article 11(3); CEDAW, Article 10.

³⁵ Sections 30 and 31, Act 108 of 1996

³⁶ Section 39(2)

³⁷ No 38 of 2005 as amended by Act No.41 of 2007 and Act No 75 of 2008

³⁸ No 32 of 2007

2.3 The situation of children in South Africa subject to customary law and practice

2.3.1 Which communities are ruled or affected by customary laws and practices?

Murray (2004: page 3) points out that in South Africa there is no reliable data about how many people are subjects of traditional leaders or live under customary law systems. The Department of Provincial and Local Government, in 2003, estimated that 14 million people in South Africa live in areas falling under the jurisdiction of traditional leaders. (Department of Provincial and Local Government, 2003: page 34). This number is pegged as high as 22 million by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women. (Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, 2008: page 1) However one looks at it, a substantial number of people live under customary law in South Africa, and this is especially so in rural communities.

2.3.3 The social and economic situation of children in rural South Africa

The quality of life for children living in rural areas in South Africa is marked by significant inequities.

There are 18, 7 million children in South Africa and just over half of them (54%) live in rural households. (Hall, Undated). Nearly two-thirds of all children in South Africa live in poverty.³⁹ (Hall, Income poverty, unemployment and social grants, 2009/2010: page 105) Child poverty is higher and more prevalent in rural areas. Two thirds of children living in poverty live in rural areas. (HSRC, 2008)

Not only are children in rural areas poorer, they are further disadvantaged because “service provision and resources in rural areas lag far behind urban areas”. (Hall K, Children Count: Housing and Services – Urban-rural distinction. Undated)

Rural provinces with the greatest proportion of poor children have the lowest proportion of births registered in the year of birth. (Giese & Smith, 2007) Access to the Child Support Grant (CSG), the primary poverty alleviation grant for children in South Africa is lower than average in provinces with higher levels of child poverty, especially in the rural areas of these provinces. For example, in KZN, 70% of children living in poverty are eligible for the CSG. However as a provincial average, only 64% of eligible children receive the grant. As one moves into the more rural areas the eligibility rate increases to as much as 90%, but the take-up rate drops as low as 40% and less. (Noble, Barnes, Noble, Ntshongwana, Gutierrez-Romero, & Avenell, 2005)

Access to education is lower for rural children. Children living on farms are less likely to attend school than their urban counter-parts. Attendance in commercial farming areas is 14% lower than in urban areas. The higher levels of child poverty impact on their ability to cover access costs like uniforms, transport, stationery, books and school fees (where applicable). Children in rural areas living with a disability face greater shortages of educational facilities than in urban areas; there is also a more severe shortage of infrastructure and learning resources such as libraries in rural schools (The Presidency, RSA , 2009).

³⁹ Calculated on a poverty line of an income below R350 per person per month

Child labour is a common feature in the lives of almost all rural children who spend a certain amount of time each day, both before and after school, on domestic and agricultural chores such as herding cattle or fetching firewood or water. Access to running water is more problematic in rural than in urban areas and this has far reaching impact on children. A study conducted by the TECL (Towards the Elimination of the worst forms of Child Labour) found that children in rural spent an average of 12 and a half hours a week collecting water. This time was as high as 40 hours a week for some children. The impact on the children's' education was negative: Children complained of being late at school, being unable to concentrate in class, having poor morale and needing to leave school as early as possible to collect water. The impact on educational outcomes appear to be significant as 85% of children who were involved in fetching water, compared to 15% who were not, were not in the appropriate age group for their grade. (Department of Labour, 2007) In addition, children in deep rural areas are more likely than their urban counterparts to be engaged in economic work of three hours or more per week. (CASE, 2007)

With regards to the right to protection from abuse and neglect, the data is sporadic and not disaggregated sufficiently to allow for a rural analysis. With regards to corporal punishment, nearly 1 in 5 children experience corporal punishment at school; 1 in 3 parents use severe corporal punishment in the form of beatings. Children in the poorest households are more likely to experience corporal punishment at the hands of their teachers. (UNICEF South Africa, 2011: page 61) Violence levels against children are very high. Over 56 500 children were reported to be victims of violent crimes in 2009/10; and this reflects only a percentage of actual cases as most cases go unreported. Over 4 000 cases of child neglect or ill-treatment are reported to the police annually. (UNICEF South Africa, 2011: page 55)

Chapter 3: Analysing the interplay between custom and protection rights

3.1 An exploratory study

This chapter aims to document a selection of customary laws, practices and institutions in South Africa which impact on children's protection rights. It must be emphasised that this research is exploratory; it is not an exhaustive expository of all practices in the country that impact on children's rights.

The scope and heterogeneity of customary jurisdictions has of necessity seen this study take on an exploratory versus an expository nature. In South Africa, whilst there is some uncertainty about exactly how many people live under the jurisdiction of customary law, the numbers are substantial. They are primarily spread across six of the nine South African provinces.⁴⁰ (Economic Commission for Africa, Southern Africa Office, 2007) This study has identified a number of, but not all customary practices in South Africa, which impact on children's protection rights. Furthermore, the documentation and analysis of the various practices, each of which constitutes a detailed thesis in and of its own right, has by necessity been limited to a preliminary identification and broad overview in terms of their impact on children's rights. One of the objectives of the study was to provide an analytical framework for guiding further in-depth analyses of the practices identified as well as those practices that are relevant but not covered by this report.

Moreover, this review does not profess to explore the impact of practices on the full scope of children's rights, or for that matter the full scope of children's protection rights. The analytical emphasis is on the rights considered most proximate to the realisation of a protective environment for children as per the guidance provided by Save the Children and UNICEF's principles of an enabling environment and the terms of reference for this study. The terms of reference called for an analysis under the following headings: Upbringing and parenting practices; practices relating to children's health; practices pertaining to criminal offences against and by children; protection mechanisms available for children in the communities; practices relating to the transition of children into adulthood; gender sensitive practices; and the status and participation of children in customary law.

3.2 Defining key terms

This study aimed to identify current and historic customary law and practices, institutions and structures pertaining to children and their rights in South Africa. Relevant national and other stakeholder's responses to the custom in question were also considered to determine if the relevant African customary practices have in turn been promoted, outlawed, or otherwise regulated, and what the consequences of this action have been.

⁴⁰ The Economic Commission for Africa analysis of information from the 2005 South African Social Attitudes Survey indicates that traditional leadership structures and jurisdiction are not found in the Western Cape, the Northern Cape and Gauteng

This process of identification and analyses requires answering a number of preliminary questions.

3.2.1 What is a custom; what is customary law; what is a customary practice?

Customary practices are defined by Bennett as “social practices that the community concerned accepts as obligatory” and customary law as the body of law derived from these practices, which “in its most pristine form, it is unwritten; an oral repertoire.” (Bennett, 2004: page 1)

3.2.1.1 Important distinctions

Official versus living customary law

Whilst the preceding definitions are useful and will serve to guide the scope of the study, they must be read in the light of an all-important difference between “official” and “living” customary law. Official customary law should be regarded with circumspection. It is the law as documented in pre-colonial times through a particular, often distorted ideological lens. The fact that it was written down and often inaccurately at that, has resulted in “official customary law” being viewed as a “rigid and inflexible system of fossilised rules writtem down by white colonialists and enforced by white judges during the apartheid era.” (De Vos P, 2010)

On the other hand, living customary law is regarded as the “current socially accepted practices of the people”. (Zambia Law Development Commission, 2004: pages 13 and 15). It is:

...unwritten and the rules can be traced to the people and have been handed down to succeeding generations. The law consists of different bodies of rules that may be involved in different contexts. These rules are based on conceptions of morality and depend for their effectiveness on the approval and consent of the people. The law has evolved in response to the pressures put upon people by their environment. It reflects their way of life and their adjustments to life in the particular society and environment.
(A N Allot in Frances Mwangala Zaloumis, Undated)

Himonga and others stress the importance of the distinction between “official” and “living” customary law when conducting a review such as the current one.⁴¹ It is important that one accurately identify the correct, current practices governing the lives of people before one engages in a rights-based review of custom. To resort to “official” customary law runs the risk of duplicating inaccurate descriptions, leading to incorrect evaluations as to the impact of customary law and practice on children’s rights. This is especially pertinent in light of the observation made by Bonthuys and Curran that the “practices of contemporary customary law are often more accomodating to women’s [and children’s] needs than the official customary law.” (2004) This review has therefore at all times sought to remain respectful of these distinction.

Customary practices versus habitual practices

A further important distinction, as explained by a number of traditional leaders in KZN (KZN) that participated in the research, is the one between custom and habit. All of the definitions of a customary practice share a common element; the need for broader societal approval of any practice

⁴¹ Interview with Professor Himonga, February 2011

to elevate it to the status of a “customary practice”. In the absence of such approval, the mere fact that a practice is prolific in a community does not make it a customary practice. The KZN traditional leaders focus group explained this as a difference between “*amasiko*”, which are true cultural practices sanctioned by the custodians of custom and which are regarded as obligatory, versus “*imikhuba*” or mere habits.

It is easy to fall into the trap to mistake habits for cultural practices where they are practiced by a number of members of a traditional community. The KZN traditional leaders went on to explain that habits are those practices that are not allowed by custom. Most of the time they are distorted practices that have emerged over time; that have been interpreted and applied differently to the true custom, without receiving custodial approval. Customs are practices that have been in a particular society for generations and are followed without questions because they are revered and believed in. One of the examples provided by the KZN traditional leaders related to the common practice among young men not to honour their paternal obligations to children conceived outside of marriage. In the past, it was a custom to pay “*inhlawulo*”, a fine for making an unmarried woman pregnant which was symbolic of the man’s acceptance of his parental responsibilities. However, today few men pay this fine and many do not assume their parental responsibilities to their children; it is “*imikhuba*” not to pay that fine. They expressed concern that as a result it is now mistakenly believed that it is an African culture for unmarried fathers to disown responsibility for their children born out of marriage.

This distinction is important for a number of reasons, one of which is that custom is dynamic and this discourse of dynamism creates potential space for buffering harmful practices against close legal scrutiny. Custom is ever-changing. The resultant inbuilt flexibility in customary law also creates the space for opportunistic defence of a potentially harmful practice as a customary practice, and hence deserving of protection within South Africa’s dual legal systems.

The importance of this distinction does not only go to the risk of incorrectly defining a particular practice as a customary tradition, but also goes to the risk of applying inappropriate advocacy measures to remedy any such “*imikhuba*” practices that are harmful to children. A practice that is simply harmful, as in the case of a current form of “*ukuthwala*” practiced in some parts of South Africa (which is discussed in more detail later in this chapter) where underage girls are kidnapped and forced into marriage cannot be defended as a customary practice; it is a criminal offence and simply requires proper policing and implementation of the law against sexual abuse and forced child marriages.

3.3 Parenting practices & community protection mechanisms

The scope of what qualifies as an upbringing or parenting practice has been determined by the governing legal framework to include practices that manifest the right and correlating responsibilities to parental care and protection. These include parental practices that contribute to, or undermine a child’s material, physical, intellectual, psychosocial, spiritual and social wellbeing and development. Consequently it includes those that are relevant to the provision of children’s material needs such as food, clothing, stimulation and education; practices relevant to children’s psychosocial needs such as communication practices, socialization and counselling and advisory practices; and practices relevant to protection from abuse and exploitation, including disciplinary practices.

3.3.1 Naming practices

Entry into the family and the assumption of parental roles and responsibilities that breathe life into the right to parental care and protection is symbolically marked by the naming of the child. The act of naming is strongly ritualized and of great significance in African customary communities. It heralds the entry of a child into a family and community. Equally so, the right to a name and nationality, often given effect to through birth registration is a critical element of the national child protection system. Birth registration marks the recognition of a child as a national subject who is entitled to claim various benefits and services relevant to his or her material, emotional, educational and physical well-being.

3.3.1.1 Customary naming practices

In the South African communities visited, both the chosen name and the act of naming of a child were seen as significant in establishing a linkage between the child and his or her clan or kin. Naming ceremonies are associated with welcoming, acceptance and acknowledgment of the child in the broader group, whether the family, community or clan, and are an essential step in ensuring the child is well prepared for life.

The choice and source of the name often has symbolic value, symbolizing the child's connectedness to the family. Naming is seen as a thread that connects children to families, families to other families and to the broader community. For example, often a child will be given the name of a deceased relative to reflect the history of the family and the continuation of the family lineage.

One such naming ceremony is *ukubikwa*, which is practiced amongst the *amaZulu*. An elder in the family presents a child to the ancestors, slaughters a goat and uses the bile of the goat mixed with ash in the fireplace to make a mark on the child's body as a sign that the child belongs and has roots in his or her family. In the Eastern Cape districts visited, upon the birth of child, families perform a practice known as *imbeleko* where a goat or sheep is slaughtered to give a newborn infant a protective "blanket" and connect the child with his or her ancestors. When a person arrives on earth he/she has to be welcomed by *izinyanya* or ancestors and also receive protection from them. In the village in Limpopo, participants spoke of a ceremony called *Uthusa* which appears to serve a number of purposes, the naming of the child being one of them. The ceremony, which is conducted by the traditional leader, takes place when the child is about three months old and focuses on the naming the child by the elders. The ceremony seeks to prepare the child for life and naming is seen as integral to proper preparation for life.

3.3.1.2 The right to a name and nationality

A child's right to a name and nationality is protected internationally, regionally and nationally. Both the ACRWC and the UNCRC recognise the right. The UNCRC however expressly recognises this right as an adjunct to the right to parental care and protection. It states that:

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parent.*⁴²

⁴² Article 7(1)

The process of registration of the child's birth is the manner in which the right to a name is made concrete. Birth registration is however not only a means of realising the right to a name and nationality; it is also an essential step for the realisation of a host of other protection rights recognised and protected by the UNCRC and the ACRWC, including the rights to protection from abuse, neglect and exploitation, family care, health care, education, and to appropriate treatment when in conflict with the law. In addition, birth registration is an important tool in the protection of children against a number of harmful practices such as age-related protection from child labour and forced or early marriages. (The African Child Policy Forum and PLAN, 2005:page 14)

The Births and Deaths Registration Amendment Act No 51 of 1992 imposes an obligation on all parents to register the birth of the child within 30 days of birth with the Department of Home Affairs.

Despite the protection of the right to a name and obligatory registration of all births, poor birth registration rates in rural areas is common across Africa. (The African Child Policy Forum and PLAN, 2005: page 13) The question that arises is why, given the importance of naming a child in customary law, do we see such low rates of birth registration in customary jurisdictions?

South Africa's national birth registration rate is relatively high in comparison to other southern African states. In 2009, 85 % of children were registered in their first year of birth. (Statistics South Africa, 2009) However, there is provincial and local variability in the proportion of births of children not registered. The problem is particularly severe in rural provinces. For example, in KZN, a predominantly rural province, 62% of births were registered compared to 97% in the Western Cape. (Giese & Smith, 2007: page 28)

3.3.1.3 Custom and birth registration

The African Child Policy Forum has identified various reasons for these poor rural registration rates, one of which is that traditional attitudes, perceptions, beliefs and taboos are not supportive of birth registration.⁴³ (The African Child Policy Forum and PLAN, 2005, p. 17)

Traditionally, the relevance of a name and the identity of a child and the process for that identification has little bearing to the administrative birth registration process which marks the entry of the child into national population registers. Naming and naming ceremonies and rites are important customs. Their significance is traditionally perceived as confirming a child's place or legitimate belonging within a family, clan or tribe. "People see a child's identity as being established when they are born into a specific lineage system of clan, sub-clan and sub-sub-clan. But the clan lineage system, or genealogy, does not serve the modern state's needs of identifying a child and establishing their citizenship." (The African Child Policy Forum and PLAN, 2005: page 16)

At present the bureaucratic process of name registration is alien for many; it is not seen within the same context of belonging and entry into a community. Rather, it is linked to a colonial past which saw the introduction of registration processes which were seen as an imposition; as "more of a nuisance than anything else". Consequently, there is little urgency or motivation on the part of

⁴³ It must be noted that African custom is only one of the reasons identified for poor registration rates in rural customary jurisdictions. Other reasons, which will not be explored in any detail in this study include the lack of accessible service delivery points in rural areas, lack of access to relevant documentation and poverty which impacts negatively on transport and documentation requirements for birth registration purposes.

parents to register the birth of their child, until they experience problems later in the child's development". (The African Child Policy Forum and PLAN, 2005: page 16)

Despite the historical disjuncture between customary naming practices and the registration of a child's birth, the understanding and significance of naming through the customary lens in fact holds significant potential for unlocking an indigenous appreciation of the importance and value of registering a child's birth. Both are aligned to marking the entry of a child into a broader community, whether a family, community or nation; both herald the commencement of responsibilities necessary to assure the care and protection of children.

Clearly there is a need to bring the formal registration process and traditional practices closer together; both revolve around acknowledgement of and marking belonging within a broader social structure. In moving forward there is a need to unlock the potential advocacy value inhering within the similarities in the rationale underlying customary and official naming and registration practices so as to cultivate an appreciation of, and motivation for registering a child's birth.

3.3.2 Extended and communal child care and protection

In South Africa there is a common customary theme that informs adult attitudes to parenting and caring for children and which promotes the protection, well-being and development of children; the extended understanding and significance of kinship. Traditional leaders in KZN echoed the same message heard in the other communities that participated in this study; that traditionally, parenting was not just for the biological parents of a particular child, but rather that every adult was responsible for raising, caring for, and disciplining children in the village. The traditional emphasis on communal child care and upbringing means that the inquiry into (a) parenting practices and upbringing and (b) protection mechanisms within communities for children overlap considerably. This section will therefore cover both topics in an integrated manner.

3.3.2.1 The extended family

In most of sub-Saharan Africa, family depicts more than biological parents and their children. For example, a father's brothers or a mother's sisters would be classified as "senior" and "junior" fathers or as "senior" and "junior" mothers... In such a context, children grow up amongst a multitude of relations who share their upbringing and care – with responsibility for childcare ordinarily following the kinship hierarchy. (Mathambo & Gibbs, 2009: page 23)

The extended family structure is described by Rwezaura as "a traditional African social unit consisting of people who are genealogically related, as well as those who are related to them through marriage [and] whose social and economic welfare is closely associated." (Rwezaura 1988: page 169 in Himonga, 2008: page 78). Himonga goes on to explain that traditionally, "the members of this social unit often live together in close proximity to each other in a homestead 'headed by a senior male relative who directed important economic, religious and political activities of the unit'".

This structure is characteristic of communities subject to customary jurisdiction in South Africa where;

there is a general pattern of traditional family life across all the main ethnic groups...The family unit of the husband, wife, and children form part of a larger kinship structure through family ties and co-residence, extending both horizontally and vertically. Kinship connections are the primary source of social and material support, as well as obligations. (Amoateng, Richter, Makiwane, & Rama, 2004: page 69)

Rights analysis of the extended family

Himonga observes that the extended family structure “intersects with a number of rights of the child, particularly the right to parental care”. (Himonga, 2008: page 77) This intersection plays out in a number of parenting and upbringing practices that impact either positively or negatively on the child’s safety, protection, intellectual stimulation and development, psychosocial and social well being, as well as his or her material well-being.

Advancing the protection rights of children through the extended family

A continuum of parental care through shared maternal, paternal and multi-generational care

In South Africa, the protection and development of children has traditionally been secured through the practice of multi-generational care common in the extended family structure. This provided a safe environment which allowed for the holistic development of the child; with the different generations and genders assuming different parenting and upbringing roles. Mothers were, and continue to be responsible for the daily care, discipline and nurturing of children; fathers for their material well-being; older siblings for the minding of younger children; and the older grandparents for their stimulation and intellectual development, especially in the earlier years.

Customary communities’ exhibit marked divisions in the gendered roles of parents. A review of the literature and the information provided by research participants confirms that mothers play a more direct hands-on parenting role, being ever-present on a daily basis in the child’s life, compared to the fathers who are seen as playing a key role in the provision of material support.

There was consensus across all the study participants that mothers were and are responsible for the daily upbringing, the nurturing and disciplining of children; that fathers did not get involved in the daily upbringing of children, except when it came to specific skills that need to be taught to boys.

Grandmothers, grandfathers and great-grandparents have always been a key link in traditional extended family care arrangements. Elderly grandparents were the ones who provided children with stimulation and education through play and the telling of folktales. (Early Learning Resource Unit (ELRU), 2010 and information provided by participants in this study’s focus groups with caregivers and traditional leaders)

Focus group participants confirmed that siblings also have a key role to play in the provision of collective care. It is commonplace for older brothers and sisters, although more common in the case of sisters, to be responsible for looking after their younger siblings.

The protective and nurturing environment fostered by the practice of multi-generational care was described as follows by a participant in a focus group hosted by ELRU which explored traditional and local ways of ensuring child safety in Lusikisiki in the Eastern Cape:

Safety was never an issue for us. A child was cared for by three capable women: the mother, the grandmother and the great grandmother. So there was always someone to look after the child until the child began household chores, if the child was a girl, or looking after livestock if the child was a boy. (Early Learning Resource Unit, 2010)

It is thus clear that the traditional extended family arrangement allowed for a sharing of the burden of care and responsibilities among parents and across the generations – providing a strong safety net.

Focus group participants in the ELRU project pointed out that modern-day pressures have however disrupted the continuum of care provided through extended multi-generational care. For example, many families today are headed by elderly female caregivers; the middle generation of mothers and fathers has been significantly depleted because of the devastating effects of HIV and AIDS, leaving the elderly women to carry the full parenting burden on their own. (Regional Inter Agency Task Team on Children and AIDS (RIATT) Eastern and Southern Africa, 2010)

Protection from abuse

Himonga points out that the support provided by extended family members does not only translate into daily nurturing, development, care and protection from harm, but also protection from sexual abuse. The interest that the group has in its family members sometimes translates into extended family members protecting children from rape and helping rape victims recover more easily by providing family support. This seems to be especially true in the case of grandparents providing protection for grandchildren. The protective element of the relationship between the child and his or her grandparents engendered by the “play” role appears to last beyond the child’s early years. Children in a number of focus groups observed that if they were harmed by another adult or child, they would be most comfortable telling their grandparents because they considered them ‘to be our friends’.

Extended families provide a social security safety net for vulnerable children

A key feature of the extended family is that “children may look to relatives, other than their nuclear family, for the promotion and protection of their right to parental care and support.” (Himonga C, 2008: page 79).

Whilst the dual impact of poverty and the scale of the HIV/AIDS pandemic have put significant strain on the coping capacity of extended families to care for children left without parental, the extended family remains a critical safety net. (Mathambo & Gibbs, August 2009: page 26) There is strong evidence that extended family provides material relief for many children affected by poverty and HIV and AIDS, who would otherwise be left without care and support in the absence of effective state social security and social protection systems. (Himonga C, 2008: page 79)

Potential risks in the extended family construct

Whilst the extended family holds a number of benefits for children; there are also a number of risks inherent within this structure.

Deference to the family interest at the expense of the child's best interests

There is the risk that children's protection rights are subordinated to the broader family interest. Various commentators note that there are times when there is an apparent conflict between the child's best interests and the broader interests of the collective family unit and that the group interests at times take precedence over the child's interests. This conflict rears its head most vividly in cases of economic conflict. This may play out in a number of ways; for example, a child who is subject to abuse by a family member may be reluctant to speak out, or where he or she does speak out, other family members may seek to conceal the act of abuse out of fear of the loss of family respect or the possible loss of a breadwinner where the perpetrator provides the family with a source of income. (Townsend & Dawes, 2004: page 66 and Mulenga, Chisanga, Mukuka, & Kabeka, Undated: page 13).

Himonga argues that the risk of subjugation of children's rights to the family interests is lower in modern-day traditional families. She argues, and is in this regard supported by others such as Bonthuys and Curran, (2004) that the strict dichotomy and tension between the group and individual women's and children's rights is less stark in modern-day "living customary law". The latter is far more dynamic and flexible than "official customary law" of yore, and therefore creates more space to respond positively to the needs and rights of women and children. (Himonga C, 2008: page 80)

Perpetuation of gender inequality in the provision of parental care

Whilst the traditional extended family structure provided a full complement of care, development and protection as well as a strong safety net, it did unfortunately engender potentially harmful gendered stereotypical parenting practices which have contributed to an inequality in the assumption of parenting roles between mothers and fathers. The most prominent feature which participants in the study observed, and which is captured in some of the comments above, is the limited involvement of fathers in the daily upbringing and daily care and protection of their children. This clearly has implications for the quality of the parental relationship between fathers and their children and is contrary to the international directive that "both parents have common responsibilities for the upbringing and development of the child".⁴⁴ It was noted for example by boys in the Eastern Cape and KZN that they did not enjoy open and easy relationships with their fathers; that they found it difficult to relate to their fathers.

A modern-day factor which potentially aggravates the adverse consequences of traditional gendered paternal roles is the high prevalence of absent fathers in rural areas subject to customary jurisdiction. At the outset it must be stated that this study is not premised on, nor does it conclude that the growing phenomenon of the absent father is an African customary practice. In fact, as will be shown in later discussions, there is strong argument to be made that the growing phenomenon of the absent father is indeed 'un-African'; that it is attributable to a decline in customary notions of fatherhood; a notion that is indeed very positive in many respects.

A study by the Human Sciences Research Council found that 57% of children in South Africa under the age of 15 do not live with their fathers. Only 11.5% do not do so because he is deceased; 45.8% of children's fathers are alive, but absent. African children in rural areas are the worst affected: 55% of them do not live with their fathers. (D Posel & Devey, 2006: page 38) Whilst most commentators

⁴⁴ Article 18(1), UNCRC

agree that the reasons for the high numbers of absent fathers have not been adequately researched, Lesejane argues that it is not linked to traditional attitudes to fatherhood, but rather the opposite.

Lesejane argues convincingly that it is attributable rather to an erosion of the positive traditional elements of fatherhood. He argues that socio-cultural and political changes have contributed to an erosion of the African institution of fatherhood; a traditional institution which respected fatherhood and which did not contemplate the notion of a fatherless child; an institution which indeed posited the father as the head of the extended family. He admits that this institution was embedded in a broader patriarchal system, but it was one that accommodated and revered children and which insisted on respect for women. This balance was achieved by vesting authority in men, but with that authority went a number of obligations to children and women. He argues that:

True, the system seldom permitted women to ascend to positions of authority, but it imposed duties on men that allowed it to work to the benefit of children. If the system was imperfect, it nevertheless provided some stability and protection for children and women from the absolute power of men. This system was disrupted by colonialism, although some of its values remain in the hearts of Africans. (Lesejane, 2006: page 179)
(my stress)

The disruptions Lesejane speaks of have resulted in an uncoupling in the minds of modern men of the responsibilities of fatherhood. “The current problem is that ‘African patriarchy’ has become distorted and a new patriarchy without obligations or reciprocity has emerged. It gives men power but imposes few duties. The constraints on men, as well as the support and censure systems have disappeared.” (Page 179) This has contributed to an absence of a key link in a number of families; the present and responsible father.

The reasons for the decline in African customary vision of fatherhood and for the emergence of the new and distorted patriarchy need further investigation. Lesejane speaks of socio-cultural and political changes underlying the shift. The study participants in the Eastern Cape gave some insight into why and how socio-economic forces have impacted on parental roles and responsibilities. They attributed the absence of fathers to factors such as unemployment. They said that where fathers are unemployed and unable to contribute materially towards the upbringing of their children, they tend to distance themselves both emotionally and physically from connecting with their children or making any decisions regarding the care and upbringing of their children. This would suggest that the loss of capacity to fulfil the traditional paternal role, that is the provision of material support, has been accompanied by a fundamental shift in the revised role fathers envisage themselves playing. Caregivers in the Eastern Cape confirmed the high levels of absent fathers in their communities and observed further that there had been a shift in parental roles which saw mothers assuming full and exclusive responsibility for their children. Interestingly, they noted that this shift was accompanied or indeed precipitated by a shift in economic power in families. Mothers receiving the Child Support Grant tended to become more vocal and made more decisions about their children. In other words, they assumed roles traditionally reserved for the father. The scope of this study did not allow for deeper exploration and analysis of this issue which is clearly an area where more research is needed.

An increased burden of care disrupts the continuum of care

The changing role and absence of fathers and the increased burden on older caregivers has increased the burden of care. This has in turn disrupted the full continuum of care provided through the

extended parenting model of the past. (Early Learning Resource Unit, 2010) In addition, it has compromised the quality of the relationship between children and their fathers as well as between their fathers and mothers which impacts negatively on children's emotional and material well-being. A small-scale study on absent fathers in KZN suggests that the majority of absent fathers do not only fail to provide material or emotional support to their children, but do not see the benefit of forming permanent relationships with the mothers of their children. (P Denis & R Ntsimane, 2006: page 237)

Lesejane argues that the trend of absent fathers can be addressed; that the challenge of promoting fatherhood, of promoting men's involvement in the care and protection of their children lies in restoring an African notion of fatherhood "that is rooted in an African cultural value system". He argues that traditional society was built around a positive image of a father and institutional practices were in place to prepare fathers to fulfill the roles and responsibilities bestowed upon them upon the birth of their children. The African image of a father saw fathers as being responsible for their children and women in their families. This meant that:

Fathers had to be available. This meant that a father had to literally spend time with his children in order to exercise his moral authority, maintain family customs and laws, and be a leader. Availability was also a pre-requisite for being a role model.

Fathers had to be responsible. This included providing for, guiding, organising and generally overseeing the management of their children's lives. They would be key participants in deciding for instance, when a child went to initiation school and to whom they got married.

It was important for fathers to interact with their families. While they had the final say on all things, it was a sign of a good father to listen to members of the family, consult with other members of the kgoro and revert to established systems and values....Rarely would a major decision be made on behalf of children and the wife without such consultations taking place.(Page 176)

He proposes, not that there be a blanket restoration or endorsement of patriarchy, "nor [for a] return to some romanticised ideal of a traditional past when women and children knew their place." (Page 174) What he calls for is advocacy, parenting programmes and customary traditional institutions to restore and instil the positive customary vision of fatherhood; of the father as a positive patriarch, "somebody who cares for, nurtures, leads, guides, and is a role model in the family and community". This restoration process must however be balanced; it should be "in harmony with the core values of equality, respect, human dignity and freedom such as those enshrined in South Africa's Constitution." (Page 179-180) Lesejane goes on to provide practical guidance on how to achieve this. One example he gives is for a restoration of the initiation ceremony teachings that focussed on preparing boys for fatherhood. This suggestions calls for engagement with the traditional leaders responsible for the design of the initiation curriculum so that appropriate messaging and lessons are provided to teach boys about African fatherhood and to prepare them to assume their responsibilities in this regard.

A further set of customary practices that could be restored so as to promote positive paternal parenting practices and to address the rising tide of absent fathers are those linked to paternal acknowledgement and assumption of roles and responsibilities in respect of children born outside of

marriage. In South Africa, where children are born outside of a marriage, the general customary principle appears to be that the child remains with the mother and her relatives who assume responsibility for care and support of the child. There is however a customary tradition which encourages paternal acknowledgment of a child born outside of marriage and the assumption of parental responsibilities in relation to the child. Townsend and Dawes describe this practice, called *inhlawulo*, as the payment of a fine (either money or cattle) by a man who fathers a child outside of marriage to the woman's father. (Townsend & Dawes, 2004: page 66) The custom serves a protective purpose. Traditional leaders and parents from KZN explained that the payment of the fine to the family of the mother of the child, often in the form of a cow, is an acknowledgement of paternity and of the shame brought on the family. Their discussion on the subject indicated an implicit customary appreciation that if the child's paternity is not acknowledged, this will adversely affect the child's emotional and biological health and development. Customarily, a failure to acknowledge paternity is seen as a cause of resultant anti-social or bad behaviour by the child, such as truancy, committing crimes, bedwetting, because a failure to acknowledge paternity means an absence of paternal ancestral acceptance and protection.

The KZN respondents expressed concern that this custom is no longer practiced; it is more common today for young unmarried men not to pay the *inhlawulo*. This failure to pay the fine is not however an approved custom; it is a perversion of custom. The question arises as to whether the resuscitation of this practice has the potential to reenergize the commitment and fulfillment of parental duties of unmarried fathers to their children.

3.3.2.2 Communal care of children

Taking the idea of the extended family further, there is a consistent tradition of communal care of children in traditional South African communities. The customary saying that "it takes a whole village to raise a child" was often mentioned in the focus groups and interviews. Participants in the ELRU study observed that the model of care varied, depending on the child. In the early years, the child enjoyed the care and protection of three generations of women in the home. Once the child reached an age where they were ready for taking on domestic responsibilities and they spent more time in the community outside of the home, then children were cared for by everybody in the community; safety became more communal and interactive. (Early Learning Resource Unit, 2010)

Rights analysis of communal care

As in the case of the extended family, communal care has numerous benefits for the promotion of children's protection rights. Respondents agreed that it is a practice that promoted the safety and well-being of children in the community.

In the past it used to be everybody's business to care for, guide and discipline the child. Not only did this create circles of care and support for children, but also promoted good discipline amongst the children. This was explained as follows by traditional leaders and caregivers in a focus group in KZN:

Every adult was responsible for raising, caring for, disciplining children in the village. This made children respect other people and were careful about their own conduct as they did not want to get into trouble with adults in the community.

Children were fed by everyone in the village – there was no begging as the community spirit of generosity ensured that no child was hungry or without adult care and supervision whilst their parents were working in the fields.

In the Limpopo village visited, communal care is practiced with regards to especially vulnerable children. Mr Mulaudzi, a local social worker with the Department of Social Development advised that “we do not have street children here. If children are on the street, they will be reported by community members to the Royal Council and the Royal Council will find the family or refer the child to the social workers.” The social worker advised that this was the standard practice in all nine villages in the area; communities are aware of vulnerable children and the traditional leaders work closely with local government to identify and ensure they are cared for.

In as much as communal care was raised by all as a positive traditional practice, so too almost all agreed that it is a diminishing practice. In KZN this was explained as follows:

Life for children has changed dramatically....there has been a downward decline of the caring community spirit. Maybe it is civilization; Christianity and education that has made families feel they can do it alone. The result is that families are now alienated from the community. The family wants to be on its own without any interference from anyone, no matter how well-meaning. (KZN Traditional Leader focus group)

The reasons for this change are diverse. They include high poverty levels and a growing inability of families to absorb the costs of materially supporting any additional children as well as the escalating rate of child abuse and awareness of the risk of child abuse at community level. The latter concern has resulted in greater levels of suspicion about one’s neighbors. As a result parents are more protective of their children. The higher risk means “we keep them safe in our yards because of the dangers of our times” (Focus group participant, Early Learning Resource Unit, 2010)

Whilst poverty is a significant challenge to the promotion of community-based care and protection, it must be borne in mind that material support is merely one of the forms of parental care that the extended family and community can supplement. Abebe and Aase distinguish between capacities to provide materially for children (economic capacity), the willingness to care and provide psychosocial support (emotional capacity) and the capacity of families to ‘equip children with socially and culturally appropriate skills (social capacity)’. (Abebe & Aase, 2007: page 2060) A number of civil society organisations in South Africa have recognised the potential of the traditional communal care ethic to enhance the protective environment for children. They have sought to build circles of psycho-social and social care and support for children, especially in rural communities where government support services are less likely to reach, through the conscientisation and capacitation of networks of caring community members. The National Association of Child Care Worker’s (NACCW) Isibindi Model is one. It is described as a community-based model which:

...responds holistically to the needs of children, youth and families who are vulnerable and at-risk. Unemployed community members are screened, selected, trained and deployed as child and youth care workers servicing families in their own communities. They work under the mentorship of experienced social service professionals, blending practical household support tasks with care and development opportunities. (NACCW web site)

Other models of communal care are Child Welfare’s *Isolbantwana* programme (“the eye on the child”) and the Umtata Child Abuse Resource Centre’s (UCARC’s) Village Child Protection Workers

which sees community volunteers keeping an eye on vulnerable children in their communities and intervening when appropriate and necessary.⁴⁵ (Martin & Mbambo, 2010: page 7)

In South Africa, the Children's Act (No 38 of 2005) has sought to foster the revitalisation of the communal care ethic for the benefit of children across South Africa. It has sought to do so through, on the one hand, the formal recognition and support of community based structures providing care and support to children in vulnerable communities, and on the other hand through the integration of communal care practices into the national prevention and early intervention strategy currently in development in terms of the Act.

The Act recognises and seeks to support adults from local communities designated to supervise child-headed households;⁴⁶ child care forums which are defined as community-based structures are set up to identify vulnerable children and provide them with childcare and support (Department of Social Development, 2009); and drop-in centres, defined as a community-based facility provide emotional, physical and social development needs of of vulnerable children.⁴⁷ More recently, the South African Department of Social Development has started a process of developing a national prevention and early intervention strategy as required by Children's Act.⁴⁸ An objective of the strategy is to put in place programmes that prevent the neglect, exploitation, abuse or inadequate supervision of children.⁴⁹ The Department has advised that it intends to incorporate positive traditional communal prevention practices into the strategy.⁵⁰

3.3.2.3 Customary foster care and adoptions

Customary foster care and adoptions have been the cornerstone of care and support for the vast numbers of children orphaned by HIV and AIDS in Southern Africa. Customarily, the assumption of parental responsibilities for children of absent or deceased extended family members is secured through either a 'customary foster arrangement' or a 'customary adoption'. Customary adoptions are public events which, in effect see the transfer of customary parental rights and responsibilities in respect of a child from one family to another. Maithufi explains that customary adoptions normally take place between families that are related to each other by blood, but it is also takes place between non-relatives. It is a process which, in terms of customary law, has the same legal consequences as state adoptions.

The process is described as follows by Maithufi:

The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area....The formalities relating to the agreement... are aimed at indicating that the adopted child has been formally transferred from one family to another...Even in cases where the adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process... The validity of an act of adoption in terms of

⁴⁵ Personal correspondence with Joan Van Niekerk, ChildLine, South Africa

⁴⁶ Section 137

⁴⁷ Section 213 of the Children's Act No 38 of 2005

⁴⁸ Section 145 (1)

⁴⁹ Section 144(1)(f)

⁵⁰ Personal communication with Musa Mbere, The Department of Social Development: Children's Directorate

customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption. (I P Maithufi (2001) in SALC (2002): page 25)

Rights analysis of customary foster care and adoptions

Customary foster care and adoptions secure the rights of children to alternative care where their parents are absent, deceased or due to other circumstances unable to care for them. However, contrary to the obligation on states to ensure that placements in alternative care and the adequacy of the protection provided be subjected to judicial review⁵¹, customary forms of alternative care are not subject to judicial or legislative regulation.

Unlike placements recognised and governed by the Children’s Act, customary adoptions and foster arrangements are not preceded by preliminary social services investigations, inquiries and monitoring, nor are they dependent on a court inquiry and court approved transfer of parental rights and responsibilities in respect of the child. Notably too, they are devoid of any official monitoring of the well-being of the child once placed within the extended family’s household.

Maithufi points out that there is a difference between customary adoptions and customary foster care. Fostering, as in the case of the common law, does not affect the status of the child, whereas adoption does. In foster care there is no intention to sever the relationship with the biological family. In consequence, in a foster arrangement, the child does not acquire any property rights in the foster parent’s family. (I P Maithufi in SALC (2002), 2001: page 26)

A number of focus group participants indicated that traditionally, there is less of an appetite for adoptions; traditionally people are more comfortable with foster care (customary or statutory) as it is more closely aligned with the automatic extended family and communal care ethic. Mr Mulaudzi, a social worker in Limpopo, indicated that in the villages in which he works, there is “no passion for adoption” because “someone is always already looking after a child. We don’t actively have to look for someone in the community to look after a child. The community automatically takes care of them.” Mr Mulaudzi said that they did try and encourage these informal caregiving arrangements to be formalized into adoptions, but “we succeed with maybe two out of every 100”. When caregivers are approached to formalize the care arrangement he says that a standard response is “why? She is my niece: why adopt her, she is already family.” In addition, a number of the South African participants in KZN indicated a strong cultural opposition, in principle, to adopting children (whether customary or statutory) outside of the family. The opposition was articulated as follows by a number of traditional leaders:

It is not possible to adopt a child whose surname you don’t know; How can you slaughter a goat for that child? Whose ancestors are you going to call when you do not know his or her source?

The only thing you can do is to report this child to the family ancestors, slaughter a goat or something so that she is protected whilst in your home but you can never give that child your family’s surname, her ancestors will fight you.

⁵¹ UNCRC, Article 9(1); ACRWC, Article 19(1); UNCRC Article 25

Whilst customary law adoptions are in general unregulated and the transfer of rights and responsibilities are not recognised by statutory or common law, they have been recognised by the South African courts on an ad hoc basis. This has largely been for the purpose of the recognition of a duty of support on the adoptive parent to materially support the child. In the most recent judgment in South African, the High Court recognised a customary law adoption for the purpose of granting a maintenance order in terms of the Children's Act. In so doing it harmonized the legal consequences of customary and common law adoptions in so far as they relate to the parental duty to materially support adopted children. (Maneli v Maneli, 2010: paragraphs 39 and 44))

Thus at this stage, there is not a blanket common law recognition of customary adoptions which is arguably a contravention of the child's rights to equality. The inequitable recognition of the relationships of children in customary settings is arguably discriminatory in principle, as are the limitations this creates around the enforceability of non-material parental responsibilities.

The failure to recognise and regulate customary adoptions in the South African Children's Act also potentially breaches the child's right to protection. In the absence of formal screening, selection and monitoring of customary foster and adoptive parents, a gap is created for potential exploitation and abuse of children who are already in a very vulnerable situation. At present there are unconfirmed allegations of 'customary adoptions' being exploited by opportunists who 'adopt' the child in order to gain access to the child support grant paid to the primary caregiver of children living in poverty.⁵²

Concerns about the risk faced by children in unregulated kinship care are founded on a number of studies which show the heightened vulnerability of children living with non-biological parents to abuse of their rights – and the correlative need for regulation and monitoring of these placements. UNICEF found that in 20 sub-Saharan African countries, children who had lost one or both parents were less likely to be in school and more likely to be working more than 40 hours a week. Furthermore, orphans are less likely to be at the correct education level. (HIV and AIDS and Education (UNAIDS Inter Agency Task Team on Education), 2004). The latter finding is true of orphans in South Africa. A study by Case and Ardington found that less money is spent on the educational needs of maternal orphans by their non-parental caregivers than the caregiver's biological children living in the same household. (Case A and Ardington C, 2004) In addition, the Wits School of Education found that:-

A much higher proportion of children living with relatives as the head of household who are neither parents nor grandparents [7,6%] are out of school than children who live with their biological parents as the head of household [4%]. Children living with a non-relative....are even more vulnerable: 10, 6% of these children are out of school. (Fleisch, Schindler, & Perry, 2009: page 44)

Drafters of the earlier versions of the Children's Bill predating the current Children's Act in South Africa sought to incorporate and regulate customary adoptions through the legal recognition of "kinship care" as bestowing rights and responsibilities and requiring monitoring and regulation. The resultant exposure of some children within extended family care arrangements to possible abuse and

⁵² Buyi Mbambo, presentation at a workshop hosted by the HRC and UNICEF in South Africa, Midrand on equity and child rights in South Africa, March 2011

exploitation and the lack of a system to monitor and rectify the situation calls for advocates to revisit the exclusion of kinship care from the Act.

3.3.3 Parental communication practices

Participants in the Eastern Cape and KZN focus groups confirmed that a common parenting trend in traditional African families is inhibited communication between children and parents. This inhibition is moderated however by a greater openness in communication between children and extended family members, especially older siblings, aunts, uncles and grandparents.

In KZN, the traditional leaders and caregivers explained that the supportive communication role used to be fulfilled by two sets of mentors:

1. *Izinkehli* – a maiden who has gone through all the rites of passage successfully, as a virgin and who has not fallen pregnant and is ready to get married;
2. *Amaqhikiza* – who younger than *izinkehli* and closer in age to teenage girls, but a virgin too, who was highly regarded in the community for her good behaviour and conduct.

These mentors are no longer in place and it was noted that this has left a gap, especially as parents do not discuss matters of a sexual nature with their children. What has been lost is the traditional age and gender banded regimens that talked to girls and boys throughout the relevant transition periods about their bodies and matters of a sexual nature. Schools increasingly fill this gap. They are seen by traditional leaders and caregivers as important spaces for conveying age appropriate sex, reproductive health and biological information and education. All the respondents, including traditional leaders, had knowledge of Life Orientation in schools and that it touched on these subjects, however they were not quite sure of the content and detail covered by the curriculum.

Rights analysis of parental communication practices

Inhibited levels of communication impact negatively on, inter alia, the child's rights to psycho-social support and protection from abuse. Whilst the emotional and psychosocial support provided through open communication is provided to some extent through the role played by older and extended family members and schools, there is evidence to suggest that a close and open relationship between a girl and her mother is a protective factor which reduces the risk of sexual violence against the girl. Conversely, girls who do not have an open and close relationship with their biological mothers are at greater risk of sexual violence. (Breiding, et al., 2009)

3.3.4 Discipline practices

3.3.4.1 Authoritarian parenting

Two important elements of parenting are 'parental responsiveness' and 'parental demandingness'. Parental responsiveness refers to "the extent to which parents intentionally foster individuality, self-regulation, and self-assertion by being attuned, supportive, and acquiescent to children's special needs and demands". Parental demandingness (also referred to as behavioral control) refers to "the claims that parents make on children to become integrated into the family whole, by their maturity demands, supervision, disciplinary efforts and willingness to confront the child who disobeys". (Darling, 1999)

In South Africa there is a dominant culture of discipline and obedience – parental demandingness. As explained by a respondent from KZN, "culture puts children in a particular setting in terms of rules –

they have to obey, there is no room for negotiation. Rules take centre stage over the feelings, emotions and rights of children.” This tends to result in a dictatorial, rather than a participatory parenting style.

There are thus strong indications that customary parenting styles, especially of fathers may be described as ‘authoritarian’.

Authoritarian parents are highly demanding and directive, but not responsive. They are obedience-and-status oriented, and expect their orders to be obeyed without explanation. (Darling, 1999)

Rights analysis of authoritarian parenting

This has negative implications for the rights of children to participation and freedom of expression. This impact is discussed in more detail towards the end of this section under the heading of participation. In addition, authoritarian parenting increases risks for the physical protection and emotional and mental well-being of children. Guma and Henda argue that the language of discipline and loyalty to patrilineality where child-adult authority is deeply entrenched and unquestioned, can lead to unquestioning subservience to male adults by children. When you add to the mix, fear of breaking up the family members, children are at risk of abuse and afraid to speak out about it. (Guma & Henda, 2004: page 105)

3.3.4.2 Corporal punishment

Sloth-Nielsen highlights that whilst children’s rights are not alien to the African continent; that most children’s rights have indeed gained institutional prominence and increasing recognition in both law and practices on the ground, there is one significant exception – corporal punishment. In Africa, “corporal punishment is regarded as being culturally acceptable on a pervasive basis It is testimony to the resilience of beliefs about the practice.”(Sloth-Nielsen, 2008: page 7)

This is true for South Africa. Despite the clear obligation to abolish corporal punishment in terms of various international instruments⁵³, and despite the fact that South Africa has outlawed beatings in schools and within the penal system, corporal punishment remains pervasive in South Africa. 1 in 5 children experience corporal punishment at home where 1 in 3 parents use severe corporal punishment. (UNICEF South Africa, 2011: page 61)

Rights analysis of corporal punishment

The UNCRC unambiguously bans all forms of violent or degrading forms of punishment. South Africa has sought to fulfill its obligations by outlawing corporal punishment in schools, penal institutions, and alternative care settings.⁵⁴ This ban does not however extend to corporal punishment in the home. With regards to the latter, “parents are still allowed to impose reasonable chastisement on a child, which chastisement may include physical punishment.” (Kassan, 2008: page 176)

⁵³ The UNCRC, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the ICESCR all require a ban of corporal punishment.

⁵⁴ Laws prohibiting corporal punishment include the Schools Act no 84 of 1997 and the Abolition of Corporal Punishment Act of 1997.

Custom is seen by Dawes et al as a primary reason behind the legislature stopping short of a full legal prohibition of corporal punishment in the home in the Children’s Act, as well as a driver of the wide-spread use of corporal punishment in schools, despite the ban, and in homes. (Dawes, Kropiwnicki, Kafaar, & Richter, 2005: page 6) Furthermore, they argue that the wide-spread acceptance and tenacity of this practice has its roots in customary attitudes to children, their status, the family and patriarchy. Dawes et al see these factors as:

Central background factors in determining the manner in which adults in our society construct their relationships toward children. It is the character of normative construction of the power relations between adults and children and adult rights over children that make violence to the young by adults possible (but by no means inevitable).

(Dawes, Kropiwnicki, Kafaar, & Richter, 2005: page 2)

Parents in South Africa believe corporal punishment is appropriate; that it protects children against further harm. Moreover, parents feel justified in using it because of communal acceptance of the practice. (Dawes, Kropiwnicki, Kafaar, & Richter, 2005: page 6) This certainly held true in the customary communities that participated in this study. Amongst the KZN and Eastern Cape focus groups, most parents and children alike identified the use of corporal punishment as an accepted form of discipline and spoke of it as a normal practice in their homes and schools. Interestingly however, in the Limpopo village visited, there was a keen awareness amongst traditional leaders, caregivers and children alike of the ban on corporal punishment in the school and penal setting, and the harm of the practice in the home. The majority of participants indicated that corporal punishment was not meted out at the school, by traditional leaders, or indeed parents.

Thoko Mkhwanazi-Xaluva, the head of public education and advocacy at the South African Cultural Commission concedes that corporal punishment is a harmful customary practice. She argues however, that child rights lobbyists have thus far not been able to provide traditional communities and families with workable alternative forms of discipline. She says for example, a common alternative practice presented is to take away a child’s toys; “what good is this?” she asks “in deeply poor communities where children do not have toys?”⁵⁵ As a result, she argues, parents are often hard pressed to find and apply positive alternatives, thus strengthening calls for the next wave of advocacy to focus on sharing information about effective alternatives that can be meaningfully applied in customary settings.

3.3.4.3 Communal discipline

Many of the participants said that the communal ethic of shared parenting meant that traditionally all adults were responsible for meting out discipline when necessary. A number of participants lamented that this practice has, as in the case of other forms of communal care, diminished. For some children this constituted a loss of care and support; some of the children in KZN said that they would be happy to see more community members “showing them the way” as it would be a sign that the community cares for them. Caregivers from the Eastern Cape noted that these days it is very difficult to discipline a child who is not your own; that children’s parents are quick to accuse non-family members as interfering in matters that do not concern them.

⁵⁵ Presentation made by Ms Mkhwanazi-Xaluva to a workshop hosted by the SAHRC and UNICEF on equity and child rights, March 2011

3.3.5 Children's participation in work

South Africa has sought to protect children from exploitative and harmful labour practices through the enactment of laws such as the Children's Act and the Basic Conditions of Employment Act No 75 of 1997. The latter Act prohibits the employment of all children under the age of 15 and the employment of children between the ages of 15 and 18 years where such work will impact negatively on the child's well-being, education, physical or mental health, or spiritual or moral development.

Despite these laws many parents and caregivers require or permit their children to participate in either economic or non-economic labour activities. Whilst there is no recent data, a 1999 survey found that 36% of children in South Africa above the age of 5 years were engaged in at least one form of work activity. (UNICEF South Africa, 2011: page 59) The Presidency's office estimates that there are 1 million children between the ages of 5 and 17 involved in child labour. (The Presidency, RSA , 2009: xiii)

Girls are especially vulnerable in traditional communities to spending time on domestic chores, especially caring for younger siblings and collecting water and wood. As pointed out by numerous focus group participants in all three provinces, the division of household labour is highly gendered, with girls assuming the bulk of the domestic chores. The amount of time spent on the latter responsibilities is aggravated by poor access to running water and adequate sanitation facilities in rural areas in South Africa. (Department of Labour, 2007: page 47) A study conducted by TECL found that children in rural areas spent an average of 12,5 hours a week collecting water; for some children this was as high as 40 hours a week. (Department of Labour, 2007: page 49)

UNICEF attributes the high prevalence of child labour to, inter alia, customary attitudes regarding, the role of children in the family, the view of the roles of girls in society, and poverty. (UNICEF, 2006(b))

Rights analysis of child labour practices

High child labour rates in customary communities impact not only on a child's right to protection from exploitation, but also their rights to protection from gender-based discrimination and their rights to education and good health.

Child labour interferes with a child's ability to attend school, it lowers his or her attendance levels, completion rates by 1,5 years, grade progression as well as the level of educational attainment and literacy of the child. The TECL study found the impact of domestic labour on children to be as harmful as paid labour. Children involved in domestic chores complained of being late for school, being unable to concentrate in class, having poor morale and having to leave school early to fetch water. The impact on educational outcomes is measurably significant: 85% of children involved in fetching water were not in the appropriate age group for their grade, compared to 15% of those who were not. (Department of Labour, 2007: page 49) In addition, there is a link between ill-health and child labour with work in rural areas being associated with a higher risk of ill-health. (ILO, UNICEF and World Bank, 2009: page 40)

3.3.6 Protection, education and socialization through games and folktales

3.3.6.1 Games/folktales

Traditionally, the discharge of responsibility for the intellectual stimulation and development of children was achieved through; inter alia, the playing of games and the telling of stories and folktales. This responsibility was often, especially in the early years, shouldered by the child's grandparents. (Early Learning Resource Unit, 2010) From the focus group discussions, it was clear that most caregivers started teaching children while they were young to prepare them for adulthood. Much of the teaching, especially in the early years was achieved through imitation games whereby the child mimicked the roles fulfilled by the parent.

The Family Literacy Project undertook a research exercise in the Sisonke District in KZN to identify local/indigenous knowledge and practices that aided the stimulation, development and protection of children in 2010. They found that children in customary communities were encouraged to play various games, using natural and inexpensive resources in the natural surroundings. These games, such as *amagende*, *amathini* and *utswayo* helped children learn skills such as counting, socializing and taught them how to deal with issues such as winning and losing. Playing games also developed the child's physical strength and coordination. Participants in that research project indicated that "most children today do not play the same games as they did as they are more likely to be watching TV, talking about what they did at crèche and playing with bought toys." (Family Literacy Project, 2010: page 13)

Whilst children in traditional communities are largely subject to a culture of silence, there are traditional spaces allowing for expression of their views through games, including the telling of stories and enactment of dramas by children amongst their peers. In South Africa, one particularly relevant game that has the potential to provide a protective and healing space for victims of sexual abuse is a game known as *Masekitlana*. This is a traditional Sesotho story-telling game played by children, either on their own one at a time, or with other children listening attentively. The game involves the child narrating a story, usually about something that worries or excites them. The storytellers share their story by using stones as props which represent the various role players in the story. The other children in the audience serve as "little counselors, often reflecting the content and the feelings where necessary." Selepe argues that this game holds significant potential for use as a therapeutic tool to aid and support children victims of sexual abuse. (Selepe, 2011)

Rights analysis of traditional games and folktales

These folktales and games contribute to the promotion of children's rights to physical and cognitive development, early stimulation, psychosocial support, education, and social skills. Whilst many participants in the current study recognised the positive development value of games and folktales, others noted that the early socialization of children through games imitating domestic roles of their mothers and fathers tends to foster and entrench traditional gender stereotypes and practices. The rationale behind this was explained by a participant in a parallel study conducted in Zambia: 'Upbringing and parenting practices are rigorously followed and aimed at regulating growth of the child's life which is understood through the idiom that young trees are our future forests. So

practices deliberately aim at ensuring that the child follows tribal customs so that the child can become accepted into tribal settings.’⁵⁶

The next section of this report will explore the issue of gender socialization and some of the relevant practices which are informed by, and in turn inform gender relations and practices in traditional communities.

3.4 Gender sensitive practices impacting on children

3.4.1 The right to equality and protection from discrimination

Both the UNCRC and the ACRWC guarantee the right of all children to equality regardless of the child’s or child’s parent’s sex, status, background or circumstances. This right translates into a guarantee of equal access to all other rights and to be protected from practices that inhibit the realisation of rights based on a child’s gender or the gender of his or her parent/s.

In addition to the general prohibition against discrimination, various child rights and gender instruments⁵⁷ single out and require that special attention be paid to customary practices which:

1. Are harmful to girls and which prevent girls from enjoying the same rights as boys;
2. Entrench stereotyped roles of men and women or which undermine the common responsibilities of men and women in the upbringing of their children;
3. Promote discrimination against the girl child in the family, community, institutions and at state level;
4. Prevent girls from enjoying equal access to education and health care;
5. Promote the development of a negative self-image by girls;
6. Result in, or contribute to the economic exploitation of, or violence against girls.

Despite the clear prohibition against gender-based discrimination, many girls and women in rural customary communities do not enjoy equal access to their rights, do not benefit from equal division of parenting roles and responsibilities and are subject to high levels of violence and exploitation.

In sub-saharan Africa women, especially young women are disproportionately affected by HIV. They they are 2-4 times more likely than their male counterparts to be infected. In South Africa in 2008 only 4% of men aged 15-24, compared to 14% of girls and young women in the same age group were HIV positive. (UNICEF South Africa, 2011 page 39)

Child labour is a common feature in the lives of almost all rural children in South Africa. Access to running water is more problematic in rural than in urban areas. Girls and women bear the brunt of the resulting domestic responsibility to collect water and firewood.

While men and boys do fall victim to gender violence, it is women and girls who are most often subject to physical, sexual and psychological abuse. Underlying attitudes sustain these trends. In South Africa, a study on the ‘Acceptance of Violence Amongst Female Learners in Rural High Schools

⁵⁶ Wilfred Chilangwe, Board trustee, Zambia Civic Education Association

⁵⁷ Including the ACRWC, Articles 6,11,17 and 18; UNCRC, articles 2,6,7,17,37,40(3); CEDAW, articles 5,10; SADC Gender Protocol, article 11

in KZN' concluded that acceptance of violence is shaped by gendered socialisation of girls and boys in rural communities:

Rural households headed by women are substantially poorer than those headed by men. In South Africa in 1999, households headed by women had a 48% chance of being poor, compared to those headed by a male, which had a 28% chance of being poor (Woolard, 2002). More recently, it was found that children in female-headed households are 1.5 times more likely to experience hunger and 1.3 times less likely to have access to adequate sanitation and water. (UNICEF South Africa, 2011: page 16)

3.4.2 The causes and consequences of gender inequality

The question that arises is why, given the protection against discrimination, is there widespread gender-based discrimination in rural customary communities?

3.4.2.1 The status of women in African customary law

Bennet observes that "Patriarchy is an established feature of all southern African systems of customary law." (Bennet, 1993) Patriarchy is defined as "Social organisation that structures the dominance of men over women." (Social Science Dictionary) In customary law this means that women enjoy a lower legal and social status than men and that the traditional family, community and broader society is organized to found and sustain the subordinate status of women.

African customary law bestows a very limited legal status on women. They lack all formal legal capacities; they are not allowed to sue for divorce; they have no right to the custody or guardianship of their children; they have limited rights to hold or dispose of property; and cannot approach a court unassisted. (Bennet, 1993: page 35) The lower legal status of women is sustained by the lower social status of women which is in turn ensured through the construction of customary social and family arrangements, parenting and other practices designed to promote and sustain the patriarchal structure of African customary society – starting with children from a very early age. When focus group participants were asked to identify practices that promote gender sensitivity, divisions and/or stereotypes it proved quite challenging; not because of an absence of such practices, but rather because of the systemic nature of such practices in their family and community structures and relationships. It infuses and informs almost all conduct and behaviours. Gender differentiation was and is enforced as part of the culture – the allocation of chores and responsibilities in the family and community was gender-based; who speaks first is traditionally a man; rituals are gender specific, for example sitting positions and participating in community festivals and certain rituals was gender-specific; a woman is not supposed to oppose a male opinion in public, women had to kneel when bringing food to their husbands and fathers, girls are required to serve their brothers when they come back from initiation school or had reached a certain stage in their development. (Focus group participants in South Africa, Eastern Cape and KZN)

From the examples provided, it is evident that a number of parenting practices and relationships in families inform and perpetuate existing gendered relationships. This validates the conclusion by UNICEF that in African customary law, "The household and social values related to the position of women in the household or in society form a powerful part of children's learning and development, tending to reinforce the norms for future generations". (UNICEF, 2008:page 17)

3.4.2.2 The impact of gender inequality on children's rights

The statistics quoted in the preceding section highlight the material and cyclical link between gender inequality and child well-being; the two are intimately connected. Women are the primary caregivers of children and their status impacts on how they are able to meet their parenting responsibilities. The lower status of women translates into poorer access to scarce resources which negatively impacts on their ability to meet the material and other needs of children. Furthermore, the “quality of their parenting is affected by their level of education and their ability to participate in decision-making”. (UNICEF, 2008: page 17)

Moreover, and perhaps more fundamentally, the systemic patriarchal arrangements within society result in the exclusion, marginalization and discrimination against the girl-child from an early age. Dorothy Kasanda of CAMFED who participated in a parallel study in Zambia argues that the resultant customary social structures and socialization that we see today work against the girl and women in numerous subtle ways.⁵⁸ There are numerous customary practices, discussed in more detail below, starting from early childhood, which socialize children into their gendered roles which perpetuate gender inequality in traditional society. “Females grow up in a family, within a community observing the gender imbalance where males are deemed superior to females. This is perceived as a norm and makes them believe that it is how things should be. The attitudes and perceptions they hold are developed and shaped within these contexts. The definitions of who they are as females and their role in society emerges from these interactions.” (Nyawo, Sathiparsad, Taylor, & Dlamini, 2006: page 12)

In consequence girls in customary communities are at risk of developing a negative self-image, of fulfilling harmful stereotypical roles, of enjoying less access to education and health, of being subject to economic exploitation and various forms of abuse – both as a result and as part of systemic cause of customary patriarchy. This relationship between customary practices as the consequence and foundations of gender inequality and potential risks for, especially the girl-child's well-being, development and safety is explored in more detail in the following section dealing with a number of specific gender sensitive customary practices.

Before moving on, it must be noted that the analysis of these practices was conducted bearing in mind two critically important cautionary observations about gender and African customary law. The first cautionary note is that one should not make assumptions about the inherently and universal discriminatory nature of customary law as it was practiced in the past; and as it may have evolved in present day. The reasons for the poor status and resulting poor protection of women and girls in traditional communities may not necessarily rest in historical attitudes to women and children, but rather rest in more modern customary attitudes which have been shaped by societal and economic forces.

According to numerous commentators, the diminished status and role of women in traditional communities has not always been accurately depicted in official customary law. Women were not entirely disempowered and subordinate; and their subordinate status did not found, imply or justify

⁵⁸ Interview with Dorothy Kasanda in February 2011

practices that caused harm to women or children. Dorothy Kasanda⁵⁹ points out that this view represents colonial misconceptions about women in customary law and has become the “official”, but incorrect version.

Modern-day risks and deprivations suffered by women and girls in traditional communities should not be assumed to be justified by, or be in consequence of African traditional attitudes to women and children. In fact, at its core, African customary patriarchy is argued by many, including Bennet, Himonga, and Dawes et al, to be protective of women and children; to be protective of rights rather than a source of justification for rights abuses. Bennet argues that, despite their diminished status, women were respected members of the family and community and they were guaranteed lifelong support within the construct of the extended family. (Bennet, 1993: page 33) Townsend and Dawes explain this observation by pointing out that, whilst patriarchy conveys subordination of women, it also conveys a responsibility for protection of women and children. (Townsend & Dawes, 2004: page 66) Historically, this protective element is linked to the way in which children and women were valued; as a ‘gift from the gods’ that must be nurtured and cared for. This resulted in the fostering of practices and teachings that promoted respect for women and girls. Respondents in both the Eastern Cape and KZN pointed out that traditionally boys were taught to revere and respect girls and women; they were taught not to violate a woman’s body because a girl’s body was the pride of the family. Likewise, violence against women was frowned upon.

This study recognises the centrality of protection within African customary law. It recognises that certain harmful practices that have a gender-bias and are harmful to children may well not be a historically correct African customary practice, but rather practices which have evolved over time under social, economic and ideological pressures. The evolution and current shape of these practices have diluted, perverted or extinguished the essential African customary practice which is indeed protective, rather than harmful in nature.

In addition to the need for interrogating the authentic customary lineage of certain harmful practices, it is also essential to analyse these practices against the broader backdrop of “living” customary law. Customary law is ever-changing; it is a dynamic living institution that responds in shape and nature to societal and economic pressures within practicing communities. Thus, harmful gender-sensitive attitudes and practices are already, for the most part, undergoing changes – both positive and negative. For example, at a focus group session combining children and older educators at a school in the village in Limpopo province in South Africa, the common experience of almost all of the children (except for four out of the 20 children) was that boys and girls do the same kind of work at home; they said that “They all do the same. Boys and girls fetch water and such similar chores”. The common experience however of the older educators, speaking from experiences in earlier years, was that girls and boys did different things; girls did the domestic work and boys tended to the agricultural chores.

Thus, whilst it is valid to conclude that customary attitudes to gender inform much customary gender sensitive practices; there is a noticeable change in the degree of discrimination at a community level. Does this herald a shift in underlying customary attitudes to gender? Himonga argues that it does

⁵⁹ Interview, Dorothy Kasanda, Deputy Director, CAMFED, Zambia

and that the very flexibility of living customary law which allowed the development of the more harmful gendered practices harbors the space for the development of customary practices that are more respectful of the rights of women and children. (Himonga, 2008:page 80)

The challenge is to find and promote the levers which can hasten these changes respectfully and effectively so as to address the abiding harmful aspects of the gender-sensitive practices documented in the next section of this report.

3.4.3 A selection of gender-sensitive practices in more detail

The entrenchment of gendered roles and relationships through culture means that almost every customary practice can be analyzed within a gender framework, including those discussed under the previous heading of “Parenting and upbringing practices” and those which will appear under subsequent headings. In order to avoid duplication, this section will focus on only a selection of practices not previously covered or which will be covered later in the report, subject to the proviso that this is not an exhaustive exercise.

3.4.3.1 Transition rituals and ceremonies

Initiation rituals and ceremonies are commonly practiced in South Africa and play a central role in the gendered socialization of boys and girls. Initiation ceremonies are used to mark the transition of children from one stage of life into another. Customarily, children’s development is measured through the transition periods, rather than the child’s age, and the initiation ceremonies are, amongst other things, celebrations of the progress made through these stages and preparations for the next stage.

For girls;

African female initiation ceremonies are rites of passage for girls entering womanhood, and are usually a public announcement of the girl’s eligibility for marriage. (www.thebeadsite.com, 2007)

For boys, initiation ceremonies are;

....traditionally used as a transitional rite of passage from boyhood to manhood, conferring on the individual the right to participate in the decision-making process of the clan and the family: to share in the privileges, duties and responsibilities of the community and, in many instances, to take a wife and raise a family. (CLRC, 2008: page 28)

It was explained as follows by a group of traditional leaders in the village of Maelula in the Limpopo Province in South Africa: “In Venda we do not categorize children by their ages, but by stages. There is a first, second and third stage, depending on the stage of development of the child, and there are ceremonies to mark the transition from one stage to another.” The three stages correlate broadly with the pre-pubescent stage, puberty, and pre-adult stage. It is therefore not surprising that determinations about the readiness of children for events in life such as marriage and having children are not based on the child’s age, but by his or her stage of development.

The initiation ceremonies differ across different provinces and tribes, nonetheless, common initiation themes are found across the different locations.

- There are different ceremonies for boys and girls

- Most girls undergo an initiation ceremony upon reaching puberty
- Initiations often involve a period of isolation from one's community and family
- The initiation ceremonies combine celebrations with education in preparation for the next stage of life. There is a strong gendered dimension to the teachings; one premised on patriarchal and gender stereotypes about men and women's roles and responsibilities.
- All participants confirmed that content of the learnings and the format that they take, whilst subject to criticism, has not been static; it has changed over time, sometimes for the better and sometimes for the worse.

Initiation ceremonies for girls

Ceremonies for girls appear to take place at three times in a girl's life: the first is during the pre-pubescent phase; the second at puberty; and the third at the point of transition from being a pubescent to post-teen. The overall objective of progression through the different stages and graduation from the last stage marks a girl's full maturity as a woman which is marked and defined by her being ready in all respects to become a wife, mother and caretaker of a home. (Limpopo focus group: Traditional Leaders). When asked for an opinion about the value of these ceremonies, respondents saw them in a positive educational light. In the words of one of the female members of a royal council: "I think this is a good thing, we were taught well."

The Vemba tribe in the Maelua village in Limpopo celebrates the first stage through a ceremony held exclusively for all pre-pubescent girls in the village. All the children come together and the objective is for the girls to have fun, learn through play as well as to celebrate this stage of their life in preparation for the second stage. The ceremony takes place in the traditional healer's homestead. Focus group participants said that "the girls are taught things in preparation for the second stage of life." When pressed for details about what the girls were taught, the focus group participants indicated that they were not permitted to share this information. The teachings are largely in the form of stories, which on the basis of the scant information shared; include preparatory information about hygiene and the risks that are associated with one's growing body and sexuality.

The ceremony marking entry into the second stage of life for the girl child, known as *Vhusa* among the Venda tribe in Limpopo, takes place once the girl reaches puberty. The ceremony celebrates the attainment of puberty and takes place over a number of weeks, during which time the elders provide education to the girls in preparation for the next stage of their life as a pubescent. The focus group participants advised that the main educational theme is respect as prescribed by custom; this translates into teachings about respect for the girl's parents, respect for her husband, etc. In addition, girls are taught how to be a woman, although it seems that much of the teaching on this subject matter is intricately linked to the teachings about respect for one's parents and husband. Girls are also taught how to live in an extended polygamous family and are warned against the dangers of falling pregnant before they get married. The focus group participants did indicate that the content of the teaching has been modernized to include information about HIV and AIDS and advocacy to avoid HIV and AIDS by staying in a relationship with one husband. The ceremony lasts for four weeks, during which time the girls live together in the royal compound, away from their parents. Today the process takes place during the school holidays to avoid girls missing out on school.

In KZN there is a similar ceremony called *umhlonyane* that takes place when a girl starts menstruating. A goat is slaughtered and the girl must bath in the river. Traditionally this custom was

used to alert the community to the girl's coming of age, with the intention of protecting her. The girl was then assigned to group of girls of a similar age, all of whom fell under the tutelage of an older mentor, the *iqhikiza*, an older girl who is still a virgin and highly regarded by the community as a role model. The emphasis once again is on education; the *iqhikiza* would teach the younger girls about matters pertinent to their developmental stage.

The third stage, known as *Domba* among the Venda tribe in Limpopo and as *Ukubonga* in KZN marks the child's entry into young adulthood (approximately at the age of 16) and her readiness for marriage. The *Domba* is marked by a celebratory feast and dancing by the girls. The *Ukubonga* in KZN takes the form of a feast to thank the ancestors for delivering the children to adulthood without them getting into trouble, and to ask for guidance and protection in their adult years. The respondents in Limpopo emphasised that after the celebratory dance there is a period of education and participation in play-acting in preparation as part of the preparation of the girls for roles as adult women in society. The emphasis does seem once again to be on preparing young women for their domestic role as mother and wife and what custom requires in this regard. The tradition in previous years in Limpopo focused on celebrating the virginity of the participating girls; all the virgin girls would dance together in celebration of their virginity and their readiness for marriage. In KZN, a similar tradition celebrating the virginity of girls through dance is the *Umhlanga*, or the reed dance. This ceremonial dance marks the beginning of adulthood for girls and announces to the wider community that they are ready for marriage. (Caregivers focus group, KZN). The ceremony, which is restricted to unmarried and childless young girls, takes place under the stewardship of the mother of the traditional leader in the royal homestead. In Swaziland, where the ceremony is held as well, the celebrations and dancing last for eight days; on the seventh day the king or traditional leader attends the ceremony, watches the girls and chooses a wife if he so wishes, where after there is a feast and the girls return to their villages ready for marriage. (www.thebeadsite.com, 2007 and KZN caregiver and traditional leader focus groups)

In the Eastern Cape, there is a practice called *Intonjana* which provides girls in their late teens (17/18 years of age) with information and guidance on relationships with the opposite sex. The girl is taken to a private room where older women talk to her and give her advice on how to conduct herself. After a few days she goes to the river for cleansing and a feast is prepared for her and her peers.

Initiation ceremonies for boys

Boys undergo initiation ceremonies too, although the information about these is more scant than for the girls' ceremonies; the former are shrouded in secrecy. From as early as age 9, but more commonly, from the age of 12 years and older, boys in the Eastern Cape, Limpopo and KZN go into the mountains where they spend a period in isolation, under the tutelage of the traditional leader. During their period away they learn various life skills and receive other education deemed necessary to become a man. An example of other kinds of education provided by participants in KZN was on how to be a warrior. In the Eastern Cape, where the ceremony is called *Ukwaluka*, the boys undergo circumcision. Traditionally, this used to happen whilst in the mountains, but in modern times many boys have the circumcision performed at a hospital and only go to the mountains for the educational and ceremonial side of things.

The purpose of the initiation ceremonies appears to be educational on the one hand, as well as an institution that fosters inclusivity and a sense of belonging in the community as an adult. In the

words of a caregiver in the Eastern Cape, “when boys have not been circumcised, they cannot partake in community festivals; they are howled and laughed at for not being men.”

The participating traditional leaders and caregivers in all three provinces were reluctant to share detailed information about what happens and what the boys are taught when they go into the mountains. In essence, however, on the basis of the information provided, the games and teachings are directed towards preparing the boy to become a man; about their roles and responsibilities which largely focus on the boy’s role as “man of the house”. The focus group participants indicated that it is traditionally difficult to raise subjects such as HIV and AIDS and teenage pregnancies with boys during this ceremony, but there has been some change in this regard. During some initiation ceremonies boys are warned about the dangers of teenage pregnancies.

As in the case of the girl’s initiation ceremonies, numerous concerns have been expressed about the nature and content of the teachings; the concern has been expressed that the boys are socialized, through these teachings, to perpetuate traditional subordinate gendered stereotypical behaviour in the roles they fulfill and in their adult relationships. For example, in the Eastern Cape, respondents indicated that boys are taught that they should not be close to their mothers, that they should not show affection to their wives in public, that girls and boys should not mix, and that women must obey men – in short what is expected of boys in their relationships with girls and women.⁶⁰

Sexual cleansing as part of initiations

Research participants in the Eastern Cape noted a recent addition to the initiation practices of boys that is harmful to the protection rights of girls in the community. In the past, boys that came back from the mountains underwent a ‘cooling off’ period where they had to isolate themselves from the rest of the community for a while for cleansing purposes. In recent times this has mutated into a harmful practice; cleansing is now purportedly attained through sexual intercourse with a girl in the community “to cleanse off the evil or dark aura from the mountains”. (Focus group participant, Eastern Cape)

Parental oversight of initiation ceremonies

Parents in the Eastern Cape expressed discomfort at the way initiations have developed to include sexual cleansing practices, as well as a sense of helplessness at not being able to do anything to change the practice. Their response to sexual cleansing was that; “we do not know what to do to change things, we feel helpless” and “we only hope and pray that when boys do their sexual cleansing, they do not do it with our daughters.” Their discomfort was not only with the sexual cleansing practice, but rather, more broadly with the harmful male attitudes engendered amongst the boys through the initiation teachings and processes. Parents observed that in this age, when boys return from initiations, their behaviour changes completely; they lose respect for everyone, “it is as if being a man means they can do whatever they want.” They were all unanimous that this was not the case in the past.

When the question was probed as to what the cause of this change has been, parents in the Mhlontlo/Qumbu area in the Eastern Cape indicated that it must be what they are being taught while

⁶⁰ Interview with Victoria Gregory, reporting on information provided by a number of young men in the Eastern Cape that underwent initiation ceremonies and who participated in a gender equity workshop facilitated by her in 2010.

away; but this is a source of their frustration; they do not know what the boys are being taught while in the mountains. The parents agreed that boys may be getting the wrong and inappropriate messages about manhood. In addition, the possible harmful content of the education provided to them is aggravated by a further customary change; in the past boys were sent off with their mentors who supported them during and after their initiation. Today, no one mentors the boys, monitors and guides their behaviour during or after the initiation; no one teaches them to be accountable and to take responsibility for their actions, hence their unruly and disrespectful behaviour. Parents too are not involved in supporting and guiding the behaviour of the boys upon their return. An overarching concern in the area in question was that there is no leadership when it comes to the correct practice of the custom. (Focus group with parents and stakeholders in the Mhlontlo/Qumbu area in the Eastern Cape, South Africa)

Whilst the picture above is bleak indeed; the position is not the same in all areas. Some cultural groups like the *amaHlubi* in the Eastern Cape reportedly perform this ritual differently. One of the Eastern Cape focus group participants reported that he comes from an area in the province where initiation is practiced differently. He cautioned against making assumptions that the concerns raised by the rest of the group were representative of all initiation practices. He said that in his (and other areas), parents continue to be involved and monitor the boys. The practice is supervised by trained and experienced traditional healers and there is monitoring afterwards. In this community, there is still a sense of pride in the ceremony, generated in part by the community ownership of the custom.

It is not just the form, but also the content of the initiation ceremonies which varies between communities; there is no predetermined content; community and individual preference determines the tone, attitudes and socialization that take place during initiations. This point is well illustrated by information shared by a representative from an NGO in Mthatha, South Africa. She hosted a gender sensitivity workshop with male and female staff members from the NGO. Two of the male staff members attended two different initiation schools and had two very different experiences. The one school's teachings emphasised male dominance and aggressiveness; the inappropriateness of displays of affection in public (such as holding one's spouses hand) being a sign of weakness. It also taught that a man is the head of the house and this means that he should expect and enforce subservience by female members of the household. The school attended by the other workshop participant emphasised male responsibilities, rather than their entitlements; respect for one's elders and women; and what kind of behaviour honored these responsibilities and attitudes.

So whilst, in some areas boys were reported to come back from the mountains with intolerably sexist and dominant attitudes; that they expected women such as their girlfriends and sisters to "obey and serve them"; and that in most cases the mothers of these boys allowed this kind of behaviour and even abetted it, this is not an unavoidable given. The focus group involving local government and local stakeholders in the Mhlontlo area in the Eastern Cape indicated that in the past, whilst custom was, and is stridently patriarchal, there was an intrinsic awareness and respect for the value of women. Boys and girls were taught the value of girls and their importance in society. Boys were sanctioned if they disrespected girls. Sanctions included fining the boy's family, and as a result families were much stricter in controlling the behaviour of their sons. It was the role of the father to teach their sons these values and mothers taught their girls these values. The group noted however that the disintegration of families, especially the prevalence of unmarried mothers and children living

in households without their fathers has contributed to the unbalanced developments around emerging male attitudes to women and children.

Rights analysis of initiation ceremonies

Whilst the initiation ceremonies for girls and boys do provide space for education relevant to physiological transitions, and do foster a sense of inclusion and belonging within the community, there are a number of concerns about the immediate and longer-term risks for children and transgression of their rights in the initiation ceremonies.

a. The right to equality and freedom from discrimination

Initiation ceremonies are central to entrenching gender inequality and perpetuating harmful gendered stereotypes. Goddard observes that while:

.... initiation ceremonies may be constitutive of a woman's culture in the sense that it is a ritual that is run by women with women, but both content and outcomes of the ceremonies reaffirm gender inequality. Their ultimate objective is the perpetuation of men's domination and women's subordination....Boys initiation ceremonies confer onto the initiate the status of a respected member of society. They transfer onto boys the public and private authority of men, also over women. Whereas for girls they are simply prepared for marriage, preparing the girl for the rigors of marriage and life as a social and legal minor. (Goddard, 2000: page 52)

For boys, in a number of initiation processes, they are socialized into an adult role marked by aggressive male dominance.

b. The right to health

Initiation ceremonies have a number of positive and negative health implications, linked in the main to the circumcision component of the ceremony.

The primary health concerns are that the procedures followed in conducting circumcisions create a health risk to for the boys in question. Challenges include:

- botched surgery;
- dubious traditional practices;
- penis amputations; and
- even deaths of the initiates. (CRCLR, 2008: page 32).

Various respondents noted however that the prevalence of harmful circumcisions has reduced as more initiates make use of modern medical facilities. A submission made by the Eastern Cape Health Department to the CLRC hearings cited health problems associated with not only circumcisions, but also arising as a result of the conditions under which boys live during the initiation in isolation “in the mountains”. These include pneumonia, meningitis, gangrene, dehydration, hunger caused by starvation and low food intake by initiates and abuse by the initiation leaders or *amakhankatha*. In addition, the use of one surgical instrument for multiple circumcisions raised the risk of HIV, tetanus and Hepatitis A and B. (CLCLR, 2008: page 37)

Interestingly, the CLRC concluded that legislative regulation would not be enough to resolve these concerns:

*Solving the problems of initiation schools requires something more than just legislation. It must be remembered that, because of the principle of sacredness and secrecy of this practice, it becomes a serious undertaking to monitor and evaluate the negative practices in various schools. **Because the matter rests with communities, the government, communities and traditional leadership should form a cohesive partnership in enforcing the requirements for opening initiation schools.*** (CLRC, 2008: page 48; emphasis added)

Focus group participants in the Eastern Cape also expressed concern about the health and protection consequences arising out of the brutality to which some of the boys are exposed to during the ceremonies. The caregiver focus group in Mhlontlo in the Eastern Cape was especially concerned about the risks of physical injury for the younger boys who are now participating in the ceremony. There is an element of violence in the ceremonies, presumably as part of the preparation for boys as warriors, and the resulting scars do not always heal properly. The risk of death as a result of physical trauma and infection during initiation ceremonies is a real threat.

Research has however shown that circumcision also has a positive health benefit for boys and men. It has been shown to reduce the risk of men contracting HIV during vaginal sex by up to 60%. The South African government has, in line with WHO recommendations, started a campaign targeting 15-49 year olds for circumcision. (Ewing & Fourie, 2011)

c. Statutory protection for young boys against circumcision

The increasingly young age of the boys participating in the initiation ceremony was a cause of concern for the caregivers from Mhonthlo/Qumbu in the Eastern Cape. They advised that traditionally boys who were 18 years and older participated, but peer pressure, the need to belong, and economic pressures have resulted in boys as young as 13 going into the mountains, some without even notifying their parents. For example, a family that has two boys, one 18 and one 13, may decide to send both of them at the same time to cut down on the initiation costs. This happens despite the fact that the Children's Act prohibits circumcisions of boys younger than 16 years of age, unless the procedure takes place in a medical facility.

d. Protection of children from abuse and neglect

There is a concern that there is little, if any adult supervision and leadership of the initiation ceremonies for boys. The Mhlontlo caregivers expressed concerns about the way in which these initiation ceremonies had developed over time. The women especially were concerned that the change in custom has resulted in the introduction of more harmful consequences such as sexual cleansing. They attributed this trend of negative development to a lack of leadership to guide and monitor the correct practice of this custom. In addition, they expressed a sense of helplessness at not being privy to what happens at the initiation ceremonies and of not having any say in their content, tone and development.

In addition to constituting blatant child sexual abuse, the practice of cleansing results in infections and pregnancies which are rarely acknowledged by the boys. The practice is thus plainly in contravention of children's rights to protection from abuse, bodily integrity and their health, to name but a few.

Venter points out that the Children's Act requires parents to safeguard the health and well-being of their children and to protect them from maltreatment, abuse, neglect, degradation and any other physical, emotional or mental harm. In addition, the Children's Act requires that parents be given an opportunity to express their views in a matter concerning a child where such action would be in the interests of the child. She argues that the lack of adequate adult supervision over initiation ceremonies and the lack of parental involvement and/or supervision of the content and form of the ceremonies constitute a contravention of these protection rights and responsibilities. (Venter, 2011)

e. The right to education

There is a risk that both boys and girls miss out on school in their period of isolation which is mandatory to most initiation ceremonies. Many communities have however addressed this concern by holding the ceremonies during the school holidays to avoid this consequence.

f. A potentially valuable educational and psychosocial support space

Whilst there are reservations about the appropriateness of the traditional content of the teaching provided during initiation ceremonies, most commentators believe that they offer an important educational space to realise the child's right to information, health and protection from abuse. There are numerous examples that show how this valuable educational space has been taken up in some cases by NGOs to teach children about HIV and AIDS, to fight gender-based violence and other critically important issues. (Palitza, 2009) & (Ubuntu Institute & the Population Council, SA, 2010) These best practices can be emulated and advocated so that initiation ceremonies can over time become spaces where the protection rights of children can be advanced by focussing on issues such as hygiene, information about teenage pregnancies, the dangers of HIV and AIDS, and indeed foster respect for girls, women and children by reviving older respectful teaching practices. Such messages could also be repeated in the life orientation curricula offered in schools.

3.4.3.3 Child marriages

In South Africa there has been much public attention paid to a practice of forced abductions of girls as young as 12 for the purpose of marriage to older men. There is unfortunately no data available to indicate how prevalent the practice is. Media and other reports indicate that this practice is rearing its head in a few rural villages in the Eastern Cape and KZN. This practice, called *ukuthwala*, is defined by the Ministry of Justice and Constitutional Development as:

A form of abduction that involves kidnapping a girl or a young woman by a man and his peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations. (Department of Justice and Constitutional Development (SA), Undated)

At a roundtable meeting hosted by the South African Law Reform Commission, it was agreed that the form of *ukuthwala* described above is a very different version of *ukuthwala* as practiced in the past. (Mwambene & Sloth-Nielsen, 2011) Previously it was a legitimate practice that did not involve children at all. It was a staged abduction between two consenting adults who either lacked the bride price to get married, or whose parents were disapproving of the proposed marriage. The main aim was to force the girl's family to enter into marriage negotiations. (Mdazana, 2009) The practice in its original form had a number of legitimate cultural goals and had built-in protection for the young woman; the man was not permitted to seduce the girl once she has been *thwala'd*, and if he did do so, he was fined. (Mwanbene & Sloth-Nielsen, 2011: page 7)

In sum, in its old form, children were not involved in *ukuthwala* and rape was not permitted. In its current form, it is a perversion of custom, lacking in approval by many traditional elders. A number of traditional leaders in South Africa have denounced the practice. For example Dr Nokuzola Mbende of the South African Camagwini Institute has said “that abducting a girl of 12 or 13 is not the cultural practice we know. This is not *ukuthwala*, this is child abuse. At 12, the child is not ready to be a wife.” (The Herald 6 April 2009 & Sunday Times 31 May 2009 in Mwambene & Sloth-Nielsen, 2011) In addition, there is evidence of traditional leaders working with communities and NGOs to eradicate the practice in their areas. (Interview with an NGO in KZN working with a traditional leader to address the practice).

Rights analysis of child marriages

The ACRWC, the CEDAW and the SADC Gender Protocol expressly prohibit forced and/or marriages of children under the age of 18 years.⁶¹

South Africa has, through the Recognition of Customary Marriages Act of 2000, the Marriage Act of 1961, as amended, and most recently, the Children’s Act outlawed all marriages of children under the age of 18. In addition, statutory rape, that is consensual sex with a child younger than 16 years of age, assault, rape and kidnapping (all implicitly part of modern day *ukuthwala*) are criminally sanctioned in terms of the Sexual Offences Act.

Child marriages violate the rights of girls in a multitude of ways.

Child marriage is a violation of human rights whether it happens to a girl or a boy, but it represents perhaps the most prevalent form of sexual abuse and exploitation of girls. The harmful consequences include separation from the family and friends, lack of freedom to interact with peers and participate in community activities, and decreased opportunities for education. Child marriage can also result in bonded labour or enslavement, commercial sexual exploitation and violence against the victims. Because they cannot abstain from sex or insist on condom use, child brides are often exposed to such serious health risks as premature pregnancy, sexually transmitted infections and, increasingly, HIV/AIDS. (UNICEF, 2006)

The consequences of child marriages translate into a series of protection rights abuses, including the following:

1. The right to protection from forced marriages

In South Africa any child marriage constitutes a contravention of the governing marriage and child laws prohibiting child and forced marriages. In addition, sexual relations within child marriages involving girls under the age 16 years, by necessity constitute the crime of statutory rape.

2. Violence, abuse and forced sexual relations

A recent study by PLAN UK confirms that “Abuse is a daily reality for many married girls. Women who marry young are more likely to be beaten and ...to believe that a husband is justified in beating his wife.” (Myers & Harvey, 2011: page 10) Abuse includes both physical and sexual abuse, thus falling foul of the various laws in South Africa against rape and assault. Abuse is not limited to the physical

⁶¹ ACRWC, Article 21(2); CEDAW, Article 16(2) and the SADC Gender Protocol, Article 18(2)

variety. PLAN's report notes that young wives are often subjected to psychological abuse as they are often marginalised from society with few support systems. This contributes to low self-esteem and aggravated poverty. (Page 10)

3. Rights to health and education

The health and education of girls in early marriages are severely compromised. Consequences include the following:

- Early maternity: this in turn lessens the life expectancy of the girl and adversely affects her health, nutrition, education and employment opportunities.
- Early marriage has been linked to very high maternal and child mortality rates
- In sub-saharan Africa young women are far more likely than their male counterparts to be infected with HIV. Multiple factors relevant to child marriages make these young girls highly vulnerable to infection. These include the biological immaturity of the girls. Young girls are more vulnerable due to the poor barrier provided by their immature cervix to infection; Girls tend to marry men older than themselves; power imbalances make it difficult for young girls to negotiate safe sex and they are often exposed to violent sexual behaviour and rape. (Shezongo-Macmillan, et al., 2007: page 94)
- Child marriage is 'closely associated with no or low levels of schooling for girls. Girls in child marriages tend to drop out of school when they get married driving them into deeper poverty. (Myers & Harvey, 2011: page 11) Poverty leads many families to withdraw their daughter from school and arrange marriages for them at a young age. These girls are denied the proven benefits of education, which include improved health, lower fertility, and increased economic productivity.' (Mutegayya, Undated)
- Teenage pregnancies tend to feed the cycle of increased child poverty and deprivation, the primary educational inhibitors in South Africa, as the consequences include lower family income, aggravated poverty and an increased likelihood of child poverty. In addition, evidence suggests that the children of teen mothers are more likely to have poorer cognitive development and poorer educational outcomes. (S, M, Ranchod, & Letsoalo, 2009: page 47)The level of a mother's education has been found to be linked to her children's level of education. A study conducted by UNICEF in 18 countries shows that 73% of children born to educated mothers attended school, compared to 51% of children born to uneducated mothers. (UNICEF, 2009: page 19)

Drivers of child marriages

PLAN UK's study attributes child marriages to "factors that include gender inequality, poverty, negative traditional ...norms [and] weak enforcement of laws...." (Myers & Harvey, 2011: page 6)

1. Customary traditions and laws

Customary approaches to the determination of readiness for marriage are in many respects in conflict with international, continental and national prohibitions against marriages of girls younger than the age of 18. Traditionally girls are regarded as ready for marriage once they reach puberty. In this day and age, puberty commences as early as age 11. It is not however only custom regarding the age of marriage which has in the past promoted and legitimated child marriages, and which today may well create an ill-conceived perception of legitimacy of child marriages. In addition, "patriarchal customary laws and traditions give women and girls less negotiating power around marriage and sexual reproductive health and rights issues." (Myers & Harvey, 2011: page 7)The underlying legal

issue in respect of forced marriages is that, because children are not regarded as rights bearers, and because their interests are subsumed under the interests of the family, the girl child's consent is often not seen as necessary. The girl's parents are bestowed with the capacity, authority and permission in terms of customary law, to consent on behalf of the girl child. The lack of a child's consent to marriage is thus customarily not deemed fatal to the marriage. (Zambia Association for Research and Development (ZARD), 2007)

In addition, Myers and Harvey argue that the cultural importance of preserving the 'family honour' and a girl's virginity may result in parents "putting their children into marriage well before they are ready". (Myers & Harvey, 2011: page 8)

Whilst the law is unequivocal in its prohibition against child and/or forced marriages, those who seek to defend *ukuthwala* often seek to do so on these and related cultural grounds. However, as previously discussed, it is in fact seen by many traditional practitioners as a perversion of the original practice of *ukuthwala*. Many traditional leaders and practitioners have indeed been outspoken in their opposition to the practice, calling it nothing more than blatant child abuse.

2. Poverty

PLAN UK and UNICEF point out that poverty drives child marriages. PLAN concludes that "[f]or families facing chronic poverty, marriage often seems like the best way to safeguard girls' futures and lighten their economic burden." (page 7) UNICEF's analysis of the link between poverty and child marriages brings into consideration another related customary practice; that of *lobola* or bride price. UNICEF states that "early marriage contracted under customary law, mainly a rural phenomenon, is linked to payment of a bride price, and is as such widely recognised as a coping strategy for the poor." Commentators have noted that *ukuthwala* "has a class character as all victims seem to be coming from poor family backgrounds. It is also evident that there is a commercial aspect to the practice as families agreed because dowry or *lobola* would be paid in the process." (Mdazana, 2009: page 6)

There is thus evidence leading to the conclusion that the prospect of *lobola* drives families to marry off their girls at a young age. Bonthuys and Curran analyse the institution of *lobola* and note that it has changed over the years and that this change has contributed to bride price becoming a driver of child marriages. They note however that this was not always the case. They point out "that the social and economic conditions which prevailed when official customary law was first recorded were vastly different from capitalism, rapid urbanization and the replacement of the extended customary family by nuclear, woman-headed and even child-headed families, which form the current context of women's lives. As a result, customary rules [such as *lobola*] may not have had the same detrimental effects in pre-colonial societies as they do now". (Bonthuys & Curran, 2004)

They argue that the changing socio-economic environment has seen an increasing commercialisation of *lobola*. It has changed from a symbol of two families coming together to a commercial transaction. In that process it has developed into an institution that potentially perpetuates the subordinate and commodified status of girls and women in society, that potentially promotes early marriages, and that potentially undermines the protection of women and girls against domestic abuse. (Bonthuys & Curran, 2004)

Bonthuys and Curran track the historical development of *Lobola*. *Lobola* used to be paid in cattle, often by the father of the groom (in the case of the groom's first wife); the price was in many cases not paid at once, but in instalments over an extended period of time, and most often by the father of

the groom rather than the groom himself. This historical development was confirmed by traditional leaders in Limpopo. They said that in earlier times a small cash deposit was paid as a symbol of sealing the promise. The payment was symbolically as little as two rands, and that the full *lobola* would then be paid at the time of marriage or thereafter.

Lobola has changed from this form, and its function has changed too. It is no longer paid in cattle, but often in cash. Moreover, the amount paid has increased significantly over time. In Limpopo for example, the traditional leaders observed that it used to be a modest symbolic payment, averaging about one hundred and ninety rand in the past; today it is as much as thirty five thousand rand.

Previously payment was made incrementally over a period of time – this too has changed. In Limpopo, the leaders stressed that previously the payment in fact never ended between the families; that it was an ongoing form of support; that the two families, even after payment of the cattle, would continue to engage in reciprocal mutual support for as long as the marriage endured. This has been lost, “today it is just a once off payment”. The Limpopo traditional leaders summed up the shift by saying that in the past the institution of *lobola* was about the families, that it represented the thread that joined the two families. Today however, they lamented, it is all about the money.

The commercialisation of *lobola* has seen it become a potentially lucrative source of income for the girl’s family. Not only does this contribute to the commodification of girls and drive early marriages, it also potentially increases the girl-bride’s vulnerability to domestic violence and decreases her ability to resist or flee an abusive relationship. (Bonhuys & Curran, 2004). *Lobola* in its original form used to protect the bride against ill treatment as husbands who abused their wives were at risk of having to forfeit their *lobola*. Moreover, today the payment by the husband rather than his family or father is seen by some husbands as justification for abusing their wives because they believe the payment entitles them to treat their wives as they see fit. There is also less involvement of the in-laws in stopping domestic violence than in the past; because *lobola* is spent quickly in modern times, the families of girls and women in abusive marriages may be reluctant to allow their daughters to return home because of their inability to return the money, resulting in what Bonhuys and Curran refer to as “collusion to trap them”. (2004)

The commercialisation of *lobola* and the resultant vulnerability for women and children was recognised by the Zambia Law Development Commission in a review it conducted of customary law and women’s rights in 2004. The study is relevant in many respects to South African law given the similarity in the governing dual legal framework in Zambia and the similarity in many of the customary practices, including *lobola*. The reviews recommended that, given the fact that bride wealth is an entrenched principle in all customary laws in Zambia, it should be recognised and retained. However, it should “revert to the original practice of a token payment for *lobola* whose function was to bond the marriage between the parties and their families, rather than of repayment of expenditure on the bride as is the case currently.” (Zambia Law Development Commission, 2004: page xix)

3. Weak legal framework

In South Africa there is an unambiguous prohibition of child marriages. Various observers, including Thoko Mkhwanazi, the public education and advocacy officer with the CLRC conclude that our laws

are sufficiently clear and protective, but they are not adequately implemented and enforced against perpetrators of child marriages in South Africa.⁶² This was confirmed by a legal NGO representative working in a rural area in KZN to address the prevalence of *ukuthwala*. The chief in the area has confirmed that he is opposed to the practice, but the justice system in the area is not vigilantly enforcing the law and bringing perpetrators to justice. The police in the area have indicated to her that magistrates keep on remanding the rape cases brought within the context of *ukuthwala* because they are not sympathetic to the matter; they do not necessarily see it as a crime. The reason for this, she believes, is in part because the magistrates themselves come from the surrounding traditional communities and are influenced by the relevant customary attitudes discussed earlier in this section. She further advised that the traditional court in the area, presided over by a sympathetic traditional leader in this case, which could potentially remedy some of the prevailing judicial leniency, is prevented from enforcing the law as it lacks jurisdiction over sexual offences. All that the traditional court can do is order damages or the payment of a fine by the perpetrator.

3.4.3.4 Polygamy

Polygamy is the custom of having more than one wife at the same time. It is practiced in South Africa where both customary polygamous marriages and civil monogamous marriages are legally recognised.

Drivers of polygamy

The Zambia Law Development Commission in its 2004 review of customary law explored the causes and effects of polygamous marriages. Through this process it was revealed that the customary reasons for polygamy were largely economically driven. Having numerous wives and children was an inexpensive source of labour and a man in a polygamous marriage is likely to have many children which he can use as a source of income. Other reasons included the fact that many wives and children was symbolic of great wealth; an inability on the part of a wife to have children; disaffection with the qualities of an existing wife; and the age of an existing wife. (Zambia Law Development Commission, 2004: page 91)

The Zambia Law Development Commission concluded that there is no remaining legal or economic justification in modern day society for the continued retention of polygamy as a customary institution; that having more than one wife is no longer supported by the modern economic situation.

Rights analysis of polygamy

In fact, the Commission concluded that there are overwhelming reasons for abolishing polygamy. Key to this conclusion is the adverse consequences for the rights of children born into polygamous marriages. There was widespread agreement amongst respondents participating in the Commission's review that children are negatively affected by polygamy.

The negative impacts on children identified through the review process include the risk in that children will not be properly cared for because there are too many children in the family, often in a context of too few resources; it harbours inattentive parenting practices because of the number of children and the limited contact with their father; the nature of polygamy means that there is an

⁶² Interview February 2011

insufficient parental bond between the child and father and that children generally only identify with the blood mother, leading to divisions and conflict amongst the women and children in the family. In addition, there is a heightened risk of HIV transmission because of the multiplicity of partners, and hence transmission of HIV to children born into the marriage and of premature death of the child's parents. (Zambia Law Development Commission, 2004: pages 77 - 85) In short, polygamy poses a risk to a range of children's rights, including their rights to family care, protection from abuse, neglect and exploitation, to an education, an adequate standard of living, and health, amongst others.

In South Africa, the participants in the Eastern Cape civil society and government focus group strongly agreed with the view that polygamy is harmful to children; that it results in inequitable distribution of often scarce resources and that children are denied a right to adequate parental care, especially in relation to building a relationship with their father.

In Limpopo, a number of caregivers from the Maelula village observed that polygamy is on the decline, that "today not many men have more than one wife". At the same time, the same caregivers, when asked about the consequences of polygamy for children, spoke positively of the tradition in earlier times when it was required that all wives be treated equally. This engendered a safe environment for women and children, rather than a risky one. Thus while polygamy is on the decline, there appears to be a strong traditional line of support for the institution, which may in its earlier forms not automatically have harbored the risks that children in polygamous marriages face today.

South Africa is a signatory to the Convention on the Elimination of Discrimination against Women (CEDAW) and has thus undertaken to eliminate discrimination against women that arises from marital or familial relationships. In particular, it is obliged to discourage, and ultimately prohibit polygamous marriages under customary law (CEDAW: Comment 14 and General Recommendation 21). The UN Committee, in its most recent response to South Africa's combined 2nd, 3rd and 4th CEDAW periodic report, noted concern at the continued acceptance and practice of polygomy in South Africa. (UN Committee on the Elimination of Discrimination against Women, 2011: page 4) The Committee has called for the:

Implementation, without delay of a comprehensive strategy, including review and formulation of legislation and establishment of goals and timetables to modify or eliminate harmful practices that discriminate against women...Such measures should include efforts targeting women and men at all levels of society, including traditional leaders in collaboration with civil society...[and] address harmful practices such as polygamy ... (page 5)

The practice is declining in frequency and there are questions about its level of acceptability and condonation in customary law. The Zambia Law Reform Commission points to the fact that it does not in fact find the same degree of condonation in traditional customary attitudes as is sometimes thought; the fact that a family would not pay bride wealth for any subsequent marriages is seen as an indication that "polygamy is merely tolerated under customary law".(2004: page 79) Given the harmful consequences for children and women in the current social and economic context and the manner in which it is practiced, there is capital to be gained by promoting the growing customary inclination towards monogamy and emphasising the lack of customary support for second and subsequent marriages in undertaking the review and formulation of appropriate legislation and programmes as called for by the CEDAW committee.

3.4.3.5 Virginitv testing

Virginitv testing has become a highly contested issue in South Africa with a clear conflict emerging between customary and statutory law. Section 12(1) of the Children’s Act provides that “[e]very child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being”. The Act regards virginitv testing as a detrimental practice and provides that “virginitv testing of children under the age of 16 is prohibited”.⁶³ The CEDAW UN Committee’s response to South Africa’s country report expressed:

... serious concern about a provision in the Children’s Act of 2005 according to which virginitv testing for girls above 16 years old is allowed if the girl has given her consent. The Committee [expressed further concern] that the practice of virginitv testing of girls as young as 3 years old is increasing ... without respecting girls’ physical and mental integrity and exposing them to increased risks of sexual violence.

Virginitv testing is widely practiced in both the Eastern Cape and KZN.⁶⁴ In fact, many of the participants in the leadership and caregiver focus groups said that they actively promote the practice and encourage girls to have the test from an early age, well before the age of 16 years.

Rights analysis of virginitv testing

The focus group participants who promoted the practice argued that it was not a harmful but a positive practice, promoting children’s protection rights. They said it protected girls from sexually transmitted illnesses and falling pregnant. These arguments are similar in import to a suite of justifications normally advanced by what George calls the “traditionalist” camp. Other arguments include that it is a “culturally appropriate” solution to HIV/AIDS and that it detects sexual abuse and prevents teenage pregnancies. (George, 2008: Page 1449)

On the opposing side, it is argued that the practice should be outlawed as it constitutes a violation of numerous children’s rights, that it is unhygienic, counterproductive and potentially dangerous. The rights-based arguments are summarised by Jewkes as follows:

1. Virginitv testing is a violation of Article 10 of the ACRWC prohibiting the arbitrary or unlawful interference of a child’s rights to privacy or attacks on his or her reputation.
2. It contravenes the Constitutional rights to bodily integrity and the rights to equality and freedom from discrimination. The view is that it is a form of gender discrimination because men are not subject to the same inspections and it implicitly makes women responsible for society’s morality.
3. While it is often depicted as a voluntary and harmless indigenous response to AIDS and girls are proud to participate in it, the truth is that girls are not in a position to make a truly voluntary decision because of the entrenched gendered power dynamics.
4. Girls who are deemed not to be virgins are subjected to discriminatory behaviour and are ostracized. (Jewkes, 2004: page 137)

⁶³ Section 12(2)(4).

⁶⁴ Focus group participants and interview subjects in Limpopo indicated that virginitv testing is not practised in their village, but were unable to advise if this is practised by any of the other tribes in Limpopo. There was no indication in the literature reviewed of this being practised by any other tribes in this province.

The compromise made by the both traditionalists and opponents alike in terms of the clause on virginity testing in the Children's Act is proving to be ineffective. Traditional communities appear to be completely disregarding the limitations imposed by the Act, and have in fact been lobbying the Government for an amendment so as not to limit the practice at all. (Interview with David Chabalala, Ministry for Women, Children and People with Disabilities) It is difficult to see how the resuscitated traditionalist position could be sustained in terms of the governing legal framework, and unless the matter is resolved amicably, the issue may well end up before the Constitutional court for determination.

3.5 The right to health care and custom

Children have the right to survival, protection and development.⁶⁵ Key to the realisation of this right is the right to health which includes the right to the highest attainable standards of physical, mental and spiritual health.⁶⁶

South Africa has a poor track record in the realisation of this right - as is evidenced by its high infant and child mortality rates. Whilst there is uncertainty and disagreement as to the exact rates, everybody agrees that they are extraordinarily high and have increased over the last 20 years. UNICEF estimates that in 2008 the infant mortality rate was 44 and the child mortality rate was 67 deaths per 1000 live births, with a higher risk of death in rural, compared to urban areas. (UNICEF South Africa, 2011)

These high rates are attributable, in the main, to avoidable diseases of poverty such as low birth weight, diarrhoea, protein-energy malnutrition and HIV and AIDS. In South Africa one in five children are stunted as a result of chronic nutritional deprivation and one in ten children are underweight. (UNICEF South Africa, 2011) Access to sanitation and clean drinking water is low, especially in rural areas. In 2008, nearly 7 million children lived in households without access to clean drinking water and in 2010 nearly 7 million children still used unventilated pit latrines, buckets or open land. (Hall & Marera, 2010)

HIV prevalence rates among children in South Africa represent some of the highest rates in the world. In South Africa in 2009, 13 % of children under 15 (330 000) were infected, 30 000 of whom died in that year. (UNICEF South Africa, 2011).

3.5.1 Customary practices that impact on the health of children

Internationally there is an implicit recognition of the link between the right to survival, development, poor child health and customary practices; the latter is treated as a public health issue by the UNCRC which requires, inter alia, that State Parties take appropriate measures to abolish traditional practices prejudicial to the health of children.⁶⁷

A number of customary practices, some of which have already been identified under previous headings, have health consequences for children. Some of the practices which have already been identified include child labour, initiation ceremonies, child marriages, polygamy and virginity testing.

⁶⁵ ACRWC, Article 5 and UNCRC, Article 6

⁶⁶ UNCRC, Article 24; ACRWC, Article 14.

⁶⁷ UNCRC, Article 24(3).

The remainder of this section aims to identify and explore some additional customary practices which not only contribute to, but have the potential to stem some of the poor child health indicators listed above.

3.5.1.1 Traditional infant care practices

The scope of this study did not anticipate a detailed study of ante-natal and infant care practices. Nonetheless, the literature review and field work uncovered a number of relevant practices which are briefly mentioned here for the sake of completion. Due to the limited scope and the limited participation of the health sector in this study the findings on traditional infants care and related practices are not comprehensive or conclusive. They merely reflect concerns raised by those who did participate and require further investigation and documentation.

In South Africa, African women customarily breastfeed their children for up to two years and maintain constant close physical contact with their infants by securing them to their backs with a sling. (Nursing sister, Limpopo province & (Colletta, Balachander, & Liang, 1996: page 10)

Anthropologists agree that [these] African customs of infant care [such as] breastfeeding on demand for 2 or 3 years, immediate attention to infant cries.....frequent body contact and kinesthetic stimulation begin with [and further] the goal of survival.

Rights analysis of infant care practices

Breastfeeding is a key contributor to improved nutrition and also contributes to improved spacing between pregnancies which is beneficial for the health of both the mother and the child. (Colletta, Balachander, & Liang, 1996: page 10) Colletta et al observe that long intervals of between 24 and 40 months between pregnancies was a normative traditional practice common to rural areas. They further observed that this practice, that has largely been lost, was prolonged by breast-feeding and maintained by post-partum sexual abstinence; an arrangement protected by polygamous marriages. (Colletta, Balachander, & Liang, 1996: page 10)

3.5.1.2 Nutritional practices

Focus group participants in the Eastern Cape indicated that there is a practice which impacts negatively on the nutritional status of children. Given the lower status of children, they are the last to be fed and are often fed less nutritious food than their fathers and other elders.

Rights analysis of nutritional practices

Children's rights to nutrition, physical health and equality are undermined by the inequitable nutritional practice described above. UNICEF reports that 'the social status of children is generally low. Within the household, the needs of children are treated as secondary to that of adults. At a most basic level this affects food and nutrition. On a routine basis, children eat after their fathers and their mothers.' (UNICEF, 2008: page 19)

3.5.1.3 Herbal cleansing during pregnancy

In Limpopo and KZN caregivers and traditional leaders referred to a practice of herbal cleansing during pregnancy. Herbs are given to the pregnant mother for spiritual cleansing and ease of birth.

Rights analysis of herbal cleansing

Herbal cleansing can potentially impact on the health of the mother and the health and development of the foetus. In both provinces, nurses at the local clinics that were interviewed indicated that the

Department of Health and the local clinics have campaigns in place to stem this practice as the herbs used may cause a high risk of bleeding in pregnant women.

3.5.1.4 Traditional remedies to treat ill infants and children

Study participants advised that a number of traditional communities keep infants indoors for a few months after birth to protect it from harmful evil spirits “*ukuhabula imimoya emibi*” which are believed to be the cause illness in the children. When a child exhibits certain symptoms such as soft and sunken fontanel, produces stools with a particular colour, is constantly agitated “*umntwana uyethuka*”, and becomes limp, the traditional diagnosis requires a procedure called “*ukukhipha inyoni*” which is traditionally performed by experienced traditional healers and known elders with the necessary knowledge to deal with this phenomenon. In Limpopo, traditional healers perform a procedure called *ithusa*, which involves cutting the child’s skin at the joints.

Rights analysis of traditional infant treatment

The nursing sister at the local clinic in the Limpopo village that participated in this research project indicated that traditional remedies used on ill infants are potentially harmful to the child’s health. An example is *ithusa*, which holds a risk of infection for the child. In addition, the World Bank report specifically notes that customary or traditional treatment of diarrhea is inimical to the health of infants. (Colletta, Balachander, & Liang, 1996: page 10)

3.5.1.5 Facial scarification and digit amputation

Participants in all three provinces indicated that it was customary, more so in the past than today, to practice facial and body scarification (*ukugcaba/ukuchaza*) on children, or to cut off a digit of the small finger (*ingqithi*).

This was done for one of two reasons – either as a means of identifying a child as part of a clan or for curative or protective purposes. These are practices, which are spiritually significant, have been passed on from generation to generation. What emerged from the study was that there is a clear shift in these practices. Whereas in the past these practices were performed on newborn infants and younger children for identification purposes, the tendency these days is to perform them only for curative purposes – to cure spiritual or behavioural problems. Another observation that was made during discussions with children was that compared to the past, facial scarification marks were hardly visible on children’s faces as the incisions were not deep enough to leave lasting marks.

Rights analysis of scarification and digit amputation

One of the participants in the Eastern Cape indicated that she has personal knowledge of a child whose facial scarring had become infected and caused significant health problems for the child. When asked about the risk of infection, a nursing sister in KZN said that although she has never dealt with such a case of infection, she did not approve of the practice out of fear for the child’s health. These two inputs illustrate the potential harmful impact of these two practices which, within a strict legal framework, run counter to the rights of children to protection from physical harm and the right to health. Given the deep spiritual significance of the practices, and the measures that have already been put in place to minimise the impact on the child and his or her rights, there is a need, and an opening space, for further engagement around balancing the apparently opposing cultural and protection rights in the context of scarification and digit amputation.

3.5.2 Practices impacting on sexual and reproductive health of children

3.5.2.1 Customary gendered roles and relationships

As previously discussed, modern day African customary law is marked by gender inequality, with women playing a subservient domestic role. Women are socialized into this role from an early age as sexually passive, domestic creatures whose two main functions in life are to bear children and please men. (Shezongo-Macmillan, et al., 2007: page 67) In the context of HIV and AIDS, the resultant power imbalances in marriages, relationships and sexual encounters make it problematic for girls and women to negotiate the terms of sexual engagement and this puts girls and women at a higher risk of HIV infection. (Mswela, 2009)

Women in a study in Zambia described this risk shared by women in traditional communities across Southern Africa, including South Africa, as follows:

It is difficult for us to protect ourselves from infection because we are not the ones who make decisions about how and when to have sex. Girlfriends are in a better position to demand condom use than us. Demanding the use of a condom or saying no to sex within a marriage is unacceptable and problematic. (Shezongo-Macmillan, et al., 2007: page 68)

Rights analysis of gendered relationships

Mswela summarizes the ensuing harmful legal impacts of patriarchy as follows. She argues that women's right to equality is severely compromised by the imbalance in the power relations contributing to unequal treatment in the home. In addition, these "women's inability to make decisions concerning reproduction or the patrimonial affairs of the family not only impacts on their right to equality, but also on their right to human dignity". The consequences of this disempowerment create a heightened vulnerability to physical and sexual abuse, all of which at the end of the day erode women and girls' right to health, whether that is their reproductive health or their vulnerability to HIV and AIDS and other sexually transmitted diseases. (Mswela, 2009)

3.5.2.2 Sex education and taboos within families

As previously discussed, one of the commonly experienced parenting issues identified by all groups in parents do not talk to their children about sex, thus exposing children to the dangers and risks of HIV and AIDS and other sexual health dangers.

Rights analysis of communication taboos

Not only does this infringe on children's right of access to information, but it heightens the vulnerability, especially of young girls, to HIV infection and other STIs. In most sub-Saharan African countries, young women aged 15-24 years old are between 2-4 times more likely than their male counterparts to be infected with HIV. This is likely, in part, due to the fact that in Eastern and Southern Africa, young women (29%) have much lower levels of the comprehensive and correct knowledge of HIV and AIDS, than young men (38%), that is essential for their protection. The levels of knowledge are even lower in rural areas where only 20% of young women, compared to 38% of young men have the requisite knowledge. (UNICEF, 2010: page 32)

It is, however, very encouraging to note a significant exception to the customary lack of communication. When it comes to communicating about HIV and AIDS there is much greater degree

of willingness to talk openly and honestly as between the different generations. So whilst many focus group participants said that they felt less than comfortable or welcome to speak about their health and matters related to sex, many indicated that HIV and AIDS is the exception; that parents, grandparents, aunts and uncles talk openly and seriously about issues of HIV and AIDS.

This is an encouraging shift in customary attitudes to intergenerational communication. It is encouraging for a further reason: it provides evidence of the value of advocacy in shifting attitudes and perceptions that run counter to the best interests of the child. The last decade has seen a huge amount of advocacy on the HIV and AIDS front, at community level, family level, amongst traditional leaders and at other political levels. It has worked, and there is much to learn from the HIV/AIDS advocacy and communication strategies.

3.6 Criminal offences against or by children

3.6.1 Criminal offences against children

A key element of the realisation of the right to protection from abuse, neglect and exploitation is the successful prosecution of crimes against children. The rate of sexual abuse and exploitation and other violent crimes against children in Southern Africa is alarmingly high, although poorly documented. Data is very poor in South Africa. In 2009/10, the South African Police Service (SAPS) reported that over 56,500 children were reported to be the victims of violent crimes, including sexual offences, assault and murder. (South African Police Service (2010) in UNICEF 2011) This does not represent the full scale of the problem, as many crimes are never reported. (UNICEF South Africa, 2011: page 55). In addition to poor data and reporting, crimes against children are also poorly prosecuted despite the laws prohibiting sexual and physical abuse of children. These crimes are perpetrated most often by people closest to the children, and evidence suggests that the rate of domestic violence against women and girls is higher in rural areas. (Bonthuys & Curran, 2004)

Rights analysis – crimes against children

Various reasons exist for these high levels of violence, poor levels of documentation and poor levels of prosecution. In rural areas, a number of socio-cultural factors, relating to the prosecution of perpetrators of violent crimes against children, aggravate protection risks for children.

Poor reporting

As previously discussed, customary attitudes to discipline and loyalty to patrilineality where child-adult authority is deeply entrenched can lead to unquestioning subservience to male adults by children. This has contributed to a culture of silence amongst children who are inclined not to talk out against abusers. (Guma & Henda, 2004: page 105) Townsend and Dawes explain it thus:

Cultural scripts regarding respect and obedience to elders makes it probable that children do not speak out against abusers who are senior to them. If they do, they may even be punished. If the perpetrator is a member of the family (and most often a breadwinner) they may face the loss of a provider – possibly with dire economic consequences for the entire family. (Townsend & Dawes, 2004: page 66)

Poverty is a key driver of poor reporting rates of crimes against children. Often the male caregiver will not be reported because of a fear of losing his income. (Townsend & Dawes, 2004: page 67)

The failure to report is a link in a chain of risk factors contributing to the erosion of children's protection rights in these circumstances. As Townsend and Dawes go on to explain, the underlying cause of the silence is that "children's socialisation into obedience and silence, and their realistic fear of breaking such codes, may contribute to their abuse" as "under these circumstances, the perpetrator is emboldened to continue sexually abusing children".

A further cause of low reporting rates is poor knowledge levels of child sexual abuse. What was interesting to note is that the adults that participated in the KZN focus groups were not aware of the legal age of consent to sex. Poor knowledge of child abuse is in turn driven in part by socio-cultural factors. Guma and Henda argue that notions and awareness of child abuse depend upon a culturally validated definition of what constitutes "abuse": "cultural validation includes a set of community beliefs, ideas, moral values and a collection of standard norms adopted by individual members to shape a particular lifestyle and a standard moral behaviour". (Guma & Henda, 2004: page 96) This results in different boundaries being drawn in different groupings between conduct which is seen as abuse and that which is not. The danger here lies in the fact that conduct which is harmful to a child, but which enjoys "cultural validation" is not regarded as abuse by members of the community, and hence not reported, leading to the conclusion that "customary attitudes and practices cause widespread prevalence of violence, keeps it invisible and socially accepted". (The African Child Policy Forum, 2010: page 5)

Poor prosecution of crimes against children

In South Africa there is a poor prosecution rate of perpetrators of violence against children despite the fact that the Sexual Offences Act and Children's Act outlaw sexual abuse and require the imposition of harsh sentences. The reasons for poor rates of prosecution of crimes against children in rural traditional communities are diverse. In addition to obvious factors such as lack of access to courts, these include certain customary practices and the attitudes informing them.

One such practice which is regarded as contributing to poor prosecution rates is the customary law remedy for child sexual abuse known as *inhlawulo* or *ukugeza*. This remedy takes the form of the payment of a fine to the girl's parents, rather than pursuit of the matter through the criminal justice system.

In South Africa there may be no lawful recourse to this alternative customary remedy. Traditional courts do not enjoy jurisdiction over matters of child abuse and statutory courts are required to apply the clear and strong criminal laws and sanctions against perpetrators of abuse. Whilst this practice was, according to focus group participants, still happening in some communities, all the traditional leaders who participated in the study said that they had stopped this practice in their communities. They indicated that when a parent has neglected their child, he or she should come before the Royal Council and answer for their actions, but this is not the practice in the case of child abuse. Where the parent or anyone else has abused a child, the parents or other perpetrator are referred to the police and they draw the social workers in. They all recognise this is a criminal matter over which they have no jurisdiction.

Poor access to justice

In South Africa, poor reporting and prosecution of crimes against children may be driven by the lack of access to courts in rural areas. Many rural areas lack access to any or sufficiently resourced magistrate's courts. (Martin, 2010: page 243) Whilst there are 1,500 Customary Courts in predominantly rural areas, they lack the necessary criminal jurisdiction and may not issue protection orders. (Bonthuys & Curran, 2004)

3.6.2 Criminal offences by children

Children have a right to protection of their rights when in conflict with the law.⁶⁸ This right requires that children not be subject to torture, inhuman or degrading treatment or punishment (including corporal punishment) whilst in detention; the right to participate in criminal proceedings; and to social rehabilitation and re-integration into the community if found guilty of an offence.

In most rural communities, victims of crime often use alternative avenues to report crimes committed against them. Traditional authorities are the most common and accessible forums, and are therefore readily used by many victims. African traditional conflict resolution mechanisms are characterised by a focus on community reconciliation and restoring relationships between offenders, victims and their families and the community at large. (Mbambo B. , Undated: page 145)

This is true for the fora dealing with children in conflict with the law in customary settings in South Africa, which are by and large non-adversarial and more promotive of principles of restorative, rather than punitive justice. The KZN participants shared information about the *izibonda* forum. When crimes were committed by children, the custom was to call a meeting of community elders whose job it was to promote peace, reconciliation and restitution. They would discuss the problem with affected parties and try to come up with solutions. A common solution was to reprimand and monitor the child to make sure that the offence was not repeated. Similarly in the Limpopo community visited, the traditional practice was for the parent to bring the child before the Royal House for consideration of the matter and for disciplining the child. The referral of children to the traditional leadership has however diminished because, as explained by members of the Limpopo Royal Council, "parents discipline children themselves. It is only where a child is continuously and stubbornly badly behaved, that parents will look to the Royal Council to intervene through mediation and talking." The traditional leaders in the Limpopo village were very aware of the prohibition against corporal punishment as a form of discipline and indicated that this precludes them from disciplining the child by beating them. They further indicated that some of the parents in the village were also aware of the dangers of corporal punishment and were inclined to talk to their children, rather than immediately beating them. This observation was confirmed by a number of village children who participated in the research. Many of them said that there was no corporal punishment in their home; only two, one boy and one girl indicated that they experienced this form of punishment at home.

In addition to referrals to traditional leaders, children are also referred to traditional courts which impose various penalties, including a reprimand, a restitutorial fine or caning.

⁶⁸ ACRWC, Article 17; UNCRC, Article 37 and 40.

Rights analysis of customary child justice

It is of interest to note that the recently enacted South African Child Justice Act No 75 of 2008 has sought to embrace and promote the restorative and restitution-based child justice model common to customary jurisdictions.

From the preceding discussion it is clear that traditional child justice does provide a continuum of disciplinary practices, ranging from mediation, apologies, the payment of compensation, community services and fines in addition to corporal punishment. These offer unique, and in many cases constructive, remedial alternatives to corporal punishment which are respectful of children's rights to humane and constructive treatment when in conflict with the law. (Ngosa Lesa, UNICEF Zambia) Once again it is significant to note that the South African Child Justice Act has sought to embody principles strongly resonant of customary child justice, such as the provision of a continuum of disciplinary practices and constructive remedial alternatives to corporal and penal sanctions.

Corporal punishment was outlawed as a sentence by the South African courts as early as 1995 in the case of *S V Williams* (1995 BCLR 861 CC) (Sloth-Nielsen, Gallinetti, & (Eds), *Child Justice in Africa*, undated: page 23). Despite this and the subsequent law prohibiting corporal punishment as a sentence, it would appear that corporal punishment is still used in traditional settings against children who have committed a crime. This was confirmed by a focus group of traditional leaders in the Eastern Cape who admitted to using whipping as a form of punishment against children. For a significant number of parents who participated in the focus groups, beating in this context was not seen as a bad thing but as a corrective measure made acceptable by the motive behind it: "Children can be beaten with love, because as parents you would want them to grow up the right way."

3.7 Status and participation of children

3.7.1 Commencement and termination of childhood (age)

The UNCRC and the ACRWC define a child as anyone under the age of 18. "In customary law, age has no relevance in determining childhood or adulthood. Adulthood is marked by biological development and the undergoing of initiation ceremonies..." (Himonga in Zambia Association for Research and Development (ZARD), 2007) This customary approach which applies in South Africa as well, lies at the heart of many of the risks and rights transgressions canvassed in this paper. Child abuse for example, is only seen as child abuse if the victim is recognised as a child, which age can terminate as young as 11 years in the cases of children experiencing early puberty. Likewise, a child marriage within a customary framework could be limited in understanding to children who have not yet reached puberty.

3.7.2 The status, voice and participation of children

The statistics and social environment for children in traditional communities subject to customary law described in some detail in this chapter are indicative of their lower social and legal status. The low status of children in customary tradition is at one and the same time manifested through, and entrenched by the culture of silence and non-participation that permeates South African customary law. Children do not have a voice in family or community matters; their lowly status translates into a neglect of children's opinions. There was a strong consensus in all communities that participated in the study that children do not have a voice in household and broader issues, including the question

of the type of cultural practices in which they are required to participate. (Focus groups with caregivers and service providers in Mthathta, Eastern Cape)

Caregivers and traditional leaders were asked about customary attitudes to children's participation in day-to-day decision-making and issues that concerned the children. The answers were largely the same; that historically it has not been a customary practice. Many of the participating parents and traditional leaders said that it was not their tradition to consult children. However some participants in all three provinces said that increasingly, they may seek their views, especially the older children, on more mundane daily matters of direct relevance to them, such as choices regarding their education. The dominant position was well summed up by an NGO representative from rural KZN who said that:

Culturally adults do not talk one-on-one with the child; children are seen and not heard...; most parents dictate and therefore parenting styles are not participatory...Culture puts children in a particular setting in terms of rules – they have to obey, there is no room for negotiation. Rules take centre stage over the feelings, emotions and rights of children.

In addition to the absence of participation in the family environment, there are no avenues for the participation of children within traditional decision-making fora. The traditional leaders in the Eastern Cape and KZN agreed that the whole issue of children's participation in decision-making fora is an area that they have not paid attention to. They do not have a forum for children to voice their opinions. Occasionally children bring individual cases to the tribal authority. The Ngqeleni traditional leaders said that:

The truth is that we only talk about children when they have done something wrong, we call izimbizos to discuss troublesome children. When children in the village do good things we do not acknowledge them, we ignore them because we believe that if we praise them they will become proud and misbehave. We do not know how to talk to our children.

Rights analysis status, voice and participation

As such, it is evident that cultural and familial attitudes to the position and status of the child, and practices such as patriarchy, adult authority and authoritarian parenting practices, as well as the prioritization of the family's group interests over and above those of the individuals inhibit the status and consequently the rights of children to participate in decisions affecting them and to freedom of expression. (Ehlers & Frank, 2008: page 124) This was confirmed in a recent study conducted by Save the Children Sweden which found that:

It is not clear that children's participation and how it can be made meaningful is well understood in South Africa, even though there are commitments made to it in the Children's Act. Culturally the role of children is to be passive participants in the world of adults. (Save the Children Sweden Southern African Regional Office, 2010)

Chapter 4: Moving forward - Identifying the levers of change

It is evident from the discussions in the previous chapter that there are a number of customary attitudes, practices and laws that strengthen the protective environment and promote children's rights to parental care and protection from abuse and neglect; some of which have diminished over time. There are many practices, especially the older historical practices, which sought to protect women and children; which acknowledge their inherent worth and their worth to the family and community. However, this study has shown that many of these practices have become diluted, perverted or lost over time, marking a shift in how women and children are valued. For this and for other reasons, children living under customary law are exposed to a number of risks to their protection. The size and nature of the risk is however shifting as many of these practices are in a state of flux; many (but not all) are waning.

This chapter aims to identify the action that can and should be taken to reverse, modify or change the risky practices, to resuscitate the diminished protective practices and maximize the protection afforded by the current protective practices. It also aims to identify who the lead and supporting role players are, and the roles they should be playing to develop customary laws and practices in South Africa.

4.1 Promoting child protection in customary communities: What must be done?

Custom presents a shifting landscape - it is shaped in response to social, economic and legal forces. It has proven to be responsive to the international and African child rights agenda over the last decade, resulting in the moderation or abolition of some harmful practices such as virginity testing and forced marriages.

Social changes have seen the erosion of earlier practices to both the detriment and the benefit of children. For example, there is evidence of the dilution of the extended family and communal care ethic, of changing attitudes to gendered roles, and the incremental equalisation of the status of boys and girls in some communities.

It has been shaped into its current form by economic drivers such as poverty and the intrusion of the cash economy in rural communities. These economic pressures have tended to stifle the positive trajectory of customary law. This has, at times, resulted in the commodification of the girl-child and the resultant retention of harmful customary practices; and at other times the perversion of certain practices because of their income generating potential. A notable example is the current form of *ukuthwala* in South Africa.

As pointed out earlier in this report, the strength of customary law lies in its malleability. Its inherent responsiveness to external pressures creates the space for future development of the law so as to maximize its protective benefit for children. The constitutional recognition of customary law in South Africa provides strong motivation for the pro-active utilization of this space to develop customary law for the benefit of children. Given the recognition of custom as a source of law in South Africa,

and given the requirement that it must, as all other laws, comply with the rights guaranteed in the constitution⁶⁹, and given that children's rights are expressly protected, there is a strong legal argument that there is an onus on stakeholders to develop customary law so as to realise the protection of children's rights.

Mwambene and Sloth Nielsen have identified a number of ways in which customary law has been developed in South Africa by a number of role players, including traditional leaders, the courts and the legislature. They argue that customary law has been recognised as an "integral part of our law" and as an "independent source of norms within the legal system" (*Alexkor LTD & Another v The Richtersveld Community & Others*: para 51 in Mwambene and Sloth-Nielsen, 2011: page 3). They argue further that it must, as with any other body of law, comply with the constitution. In order to make it compliant, it has over the years been shaped and changed through various legal and quasi-legal processes, including: 'development' (defined as 'change/evolution or forward movement on a continuum, a departure from past practice'), 'recognition and reception', 'rediscovery', 'adaptation/adjustment/modification', 'regulation', 'registration', 'invalidation', 'prohibition', and 'harmonisation'. (Mwanbene & Sloth-Nielsen, 2010)

The description of these processes of change reveals the level and complexity of the potential within customary law for protecting children as well as the diversity of fora and agents capable of realising that potential through appropriate development of customary law.

4.1.1. Recognition and reception

Recognition does not involve any changes to customary practice, but rather the formal recognition of living practiced customs as an "integral part of our law" so as to render the attendant rights and responsibilities legally enforceable. (Mwambene & Sloth-Nielsen, 2011: page 3-4) The example cited by the authors is the case of *Maneli v Maneli*, discussed earlier in this report under the heading of customary adoptions, in which the High Court recognised customary adoptions for the purpose of creating an obligation on the adoptive parents to support the adopted child as required by the Children's Act 38 of 2005 and the Maintenance Act No 99 of 1998.

The courts are not the only fora with the mandate to recognise and integrate customary practices into the "law of the land". The legislature in South Africa has sought to promote positive cultural practices through the integration of positive practices into child protection legislation. Mwambene and Sloth Nielsen point to the Child Justice Act 75 of 2008 which "not only entrenches referrals to family group dispute resolution mechanisms as one of the diversionary possibilities,.....[in addition] the Act is predicated on the introduction of *ubuntu*, rooted in African humanist thought and carried through legal institutions in certain customary practices, as a founding value of the child justice system." (Mwambene & Sloth-Nielsen, 2011: page 17 citing Skelton, LLD thesis, 2006) In addition, the Children's Act also recognises and promotes African customary values. Himonga points out that it recognises the protective value within the extended family in its allocation of a role to extended family members in the protection of children's rights to parental care, the right to grow up with parents and the best interests of the child. A child's family is defined by the Act⁷⁰ to include extended family members, including grandparents, brothers, sisters, uncles, aunts and cousins. (Himonga,

⁶⁹ Section 8, 30 and 31 of the South African Constitution (Act 108 of 1996)

⁷⁰ Section 1(1)

African Customary Law and Children's Rights: Intersections and Domains in a new Era, 2008: page 77) As was noted elsewhere in this report, the Act also seeks to promote traditional notions of communal care. This has most recently taken shape in the development of a prevention and early intervention framework.

4.1.2 Rediscovery

Rediscovery is the process whereby customs that were practiced in the past, but which have largely fallen away, are revived and recognised as part of the living law of today. This has been done by the South African courts⁷¹ as well as the legislature in its attempts to revive the communal ethic of extended care and support through the Children's Act⁷² and the Child Justice Act⁷³ as discussed in the previous paragraph.

Similarly, civil society organisations have sought, through community-based child protection projects, to revive the communal and extended ethic of care. As previously discussed, these interventions seek to facilitate the development of networks of care and support for vulnerable children cutting across the full spectrum of possible caregivers - ranging from the extended family members, to neighbors, to active community-based volunteers - who identify, support and refer vulnerable children to state service providers.

4.1.3 Development

Development of customary law is required in terms of South Africa's constitution. The Courts in South Africa consider themselves mandated to change customary laws so as to align them with constitutional principles (Bhe v Magistrate, Khayelitsha Commission for Gender Equality as Amicus Curiae 2005 (1) SA 580 CC). They have engaged in this process of change on a number of occasions. This change can and has taken a number of forms, including 'adaptation', 'modification', 'regulation', 'registration', 'invalidation' or 'prohibition'.⁷⁴ Although cases in South Africa, such as Bhe and others did not deal directly with children's rights, they did, in invalidating customary laws such as the law of male primogeniture on the grounds of equality, improve protection for children living in customary jurisdiction by equalising their status, regardless of gender. The impact of decisions such as these, and the subsequent regulation of customary law through legislative interventions is succinctly summarised by Maluleke and Madonsela as follows:

All girl and boy children regardless of birth position, have equal succession rights; Children born in marriage and those born out of wedlock have equal rights to inherit
(Maluleke & Madonsela, 2004: page 40)

The legislatures has also intervened to change, regulate, require the registration of, or invalidate customary practices so as to minimise their harmful impact on women and children.

⁷¹ Mwambene and Sloth-Nielsen refer to the judgement in *Boikhutso Motsoatsoa v Johanna Roro and the Department of Home Affairs* as an example of rediscovery, in terms of which an archaic requirement previously required for the conclusion of a valid marriage was revived, although they express some reservations about whether the practice rediscovered were really custom or whether the court was inventing new law.

⁷² No 38 of 2005

⁷³ No 75 of 2008

⁷⁴ Other cases where the courts have changed customary law include *Shilubana et al v Nwamitwa et al* CCT 03/07 [2008] ZACC9 and *Mabuza v Mbatha* Case number 2839/01, High Court of South Africa, March 2003 in Mwambene and Sloth Nielsen;

In South Africa the Children's Act 38 of 2005 specifically prohibits, modifies and regulates a number of potentially harmful customary practices including child marriages, genital mutilation, circumcision and virginity testing.⁷⁵ In addition, there is the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, both of which regulate and require the registration of customary practices.

The development of customary law is however not only undertaken by the judiciary and the legislature. There are a number of examples of traditional leaders and families playing a pro-active role in changing practices that are harmful to children. In South Africa, a number of traditional leaders have spoken out publicly against the practice of *ukuthwala* as practiced today to the detriment of young girls. For example, the chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA) has spoken out against the current form of *ukuthwala*, he has said that times had changed and "Girl children are being encouraged to get an education... and no longer have to rely on their husbands." He further stated that the payment of *lobola* should not be commercialised; that "Parents should not force their children into a marriage...just because of dire economic circumstances." (Ross, 2009) There are a number of civil society organisations working with traditional leaders to address this harmful cultural practice. In one case, an NGO operating in KZN indicated that they are working closely with a traditional leader opposed to forced child marriages. Together they are strategising how to advocate collectively to convince parents and other community members of the dangers and illegality of the practice. Their partnership includes strategising how to get local courts, which are presided over by magistrates drawn from local communities, to actively prosecute cases. At present a number of the magistrates keep remanding rape cases perpetrated within the context of *ukuthwala*.

It is evident that there are a number of role-players that have and will continue to play a driving role in the development of customary law and practices. The following section aims to explore in more detail who the mandated custodians and developers of customary law are, and what role they can and should be playing in maximizing the protective environment for children living in customary communities. In addition, the following section aims to explore how these stakeholders can be encouraged to develop customary law as expeditiously as possible so as to harmonise African customary law and international and children's rights instruments like the UNCRC and the ACRWC.

4.2 Which role players are responsible for developing customary law?

4.2.1 Traditional custodians of customary law

The researchers asked the study participants who the custodians of customary law are. The responses were unanimous. The traditional leaders, together with the broader leadership collective are the custodians, the source, the interpreters and the enforcers of customary law. Traditional leadership institutions and structures include traditional leaders or chiefs, traditional courts, traditional counselors (the royal council), the family and the community (with a focus on the elders in the community).

⁷⁵ Section 12

4.2.1.1 Traditional leaders

South Africa's traditional leaders' mandate and powers

in South Africa, traditional leadership is constitutionally recognised.⁷⁶ The view of government is that:

The institution of traditional leadership occupies an important place in Africa life and, historically, in the body politic of South Africa. It embodies the preservation of culture, traditions, customs and values of the African people while also representing an early form of societal organisation and governance.

[Therefore] Traditional leadership not only has a place in our democracy, but has a key role to play in the transformation; to contribute to the restoration of the moral fibre of society and to play a role in the reconstruction and development of the country, especially in the rural areas. (Department of Provincial and Local Government, 2003:page 8)

It is regulated through a host of supporting laws such as the Council of Traditional Leaders Act No 10 of 1997, the Traditional Leadership and Governance Framework Act, NO 41 of 2003, the Traditional Leadership and Governance Framework Amendment Act No 41 of 2003, the pending National House of Traditional Leaders Bill, No 56D of 2008, and very significantly, both the Children's Act and the Child Justice Act which recognise the monitoring, mediation and reporting role of traditional leaders in relation to child protection issues.

The legal mandate bestowed on traditional leaders by this array of laws is to develop, enforce and monitor customary law, and to advise and engage with government in the development of legislation that impacts on customary laws and practices; to play a supportive and complementary role in the realisation of social and economic development of traditional communities; and to play a monitoring, mediation and reporting role in relation to child protection issues at a community level.

This mandate provides a compelling argument for traditional authorities to actively promote the well-being and welfare of children by changing harmful customary practices to be more sensitive to and promotive of children's protection rights as contained in the constitution and in the various international and African child rights treaties. This interpretation of the role of traditional authorities in the development of customary law appears set to become law. The pending National House of Traditional Leaders Bill No 56D-2008 expressly imposes on the House of Traditional Leaders the obligation to transform and adapt "customary law and custom so as to comply with the provisions in the Bill of Rights."

There is significant potential within the current and future traditional leaders to drive positive changes. This potential is attributable to the "forces of modernization [which] have helped the traditional leadership institution to be versatile and dynamic; formal education of kings in waiting has helped the institution to add value to the developmental goals of societies with traditional authority structures. Modern traditional leaders see themselves as 'rooted in – but not bound by – tradition'

⁷⁶ Section 211(2)

(Kind of Bafokeng, South Africa).” (Economic Commission for Africa, Southern Africa Office, 2007: page 25)

Logan (2008: page 5) and the Economic Commission for Africa (2007: page 16) argue that it is this adaptability of the institution which may be the reason for the ongoing, and increasingly modern-day positive perception, and consequent legitimacy of traditional leadership in South Africa. Both studies found that their “continuing importance in the social and political life of their communities, whether perceived as a positive or a negative, is virtually indisputable, especially in the cultural field.” (Logan, 2008: page 5) Surveys conducted by the Afrobarometer and the South African Social Attitudes Survey confirm that in South Africa (alongside other African countries) traditional leaders, chiefs and elders clearly still play an important part in the lives of many rural Africans. (Logan, 2008: page 10)

In the context of the current study, the relevance of the modern-day trust in traditional leadership is that it fosters legitimacy of the institution. “Legitimacy comprises the belief that those in power have a right to make binding decisions, and that these decisions ought to be obeyed even if one disagrees with a specific decision.” (Yul Davids in Stephen Rule & Zakes Langa, 2010: page 70) The legitimacy of traditional leadership is strong motivation for a wider recognition of this power and advocating for its use to change harmful customary practices and to resuscitate positive practices. If custom is changed externally by the legislature and/or the courts, there is the risk that the change will not gain traction at a grassroots level. To some extent we are seeing evidence of this in South Africa in the wide-spread disregard for the prohibition of virginity testing on girls and of circumcision of boys younger than 16 years of age.

This argument in favour of recognising the power of traditional institutions to change customary law is further strengthened by the argument that traditional leaders, as opposed to the legislature and the courts, are better placed to develop the law in context and in response to community needs. Change from within will be more responsive to the community context and the realities on the ground as well as of the traditional structures, like the extended family structure, which will make for stronger and more effective solutions. (Ozoemena & Hansungule, 2009: page 1) Mwambene and Sloth-Nielsen also point out the disjunctures caused by legislative and judicially driven law reform. They argue that the “statutory attempts to regulate legal issues derived from custom and traditional practice, as constitutionally required, and indeed also by international law, have been so fraught as to provide a beacon of contradiction and tension.that present law reform endeavours have simply repeated wholesale the mistakes of the positivist past, albeit now under the glare of constitutional scrutiny” and that “the case law that is emerging is indicative of a casuistic response, which does not conduce to legal certainty.”(2011: page 2)

Kanga argues strongly in favour of organic change from within; that traditional leaders “can be very instrumental in abolishing discriminatory cultures which impact negatively on women [and children].” In order to realise this potential, he asks and answers the crucial hypothetical question as to how one can spur this development on in the face of entrenched behaviours by, often the traditional leaders themselves. The example he uses is – “How to convince King Swati of Swaziland who ‘owns’ eleven wives that polygamy does not enhance women’s rights?” (Kanga, 2009: page 13) The answer he says lies in advocacy. “Education, trainings, awareness raising and good strategy are the keys.” In this regards he cautions against alienating traditional leaders with an unintelligible foreign language. He argues that “one of the best ways to educate traditional leaders is to use their

own language to convey the message: Make it intelligible; avoid looking down on their culture, but show them what is good in empowering women [and children].” (page 14) In this regard he makes specific mention of using the rights instruments that are uniquely African and have been developed by African member states. There is evidence of chiefs, including men, responding well to human rights and gender information and advocacy when it is packaged correctly.

In South Africa there is evidence of traditional leaders’ willingness to take a leading role in changing attitudes, customs and practices for the improved well-being of their children in their communities. As previously mentioned, a number of traditional leaders have taken up the cause of eliminating *ukuthwala*. There is further evidence showing how effective collective advocacy campaigns led by traditional leaders working in partnership with NGOs can be in bringing about changes in customary attitudes and practices, especially in the context of addressing gender-based violence and HIV and AIDS. The Ubuntu Institute and the Population Council of South Africa developed an advocacy campaign which specifically sought to draw in traditional leaders as key agents in the fights against HIV, gender based violence and sexual violence (SGBV). (Ubuntu Institute & the Population Council, SA, 2010: page 3) The programme met with a positive and proactive response from the traditional leaders. Capacity building workshops to improve knowledge of rights, processes and support services available for survivors of SGBV resulted in commitments by traditional leaders to lead the fight against SGBV. The advocacy strategies employed by these campaigns created the space for the revitalisation of positive and protective African attitudes through which traditional leaders could strengthen the traction of the relevant advocacy messages and objectives.

Some of the barriers identified as preventing the realisation of the full advocacy potential of traditional leaders and which these campaigns sought to address, included: a lack of knowledge; lack of effective referral systems; insufficient ties with formal court systems, the introduction of programmes by outsiders rather than programmes that are grown organically within the community; and the use of English and non-participatory styles of capacity building.

It is significant to note that in the Eastern Cape in South Africa, the traditional leaders and caregivers that participated in the various focus groups expressed gratitude at being afforded the space to openly discuss the impact of cultural practices on the well-being of children and the ways in which this could be changed. They all indicated that they would appreciate more opportunities to do this in the future.

4.2.1.2 The role of traditional courts

Traditional leaders play a key role in shaping customary law and practices through their judicial function. In South Africa, traditional leaders preside over customary courts, which are recognised by the South African constitution and various statutes. In this role they define and interpret customary law and settle disputes in accordance with customary law. (Department of Provincial and Local Government, 2003: page 23) These courts constitute the primary avenue for accessing justice by rural community members. They are valuable institutions because they “provide millions of South African access to justice they would not otherwise have. They are more accessible and affordable than existing formal courts and in general reflect the values of the people who choose to use them.” (Claassens, 2008)

The traditional courts enjoy jurisdiction over various civil and minor criminal matters in terms of which they apply customary laws . At present they enjoy jurisdiction over civil matters, including matters relating to custody and guardianship of children, customary marriages, over criminal matters of a less serious nature, and over cases of domestic violence. (Commission, South African Law Reform, 2003) This is however set to change when the Traditional Courts Bill, 2008 is enacted. The Bill excludes jurisdiction of traditional courts over all marriages, whether customary or civil, and over cases dealing with the custody and guardianship of children. In addition, traditional courts will not enjoy jurisdiction over cases of domestic, sexual and gender based violence and child abuse.⁷⁷ The Bill expressly requires that traditional courts apply and develop customary law so as to respect and further the rights in the Bill of Rights.⁷⁸

In summary, there is significant potential to advocate for traditional presiding officers to shape customary law so as to promote positive practices and change harmful practices through the traditional courts in South Africa. However, the realisation of this potential does require a closer working relationship between the presiding justices and the children's rights sector so as to build an awareness of, sensitivity to and respect for the child rights requirements in terms of the Bill of Rights and relevant child rights legislation in South Africa.

4.2.1.3 The role of traditional healers

During the study participants were asked what they thought of the role of traditional healers in promoting child health and protection. The responses were inadequate and too guarded to reach any specific conclusion. The Department of Health estimates that there are 2000 active traditional healers in South Africa and their involvement in people's health starts from pregnancy and continues until after death in the provision of spiritual services dealing with the afterlife.

South Africa has embarked on a process of recognising and regulating traditional healers and practices through the Traditional Health Practitioners Act No. 35 of 2004. The process of regulating traditional healers has come to a standstill and this is a cause for concern as it further compromises the health of people and children in particular. It is important to speed up the finalisation of the process and the establishment of the Traditional Health Practitioners Council in terms of the Act which will keep a register of traditional health practitioners, determine a code of professional conduct and ethics, including disciplinary procedures, and regulate and monitor traditional healing practices.

Traditional healers have a very important role to play in eliminating harmful practices and creating a protective environment for children. Their role in child protection has been acknowledged and promoted by the South African Children's Act, which classifies them (traditional health practitioners, separate from traditional leaders) as a category that is mandated by law to report child abuse. This role should be clarified with them through open dialogue, support and creating opportunities for them to work alongside the child protection system to promote a protective environment for children.

⁷⁷ Articles 5 and 6

⁷⁸ Article 2

4.2.1.4 The role of the family, elders, the broader community and children

It was noted by all participants that the family, the community elders, and indeed children themselves are important custodians of custom. They are ultimately the ones who determine, through regular practice, or not, the shape and continued existence of any specific customary practice.

It is significant that most of the focus groups observed fluctuating levels of adherence to certain, especially harmful practices within families within communities. Many families are today not as keenly observing, for example, strict gender divisions between the roles of girls and boys, communication with children on important health-related matters such as HIV and AIDS, and consultation with children in the family on matters of direct relevance to them, such as their education.

It is thus important to recognise and capitalize on the role of the family, elders, children and the broader community as drivers of the development of customary practices and law.

4.2.2 The role of the legislature, the executive and judiciary

Previous statements about the central role to be played by the traditional institutions are not to be interpreted as denying the critical role played by the legislature, the executive and the other court structures in South Africa in the development of African customary law.

The legislature has the mandate, which it has duly exercised, to develop customary law. However, evidence shows that legislative developments are more effective if done in meaningful consultation with traditional structures. There are a number of risks attendant on a failure to develop laws in consultation with these structures, including a lack of meaningful responsiveness to the situation on the ground in communities and a failure to accept, abide by and implement the governing laws. In South Africa, despite the participation of traditional institutions in the development of the Children's Act provisions on virginity testing and circumcision, there is evidence that traditional communities are paying scant regard to the regulation of these practices, thus raising questions about the effectiveness of the chosen method of inclusive development of the law.

The executive is responsible for the implementation of child protection laws, and in this regard should work closely with traditional structures. It is in this domain that meaningful effect can be given to South Africa's vision of traditional leaders as being partners in the development of rural communities.

A key mechanism used by the administrative branch of government to build multi-sectoral partnerships to facilitate the development of holistic and responsive programmes and to implement them, is the coordinating governance structure. The South African government has established a number of structures to co-ordinate the collective action of role players to advance the protection of children. These structures are ideally placed to advance the collaborative development of custom through the implementation of child protection programmes and services in rural communities.

These structures include:

1. The National Child Care and Protection Forum. It is headed by the Department of Social Development and is constituted in terms of the Children's Act.⁷⁹ Its purpose is to "facilitate the co-operation, co-ordination and integration of all government spheres and departments and civil society organisations in the implementation of the Children's Act and related matters." (Giese & Saunders, 2008: page 57) A representative from the forum's secretariat advised that to date there has been no representation of traditional court presiding officers or traditional leaders; COGTA is represented, but this department's attendance is sporadic. She did however add that they have recognised this gap and are working to ensure that these stakeholders are represented in the future. (Mpho Papale Policy, Legislation, Monitoring and Evaluation Chief Directorate: Children, DSD (SA))
2. The National Action Committee for Children Affected by HIV and AIDS (NACCA) is headed by the DSD. It operates at a national and provincial level. Its objectives are to "promote coordination between all stakeholders at all levels to promote collaboration between stakeholders to improve services and programmes for orphans and children made vulnerable by HIV and AIDS." (Giese & Saunders, 2008: page 84) As in the case of the National Child Care and Protection Forum, traditional institutions are not represented on the structure, however the secretariat has targeted their recruitment in this financial year. (Moses Ramufhi, Chief directorate: HIV and AIDS, DSD (SA))
3. The National Child Protection Committee and its provincial and local counterparts coordinate collective efforts for the prevention and management of child abuse, neglect and exploitation. Musa Mbere from the Department of Social Development advised that they have involved traditional leaders in the National Committee through their representatives and have been encouraging provinces to do the same in their provincial and local Child Protection Committees.⁸⁰
4. The South African National AIDS Council (SANAC) is a high level representative national body that provides strategic and political guidance to the South African government on HIV and AIDS. It "creates and strengthens partnerships for an expanded national response to HIV and AIDS in South Africa." (Giese & Saunders, 2008: page 71) The structure cascades down to provincial and local levels through the Provincial and Local AIDS councils. Traditional leadership (both leaders and healers) is represented on SANAC and the Provincial and Local AIDS councils.
5. The Child Labour Programme of Action Implementation Committee is headed by the Department of Labour. Its function is to oversee the multi-sectoral Child Labour Programme of Action (CLPA)⁸¹ and "to coordinate activities of various departments and organisations in accordance with the steps recommended in the CLPA." (Giese & Saunders, 2008: page 66) Representatives on the committee, as documented by Giese and Saunders, do not appear to include traditional leaders.

⁷⁹ Act 38 of 2005, Sections 4 and 5

⁸⁰ Private correspondence with Musa Mbere, 16 May 2011

⁸¹ The National Child Labour Programme of Action for South Africa: Phase 2: 2008 to 2012, The Department of Labour

Some of the key government departments which should, to the extent that they do not already do so, be encouraged to work in partnership with traditional structures include the Departments of Women, Children and People with Disabilities; Social Development, Health, Home Affairs, Justice and Constitutional Development, Basic Education and the Police in South Africa.

The role of the courts to develop customary law is well developed. This role has been actively fulfilled by the South African courts; however their role has been criticized by commentators such as Mwanbene and Sloth Nielsen. They argue that:

Remedies in this sphere areproblematic, especially as the case law that is emerging is indicative of a casuistic response, which is not conducive to legal certainty. (Mwanbene & Sloth-Nielsen, 2010: page 2)

It is perhaps for this reason that the courts themselves, as previously discussed, have indicated that it is indeed preferable that development takes place within communities themselves and that court decisions should serve to empower communities to fulfill this role.

4.2.3 Institutions supporting constitutional democracy

4.2.3.1 The South African Law Reform Commission (SALRC)

The SALRC is an advisory body which is mandated to facilitate the renewal and improvement of the law of South Africa (including customary law which has been declared by the courts to be part of the “law of the land”) through a process of legal review. This has resulted in the development of a number of laws that have effectively developed customary law.

4.2.3.2 Rights commissions

The South African Commission for the Promotion and Protection of the Rights of Cultural and Linguistic Communities (CLRC)

The CLRC is mandated to promote fulfillment of the rights of cultural, religious and linguistic communities and to promote peace, friendship, humanity, tolerance and national unity among and within such communities on the basis of equality, non-discrimination and free association. (SALRC, 201: page 58) It has expressly indicated that its functions in delivering on its mandate are to “assist communities in safeguarding the integrity of their cultural practices.....to help [communities] recover the diminished meanings, symbolism, values and heritage that guided and informed [their past practices].” (Commission for the promotion of the rights of cultural religious and linguistic communities, 2008: page 14) As such the Commission has a key role to play in the resuscitation of diminished positive traditional laws and customs that do, or have the potential to protect children.

South African Human Rights Commission (SAHRC)

The mandate of the SAHRC is to⁸²:

1. Promote respect for human rights and a culture of human rights.
2. Promote the protection, development and attainment of human rights.
3. Monitor and assess the observance of human rights in the Republic.

⁸² Section 184 of the Constitution

This mandate makes the SAHRC an ideal monitor of customary law and practice; an ideal partner in the development of practices which either offend children's rights or which can advance their rights; and an ideal driver of child rights education, capacity building and awareness-raising campaigns targeting communities, courts and leaders.

4.2.4 African Structures and Institutions

The African Union (AU) and Southern African Development Community (SADC)

The African Child Policy Forum argues that the AU (and by extension SADC) can play an important political leadership role in the development of African customary law on the continent. The AU has "the potential moral and political power and legal basis to influence the climate of public opinion in Africa, the tone of discourse and the behaviour of African governments to act in accordance with their international and national obligations to put children first." The Forum argues further that this can be achieved by lobbying the AU (and SADC) to make violence against children a priority area of concern; to establish a programme of cooperation with the UN special representative; to embark on a continent-wide campaign to promote non-violent and positive values; to prepare an African report in customary practices and violence against children; to promote national policy and legal reforms; and to put child wellbeing and violence against children on the political agenda by garnering political commitment of Africa's top political leaders to develop custom to protect children. (The African Child Policy Forum, 2010: page 6)

The SADC Council of Traditional Leaders

A SADC structure of particular importance is the SADC Council of Traditional Leaders. It is made up of chiefs in the SADC region who have come together to facilitate their participation in regional integration. The Council has assumed a strong rights promotion role in the "revival of the traditional African family support mechanisms that took care of orphans. Other areas identified for follow up include: lobbying for the domestication of ratified international human rights instruments so that they become implementable locally; and the promotion of women and children's rights." (Southern African Development Community, 2004) Professor Hansungule advises that the SADC Council of Traditional Leaders has not yet been formally launched, nor has the formal constitution been accepted by the General meeting. Its potential is thus likely to remain unrealised until this situation changes.⁸³

4.3 Conclusion

From the preceding review it is clear that there is a diverse and suitably mandated array of institutions and role players with the power to develop customary law. It is equally clear that deriving the maximum protective benefit for children from customary law and practices will not be achieved through action by only one or some of these institutions - all will have a role to play. It would be especially useful for these role players to be guided in their actions within a common child protection framework which highlights the areas of tension and necessary steps to, at one and the same time, promote and protect children's rights as well as positive customary practices. The next chapter will explore possible ways of facilitating the requisite change by the various stakeholders.

⁸³ Personal correspondence with Prof Hansungule, May 2011

Chapter 5: Recommendations

The previous chapter explored the possible methods of change and the role players that are mandated to change, monitor, revive or otherwise develop customary law so as to make it more protective of children and their rights. The following recommendations embody a number of suggestions as to how organisations like Save the Children Sweden and others can facilitate, support and expedite this process of change.

5.1 Cross-cutting recommendations

5.1.1. Encouraging traditional institutions to promote customary development

A number of traditional institutions have shown a willingness to challenge and change certain customary practices for the benefit of children. This reveals an underlying concern about the well being of children which lies at the heart of the various precedent-setting instances where children's protection has been prioritised over custom. This provides evidence of significant advocacy potential to foster organic change from within communities. The following recommendations centre on how to maximize this potential; how to support and promote organic community-based advocacy to advance the protection of children through the appropriate development of customary laws and practices.

Having said this, there is no denying that the intersection between custom and children's rights is fraught with tension; that at times the necessary changes require traditional leaders and others to change practices and attitudes which they themselves have practiced for a long time. This underlying tension has tended to manifest in an apparent resistance within traditional communities to children's rights; in hostility to child rights advocates, and ultimately in a divide between the children's and cultural/traditional sectors.

Most commentators agree that the route to follow to resolve this tension is to establish meaningful long-term constructive relationships based on trust between the children's sector and traditional institutions, and to foster organic change through education, training, awareness raising and empowerment of the traditional role players.

More specifically:

1. Target, mobilise and support the full range of traditional institutions with the mandate, capacity and inclination to develop custom. This includes chiefs, members of the traditional councils, religious leaders, traditional courts, community elders, and broader community members, all family members including fathers, mothers, grandparents and siblings, and of course children themselves.
2. Engagement with targeted traditional drivers of change should commence as early as possible in the life of any campaign. Ideally it should start at the point of development, and the relationship should be maintained up to the point of monitoring - which should be jointly undertaken with members of the traditional institutions.

3. Most commentators agree that advocacy campaigns must be framed to avoid alienating traditional leaders and communities. They recommend the framing of objectives, outcomes and interventions in the language used by traditional communities; and the tone should not be seen to look down on the customs in question.
4. A campaign which starts from a point of respect for and the desire to promote positive customary practices and attitudes is likely to engender trust and local identification with the campaign. In this regard it is recommended that advocacy initiatives commence with a recognition of, and intent to celebrate and revive the innate traditional appreciation of children as a “gift” to be nurtured and correlating protective customary core.
5. One of the barriers preventing the recognition and integration of positive customary practices into government and civil society services and support is a lack of knowledge and documentation of positive practices. This knowledge gap “makes it difficult to even think about integrating these practices into our programmes. [Consequently] there is no conscious thought in planning and analysis of good customary practices that service providers can build their programmes on.” (Mthatha service provider focus group)

There are two possible means of overcoming this knowledge gap. The one is through the creation of dialogue opportunities for various stakeholders to discuss, identify and interrogate how the practices in question can further child protection. This can simply be achieved in the space provided through focus group discussions and workshops such as the ones organised to collect information for this project. Almost all participants in the focus groups and workshops noted the value of these discussions. They requested that more be arranged, and specifically in the context of positive practices, the Mthatha social development representative asked that there “be more dialogue to reveal the positive practices and to develop ideas about how to integrate them into the work we are doing.”

Another way of facilitating this is through the development of advocacy material documenting positive practices (past and present) with recommendations about how the executive, legislature, traditional leaders and communities can revive those that have fallen into disuse and scale up the use of those currently in use, but only within smaller communities.

The CRLC is expressly mandated to help communities recover their diminished cultural practices, and would as such make an ideal partner in relation to initiatives under this recommendation. (Commission for the Promotion of the Rights of Cultural Religious and Linguistic Communities, 2008: page 14)

6. If one can successfully build a shared foundation premised on a common objective of the well-being of the child, it creates an environment more amenable to changing harmful practices. Commentators are unanimous; advocacy campaigns which focus on the harmful consequences, especially the harmful health consequences of a practice, rather than immediately focussing on the legal or human rights aspects “are more likely to succeed and be accepted by the target population.” (UN High Commission for Refugees, 1997: page 1) This

does not imply that one has to forego the legal or human rights goals, but rather that they be framed within a 'health consequences framework'.

7. A further set of recommendations related to the previous point stem from a number of observations made by the ELRU study into traditional practices in the Eastern Cape in South Africa regarding how the 'western' rights discourse can be made more intelligible and acceptable to traditional communities. (Early Learning Resource Unit, 2010)

The study noted the dominant use of metaphors by research participants to explain practices and their consequences. The use of metaphors was commonly witnessed during the course of this study as well. The use of metaphors is significant for two reasons. The first is that any advocacy messaging should, as far as possible, make use of local metaphors that resonate with the legal issues / concerns one is seeking to advance, thereby making the message accessible and acceptable.

The second, as noted by the ELRU researchers, is that the use of consolidated metaphors is illustrative of the way in which well-being of children is conceptualised and understood in traditional discourse – which is different to the conceptual tools of the 'western' legal rubric. The use of metaphors is indicative of the fact that in traditional discourse, the needs and rights of children are not separated out, nor are they separable. A complex and comprehensive range of interlinked rights are implicit in various traditional practices; they are unstated but present. The ELRU researchers conclude, it is submitted correctly, that the breaking down of children's rights into discreet elements (i.e. the clause by clause analysis often resorted to when following the UNCRC or ACRWC rights-based framework) potentially creates an unnecessary barrier. It has left parents feeling unnecessarily unable to make sense of these endeavors and has fostered unnecessary resistance to what appears to be an overwhelming array of 'imposed' obligations; when in fact many are already being practiced and realised through positive traditional practices.

8. In seeking to bring about changes in harmful practices, it is vital to understand and respond to the drivers behind the retention of a particular practice and develop appropriate interventions that address the underlying pressures. For example, it has been noted that a number of harmful practices have in part been retained and shaped by poverty. Projects for the development of harmful practices ought therefore to be developed in partnership with relevant role players to provide alternative sources of income or advance the economic development of the community.

In addition, advocacy messaging should speak the language of the affected family and address their needs by showing the improved economic benefits, alongside the other benefits for the child, the family and the community of changing the harmful practice. For example, stress the value of the income earning potential and economic independence of the girl child if she goes to school and is not married off early, in addition to the health and other benefits that will make her a productive and valuable member of her family.

9. There are times when it will be more appropriate and indeed necessary to resort to the rights-based formulation of messages – notably when developing training material for traditional leaders and courts that include sections on the international and African child rights treaties and national child protection laws. When this is necessary, it is recommended that the African rights-based instruments are used as far as possible to support arguments and requests.
10. It is strongly recommended that projects seek to build the child rights knowledge and capacity of traditional leaders and traditional and local courts, as well as their knowledge of their international, continental and constitutional obligations to prioritise children’s rights when there is a conflict with traditional practices. This requires the development of a training curriculum and the implementation of training on international, African and national legal tracts on children’s rights, as well as building of knowledge on the pro-active role they are legally mandated to take in reviewing the constitutional validity of practices and laws. Training should not be limited to presiding officers, but also include support staff in courts.
11. Training, capacitation and support for traditional courts should include drawing them into, and providing them with knowledge to enable them to be an integral part of community-based child protection networks as a capacitated link, into the referral chain. They should be capacitated to identify and refer cases of child abuse to the various support services.
12. In addition to targeting traditional leaders, campaigns should also target parents and community elders. This should be achieved through various capacity building, awareness-raising and communication strategies. Parents need to understand more about their own rights and the rights of their children, linked to their responsibilities. (Childline South Africa, Undated)

5.1.2 Legislative, executive and judicial advocacy

1. Advocacy should seek to promote the necessary national legislative and executive action to systematize and allow for implementation, budgets and enforcement of customary law developments. This requires that advocacy organisations work together, and be supported in calling for stronger national laws outlawing harmful practices and imposing sufficient penalties, subject to the proviso that such recommendations ought to be developed through meaningful consultation with communities.
2. Any calls for legislative or executive action must be evidence-based. There is a significant challenge in South Africa in moving forward on a sound evidentiary footing - a lack of sufficient data and research on customary practices and their impact on children. This was confirmed by David Chabalala from the Department of Women, Children and People with Disabilities who said that:

To be honest I think data is a gap and we need to take it head on so we can debate the issues on the basis of fact. The Minister is seeking to promote research collecting data.

There is thus a need to support and promote research in this domain as well as develop a shared national research and data collection framework. Ideally the development of this framework could be spearheaded by a research workshop which could be co-hosted by the various rights commissions, national statistics organisations and civil society research and child protection organisations.

3. Customary law should be subject to the same level of scrutiny, protection and engagement as is the case of the common and statutory laws. The Zambia Law Development Commission conducted an extensive consultative review of customary law in relation to its impact on women's rights. (Zambia Law Development Commission, 2008) There should be a similar review in respect of children's rights in South Africa.
4. Advocates should engage with the Ministry of Education on how the education system can promote positive cultural practices.

5.2 Recommendations relating to specific domains of practice

5.2.1 Advocacy to promote the development of customary upbringing and parenting practices

1. Positive traditional parenting and upbringing practices that contribute to the care and protection of children must be identified, recognised, and promoted by national laws and programmes as well as civil society's advocacy campaigns.
2. The communal care ethic and care by extended family members are all positive practices that should be revived and revitalized through statutory and programmatic interventions by the legislature, executive and civil society.
3. Legislation should recognise and regulate customary adoptions and foster care arrangements so that the practice may become more widely exercised, and so that children in these care arrangements may enjoy the same level of protection as children in statutory alternative care arrangements.
4. Positive traditional stimulation and development practices such as traditional games and folktales ought to be integrated into community-based early childhood development programmes, as well as the local education curriculum.
5. Messaging to promote positive and protective parenting should be as closely aligned as possible with traditional attitudes, knowledge and customs to improve intelligibility and acceptability. For example, campaigns targeting increased birth registration should articulate the relevance and importance of the issue in terms that resonate with customary attitudes and experiences.

6. There is a need for parenting and awareness-raising interventions to focus on the importance of equal sharing of parenting responsibilities to counteract the traditional tendency towards uninvolved fathers, and, more recently, the dominant practice of absent fathers.

Advocacy, parenting programmes and customary traditional institutions should restore and instil the positive customary vision of fatherhood which emphasised not only the rights, but also the responsibilities of fathers.

7. Advocacy efforts must target the elimination of the communication taboos around sensitive information of a sexual nature in the relationship between children and their parents. Communication programmes must be developed to build the communication skills and comfort levels between parents and children through appropriate parenting workshops.
8. Communication campaigns about the rights and needs of children and how to protect them should target those who are traditionally responsible for communicating with children such as grandparents as well as the young men and women that provide guidance to their younger counterparts.
9. In order to address the prevalence of corporal punishment, advocacy campaigns should seek to undo the cultural validation of violence by emphasising the harmful consequences of corporal punishment and other forms of violence against children. An emphasis on the physical and psychological harmful consequences is likely to start shifting the tendency not to view corporal punishment as child abuse. It is critical that traditional leaders be convinced about the link between the two and be outspoken in this regard as they are at the vanguard of cultural validation. As the space is created through a shift in attitudes, the opening space must be used to promote the validation of alternative forms of positive discipline. This can be achieved through the identification, articulation and sharing of traditionally contextual alternative best practices - forms of discipline used by caregivers in a local setting.
10. The prevalence of child labour in traditional families can ultimately be addressed through a three-pronged advocacy campaign: (1) through education; (2) through advocacy efforts to improve the socio-economic well-being of families; (3) and through legislative reform to strengthen the prohibition and sanction of child labour, including harmful non-economic and domestic forms of child labour.

5.2.2 Advocacy to promote gender sensitive practices

1. The development of early childhood development programmes and school curricula by government departments, NGOs and community members ought to challenge and question, rather than perpetuate the stereotypical gendered roles.
2. The prevention of *ukuthwala* can be achieved through a range of advocacy initiatives targeting different traditional institutions as well as the legislative and executive branches of government. There is a need to harness the positive energy among traditional leaders and allow them, with the support of government agencies and civil society, to lead the fight against child marriages. This will allow for greater credibility, at a community level, of the anti-

child marriage messaging and action. In this regard, it would be useful to work, not only with individual traditional leaders, but also through formal traditional leadership organisational structures like the various Houses of Chiefs and Traditional Leaders and the SADC Council of Traditional Leaders.

Given that the practice of child marriage is so closely aligned with family poverty, advocacy at this level should emphasise the positive income-earning benefits for children, as well as the family's well-being if girls do not marry early. At the same time advocacy initiatives should provide complementary community-development and social security alternatives to supplement family incomes.

In addition, traditional leadership institutions ought to be capacitated to be able to support parents who transgress the law against child marriages. Rather than seeing a situation of stigmatization and possible abuse of the rights to dignity and other rights of parents, traditional leaders ought to be in a position to refer the families in question to service providers that can provide parenting and economic support.

3. The children and gender sectors should join efforts in raising awareness and educating children, families and other traditional institutions about the harmful consequences of *Lobola* and polygamy for the girl child.
4. Addressing virginity testing in South Africa is a complex issue. On the one hand there is need to advocate for compliance with the legislative regulation of the practice, and on the other, there is a legal obligation to move towards realisation of the internationally prescribed ban of the practice. The latter requirement poses one of the most difficult challenges that will be faced in the facilitation of dialogue between children's rights advocates and traditionalists.
5. There is a need to advocate for different messaging and education to be provided to children during their initiation ceremonies. The custodians of these ceremonies, namely older women, men, religious and other traditional leaders should be targeted and engaged in a process of discussion about how the educational space within the ceremonies could be optimally used to benefit the child by teaching them age-appropriate information that is necessary to their health and development. The objective of these discussions should be the co-creation of a positive initiation curriculum. This process will be strengthened by highlighting the harmful health consequences of current traditional teachings, and will be further strengthened if parents are encouraged to actively participate in the development and monitoring of initiation ceremonies.

The education space offered through initiation ceremonies offers a unique and potentially positive space to properly prepare children for the challenges they will face in the next stage of their life and how to deal with them, as well as to provide them with information about their rights and responsibilities. This does however require a revision and deliberate oversight over the curriculum followed by initiation schools. It is recommended that advocacy efforts be directed towards collective community-driven development of a revised curriculum that is

rooted in positive practices, such as the revised vision of African fatherhood and which is formulated within a child rights framework.

5.2.3 Advocacy to address children's health

1. Parenting programmes should include and promote positive health practices such as extended breastfeeding of infants.
2. Dialogue around practices such as scarification and digit amputation should be promoted with a view to interrogating their cultural validation.
3. Sustained efforts should be made to break down the taboos around open communication about sexual and reproductive health between children and their parents. Education about the harmful consequences for children in the absence of open communication should be emphasised, along with support to facilitate the development of communication skills amongst children and their parents.

Advocates should also seek to increase knowledge levels of sexual and reproductive health matters amongst children directly. Appropriate information should in addition, be targeted at older caregivers and other community members who traditionally assume the bulk of the communication responsibilities.

4. Lessons may be learned from the successes and advances made by the HIV and AIDS sector in addressing harmful customary practices. One of the unique features in South Africa in this sector is the inclusion of the traditional institutions as key stakeholders in the National HIV and AIDS Strategic Plan. This means that there are clearly defined objectives and responsibilities assigned to the sector with regards to customary development. It would be valuable to see the same express inclusion of the traditional institutions in collaborative and coordinated child protection plans in South Africa, requiring traditional institutions to play a specific role and to account for fulfilling their specified responsibilities.

5.2.4 Advocacy related to criminal offences against and by children

1. All efforts must be made to raise awareness and the knowledge levels of all family members, community members, traditional leaders, and children of the laws and sanctions against child abuse, neglect and exploitation. In addition, children and families must be made aware of the redress avenues available to enforce their rights.
2. Traditional courts must be capacitated and enabled to be an effective link in a broader community referral network to support children that are abused.
3. In order to address the risk that children in authoritarian families are not inclined to report abuse, it is recommended that safe alternate reporting mechanisms be provided (such as confidential telephone reporting services).

4. Revitalize restorative non-adversarial justice forums through capacity building of traditional institutions on mediation and similar skills, including families, traditional leaders and courts.

5.2.5 Advocacy to promote the status and participation of children

1. Strong advocacy is required to create a space and responsiveness to children's participation within the family, community and traditional leadership forums. This can be achieved through the development of appropriate messaging within parenting programmes and through the support of more spaces at a community level for children to safely express their views, such as the Isibindi Safe Parks. Traditional leaders should be encouraged to create spaces for children's participation in decisions at a community level that impact on them.
2. Schools, religious and youth programmes should be approached to encourage and institutionalize the participation and presentation of plays and dances by children as a form of expression of their needs, rights and concerns so that they may become comfortable with exercising their voice and to foster a culture of expression and participation.

5.3 Conclusion

The preceding recommendations are but a few of many that could facilitate and expedite the organic development of customary law and practice. A closing recommendation is that a project of this nature should not seek to develop a comprehensive body of recommendations to be implemented by outsiders seeking change; instead the process of developing recommendations should itself be a consultative process through which all role players, especially the traditional institution representatives, deliberately engage in a collective process of plotting a way forward that is both meaningful for all, as well as effective to improve the protection of children in traditional communities.

This will lay a sound foundation for the ensuing partnerships and processes through which the organic development of customary law and practice will be facilitated so as to ensure a protective environment for all children living in customary jurisdictions marked by:

1. Customs and attitudes respectful of children's protection rights.
2. Government commitment to fulfilling protection rights through protective legislation and adequate enforcement of the laws.
3. Open discussions and engagement on child protection issues.
4. The provision of preventive and responsive services.
5. Support to ensure that those present around children have the capacity to protect them.
6. An aware and supportive public.
7. Children's knowledge and participation.
8. Monitoring and reporting of child protection issues.
9. Meaningful coordination.

It is hoped that this study will serve to found a number of the requisite discussions and engagements between the respective stakeholders, especially between the children's and cultural sector with a view to facilitating collaboration and partnerships in moving towards a more protective society for children in South Africa.

Annexure A: Description of communities visited during the research

KZN Site: Swayimane

Swayimane is an area which falls under Umshwati Local Municipality, a municipality under Umgungundlovu District Municipality. It is situated approximately 65 km east of Pietermaritzburg. It is a rural area with both traditional and formal housing. Like most rural areas, Swayimane has a traditional authority and though the community has to an extent adopted modern ways of living, it is one of those areas where traditional customs are still observed.

According to the 2007 community of Statistics South Africa,⁸⁴ Umshwati has a population of 113 054; women constitute 53.1% of the population; 52% of the households are headed by women; approximately 66.6% of households live below the poverty datum line and the unemployment rate is quite high; most of the unemployed people are supported by social grants.

Swayimane falls under a district municipality where it is estimated that 1 in 3 women aged between 25 and 29 years and over a quarter of men aged 30 – 34 years are living with HIV⁸⁵. This has left over 500 orphans and vulnerable children, most of whom are mainly receiving support from NOAH's Arch which has established two (2) operational sites in the area due to a high demand for services.

Eastern Cape Sites

Two sites were selected in the Eastern Cape. Qumbu in the Mhlontlo Local Municipality and Ngqeleni in the Nyandeni Local Municipality.

Both these areas fall under the OR Tambo District Municipality. This district is known to be the poorest district in the province. It has the highest poverty gap, which is 64.6%. In the past many households were supported by men who worked as migrant labourers in the mines but subsequently got retrenched, which has left many households with scant means to survive. 77% of the population can be regarded as indigent with either no income or an income of less than R800 per month. Government social grants are the main source of income for most families. With a population of 1 604 411 million, the district has 306 463 households with an average family size of 5.2. Women from the ages 20 upwards outnumber men whilst between 5 -19 years, males outnumber females. The district has a largely youthful population with young people aged 0– 19 making up the bulk of the population.

The areas are characterized by low density rural settlements and 79% of households reside in traditional or village type settlements, which are loosely scattered, surrounded by communal grazing land. Apart from a few trading stores there is very little indication of significant economic activity within these rural areas.

Although social change has led to a shift in traditional practices in the district, in the past few years there has been a re-emergence of old traditional practices of "*ukuthwala*" where young girls are

⁸⁴ Some of these characteristics are also cited in Mshwati Local Municipality Adopted IDP 2009/2010

⁸⁵ HSRC (2009). South African National HIV Prevalence, Incidence, Behaviour and Communication Survey, 2008: A Turning Tide Among Teenagers?

abducted on their way to or from school. Some are allegedly kidnapped from school during breaks and married off to older men in the village.

Limpopo site

The village of Maelula was selected for field work in the Limpopo province. It falls within the Vhembe district under the Makhado municipality. It is situated about 30 km North East of Louis Trichardt town.

It is subject to traditional leadership, headed by Chief Vhambelani Edward Ramabulana. Every block in the village has a councilor. These councillors, who include a number of women, make up the Traditional Council.

The traditional leadership estimates that there are approximately 10 000 residents in the village, including children.

Services available for the village include its own dedicated clinic, a social development office, 3 primary schools and one secondary school.

The primary source of employment is agriculture, but unemployment rates are high. The unemployed do receive grants for children and the elderly, and community members are active participants in a number of community development projects.

Annexure B: Interview and correspondence informants

<i>South Africa</i>	
National Government Departments	<p>Department of Women, Children and People with Disabilities – David Chabalala, Director, Children’s Rights and Responsibilities</p> <p>Department of Social Development – Mrs Musa Mbere</p> <p>NACCA (Social Development’s HIV and AIDS directorate) – Moses Ramuthi, Chief directorate: HIV and AIDS, DSD</p> <p>DSD, Child Care and Protection Forum: Policy, Legislation, Monitoring and Evaluation – Mpho Papale</p> <p>Department of Justice (Gender Division) – Joyce Maluleke, Director</p> <p>Commission for Cultural, Linguistic and Religious Rights – Commissioner Thoko Xaluva-Mkhwanazi, Head: Public Education and Advocacy</p> <p>South African Law Reform Commission – Fanyane Mdumbe</p>
Provincial and local	<p>Social Development social worker - Mr Mulaudzi(Limpopo)</p> <p>Social Development social worker (KZN)</p> <p>Department of Health nursing sister (Limpopo) – Sister Ndwamato Mainganye</p> <p>Department of Health nursing sister (KZN)</p> <p>Magistrate (KZN)</p>
Traditional Leaders	<p>Chief Vhambelani Edward Ramabulana (Limpopo)</p> <p>(in the other areas traditional leaders were engaged through focus groups)</p>

<p>Civil society organisations</p> <p>(Many additional civil society organizations participated in the broader civil society focus groups. The organizations listed here are in respect of those who participated in one-on-one interviews)</p>	<p>UCARC (E Cape) – Victoria Gregory and various other staff members who participated in the focus groups and workshop</p> <p>NACCW (KZN and Limpopo) – Zeni Thumbadoo, Deputy Director, NACCW</p> <p>Legal Resources Centre (KZN) – Willene Holness</p> <p>ChildLine SA – Joan Van Niekerk</p> <p>UCT Law Faculty –Professor Chuma Himonga</p> <p>Mpolweni Child Welfare Society - Ms Lungile Mazibuko, Social Worker</p> <p>Children in Distress (CINDI) Network (KZN)</p>
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