

**COMBATING TRADITIONAL PRACTICES HARMFUL TO
GIRLS: A CONSIDERATION OF LEGAL AND COMMUNITY-
BASED APPROACHES**

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Dedication

“I can do all things with Jesus who strengthens me”. I want to thank God for giving me the courage and strength in this endeavour.

Mom and dad: thank you for being my pillar of strength. To my sisters, Rudzani; Fhatuwani and Muvhuso, thank you for the words of encouragement. To my only brother Mukona, thank you for inspiring me.

And to my best friend Simukele, you are the best.

This dissertation is for all of you.

List of abbreviations and acronyms

ACRWC	(African Charter on the Rights and Welfare of the Child)
CEDAW	(Convention on the Elimination of All Forms of Discrimination Against Women)
CRC	(United Nations Convention on the Rights of the Child)
FGM	(Female Genital Mutilation)
ICCPR	(International Covenant on Civil and Political Rights)
UDHR	(Universal Declaration of Human Rights)
UN	(United Nations)
UNFPA	(United Nations Population Fund)
UNHCR	(United Nations High Commissioner for Refugees)
UNICEF	(United Nations Children's Fund)
WHO	(World Health Organisation)

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Abstract

Africa is a diverse continent. Different communities have different cultural practices they participate in. Children who form part of these communities are also expected to take part. Some of these practices are harmful to children. This is a human rights issue, given the clash between children's rights and the right to participate in one's cultural activities. This is a widely recognised fact. For this reason, the law protects children in this regard. The challenge is that despite these laws, children are still subjected to these harmful traditional practices.

Chapter 1: Introduction

1.1. Introduction

Africa is a diverse continent. Different cultures exist and are still, to large extent being followed. Amidst of all of this are children. Children often find themselves in situations where they are being forced to undergo certain traditional practices as part of their communities' culture and tradition. Some of these are harmful to them, and given the subordinate status that children hold in most African societies, they do not have a say in the matter. This is not the only challenge, girl children are faced with an even bigger challenge because of their subordinate status in relation to their male counterparts.

Children's rights as contemplated in section 28 of the Constitution¹ are in potential conflict with customary practices such as chastisement and initiation rites. Some of those who support customary law describe the Constitution, particularly the Bill of Rights, as a Western document which is foreign to Africa and threatens customary law.² They are reluctant to uphold the law contained therein.

This paper focuses on the harmful traditional practices that children, girls in particular are subjected to. These practices include Female Genital Mutilation/ Circumcision and virginity testing. Particular attention will be paid to the unique practices that the Venda tribe still carries out.

1.2. Problem Statement

The protection of children is provided for, both at a national and international level. The Children's Act³ protects children in South Africa on a national level and the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the ACRWC) as well as the United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC) protect them internationally. Girl children also enjoy protection under the Convention on the Elimination of All Forms of

¹ Constitution of the Republic of South Africa, 1996.

² W Lenhart "The role of the Courts in the conflict between African customary law and human rights" (200 5) 21 *South African Journal on Human Rights* 241.

³ Act 38 of 2005.

Discrimination Against Women (hereinafter referred to as CEDAW) as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as the Protocol on the Rights of Women).

However, although all these are in place, their application has proved difficult. With the issue at hand, namely harmful traditional practices, the main problem is that the executors of these practices do not do so in the domain of the government. They do not do this under the instruction of the State. It is therefore difficult to monitor and keep track of these activities. These practices also take place in very remote areas and villages where law enforcers cannot reach. Another problem is that these practices are also not recorded.

Children are acknowledged to be vulnerable members of society.⁴ For this reason, special protection is afforded to them.

1.3. Purpose of the investigation

The purpose of the investigation is to show that although the law is necessary to protect children's rights, it needs to be supplemented with other methods to make it effective. The wish to show the gap between the law and the practicality or lack thereto, and the desire to find the solution thereof inspired the study.

1.4. Research Procedure

Desk research was used to collect material and the law concerned. No formal interviews were conducted. Personal experience in some of the matters was of great assistance, and it was confirmed by relevant members of the community.

⁴ J Sloth-Nielsen "A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child" (2007) 7 *African Human Rights Law Journal* 19.

Chapter 2: International law and traditional harmful practices

2.1. Introduction

The CRC was developed as a consequence of the recognition that children were prime victims of the violation of human rights.⁵ The adoption of the CRC brought about a paradigm shift in how children are treated.⁶ This is due to the fact that the fundamental requirement for interpretation of the CRC is the recognition of the child as an individual human being and respect for the rights of children.⁷

2.2.1. Background to the CRC

The Preamble of the CRC recalls the basic principles of the United Nations and reaffirms that children, because of their vulnerability, need special protection.⁸ It emphasises the responsibility of the family, the importance of respect for the cultural values of the child's community and the vital role of international co-operation in achieving the realisation of children's rights.

The first comprehensive international law instrument was the Declaration of the Rights of the Child of 1924. The principles in this document formed the basis of the United Nations Declaration on the Rights of the Child which came into being in 1959. This instrument was not legally binding, it served as a guideline.⁹ Eventually, the CRC was adopted in 1989 and it was ratified by South Africa in 1995. The CRC is significant in the sense that no other treaty within the human rights field has been ratified by so many States. It is also noteworthy because of the fact that it has introduced a break-through from the previous international approaches to children's rights, in that it affords children the opportunity to have a say in issues concerning their well-being.¹⁰

⁵ As above. See also B Mezmur & J Sloth-Nielsen "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context" *African Human Rights Law Journal* (2007) 7, 331. See also "Virginity Testing and the Children's Bill" Discussion Paper, 11 October 2007, Children's Institute, University of Cape Town, 1.

⁶ B Mezmur "The African Children's Charter Versus the UN Convention on the Rights of the Child: A zero-sum game?" (2008) 23 *SAPR/PL*.

⁷ As above.

⁸ E Veerman *The rights of the child and the changing image of childhood* (1992) 181.

⁹ Sloth-Nielsen n 4 above, 19.

¹⁰ As above.

2.2.2. Content of the CRC

The CRC makes room for the empowerment of children. The categories of empowerment rights include all those rights that relate to a person being heard on matters affecting his or her life.¹¹ In the context of children, it would mean that children must not only be protected, they must also be given the opportunity to voice their opinions in issues that affect them.

Article 12 of the CRC provides that State Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.¹²

The CRC Committee has identified the so-called “four pillars” of the CRC which are considered general principles for the implementation of the Convention.¹³ The four pillars include the right not to be discriminated against (non discrimination);¹⁴ the right of children to have their “best interests” be a primary consideration in all matters concerning them¹⁵; the inherent right to life¹⁶ and the right of a child “who is capable of forming his or her own views....to express those views freely in all matters affecting the child”.¹⁷

It should be noted that during the drafting of the CRC, there was some controversy over including Female Genital Mutilation (hereinafter referred to as FGM) as a harmful practice and including Article 24(3).¹⁸ Senegal noted that there should not be an over-regulation of the different cultures. Sweden; Japan; Canada and Venezuela were of the opinion that the Working Group on Traditional Practices Affecting Women and Children had defined harmful traditional practices to include FGM and that the definition had been accepted by the World Health Organisation, thus it should be included.¹⁹ The practice of FGM was not expressly included in the CRC. It

¹¹ J Le Blanc *The Convention on the Rights of the Child* (1995) 157.

¹² As above.

¹³ Mezmur n 6 above, 3.

¹⁴ As above. Article 2 of the CRC.

¹⁵ As above. Article 3 of the CRC.

¹⁶ As above. Article 6 of the CRC.

¹⁷ As above. Article 12 of the CRC.

¹⁸ F Banda *Women, Law and Human Rights: An African Perspective* (2005) 226.

¹⁹ G Van Bueren *The International Law on the Rights of the Child* (1995) 307.

is however covered by Article 24(3) which provides that State Parties have to take appropriate measures with a view to abolishing traditional practices prejudicial to the health of the child.

Although the CRC has been acknowledged by many States, it has been subjected to criticism. One of the main concerns is that it is “anti-family”²⁰, in the sense that it gives children too much power thus taking away the control that parents feel that they ought to have over their children, this being understood to be the basis of unity in a family. The reason for this argument could be that parents feel threatened about the liberation of their children because all parents believe that they know what is best for their children. The shortcomings of the CRC in arrears such as “protection of the girl child” and the protection against harmful traditional practices are also examples of aspects of the Convention which have been criticised.²¹ A regional instrument was therefore necessary.

2.3. **The ACRWC**

The adoption of the ACRWC is in line with the United Nations’ recognition of regional arrangements for the protection of human rights. However, not many African countries have ratified the ACRWC.²² Mezmur²³ argues that the reasons could be attributed to the fact that some African countries were not aware of the existence of the Charter in its early days. He argues further that those who knew about the Charter did not see a point in ratifying it when they were already parties to the CRC.

The ACRWC is more appropriate in the African context because it addresses the issues that are unique in Africa and that were not well provided for in the CRC.²⁴ However, although the ACRWC addresses most issues pertaining to children in Africa, it is not without criticism. One of the criticisms is that there is some confusion regarding Article 31 that deals with children’s responsibilities. The argument is that

²⁰ Veerman n 8 above, 13.

²¹ Mezmur n 6 above.

²² As at February 2009, the ACRWC has been ratified by 45 out of the 53 countries in Africa. See http://www.wikipediaorg/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_Child.

²³ Mezmur n 6 above, 23.

²⁴ These issues include child marriage; parental rights and obligations; child labour and prohibition of use of children as beggars; (amongst other things).

given the fact that children are required to respect their parents and elders at all times, this could conflict with their rights to participate in decision-making.²⁵

On the issue of harmful social and traditional practices, the ACRWC is more extensive and more specific compared to the CRC. Article 24(3) of the CRC provides that State Parties have to take appropriate measures with a view to abolishing traditional practices prejudicial to the health of the child. This is stated only in the health context.²⁶ Whereas Article 21(1) of the ACRWC provides for the elimination of harmful social and cultural practices affecting the welfare, dignity and normal growth of the child. Article 21(1)(a) and (b) provide for the elimination of customs and practices prejudicial to the health or life of the child, and customs and practices discriminatory on the grounds of sex or other status. Girls have to undergo these practices simply because of their gender. This is in direct conflict with this provision. This is also supplemented by the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.²⁷ The Protocol recognises that although African countries are part of international treaties that protect the rights of women, women in Africa still remain victims of human rights violations.²⁸ Article 2(2) of this Protocol provides as follows:

“States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or stereotyped roles for men and women.”

Article 5 provides as follows:

“States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to

²⁵ See n 22 above.

²⁶ Mezmur n 6 above, 16.

²⁷ Adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005.

²⁸ Preamble of the African Charter on Human and Peoples' Rights of Women in Africa.

recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- (a) Creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- (b) Prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and paramedicalisation of female genital mutilation and all other practices to eradicate them.”

Creation of public awareness is one of the most effective ways to can bring about change. It is only when people know that their behaviour is inconsistent with acceptable standards that they may be willing to change. This is due to the fact that some people indulge in harmful traditional practices because they were brought up to believe that it is a way of life. They do not necessarily have the intention to harm, they are just doing what they think is right.

Unlike Article 3 of the CRC, the ACRWC does not refer to the “State” in describing the nature of the obligation not to discriminate against children. This implies that the obligation not to discriminate against children is placed on everyone. This is indeed necessary considering that those who undertake traditional harmful practices do not do so under State authority. These people include family members who arrange for the practices as well as other community members. It is clear that if the ACRWC had used the word “State”, it would have created many loopholes. This is another significance of the ACRWC in relation to the African community.

2.4. Female Genital Mutilation

2.4.1. Introduction

Female Genital Mutilation is an umbrella term used to describe different practices that involve the cutting of female genitals.²⁹ UNICEF adopts a more comprehensive definition of FGM. It defines FGM as “comprising all procedures involving the partial or total removal of the external female genital organs, or the injury of female genital organs, whether for cultural or other non-therapeutic reasons.”³⁰

Female Circumcision is a form of FGM, and for the sake of convenience in this dissertation, where the practice involves cutting, the words “Female Circumcision” will be used. Where the practice does not involve cutting, “FGM” will be used. This is due to the fact that the definition of FGM is broad enough to accommodate both practices.

Anthropologists have tried to establish the reason behind Female Circumcision. Some reasons given by the proponents of Female Circumcision are based on erroneous and outdated beliefs.³¹ The reasons often cited are the following: hygiene;³² guarantee of virginity of girls before marriage and their chastity during marriage by reducing their sexual urge,³³ a rite of passage without which a girl cannot marry,³⁴ prevents still-births because it is believed that if the clitoris touches

²⁹ W Benedek *et al Human Rights of Women: International instruments and African experiences* (2002) 269.

³⁰ The World Health Organisation adopts the same definition. The definition includes physical; psychological and human rights aspects of the practice. See also E Dorkenoo “Combating Female Genital Mutilation: An Agenda for the next Decade” *Women’s Studies Quarterly* vol 27, no ½, 88 in this regard.

³¹ See discussion below, n 32-41 in the text.

³² A Dundes “Is the cultural defence detrimental to the health of children?” in R Kappe & R Potz (eds) *Law and Anthropology* (1994) 31. See also A Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women’s Reproductive Health in Sub-Saharan Africa* (2002) 20. See also “Razor’s Edge-The Controversy of Female Genital Mutilation” Available at <http://www.mediterraneas.org/OR> <http://www.irinnew.org/webspecials/FGM/default.asp>

³³ F Scorgie “Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention” *African Studies* vol 61:1 2002, 55. See also Packer, n 32 above, 272. See also “FGM falsely touted as a panacea for HIV” Integrated Regional Information Networks. Published 27 January 2009. Available at <http://www.aegis.com/news/irin/2009/JR09131.html>. See also “Razor’s Cutting Edge-The Controversy of Female Genital Mutilation” n 32 above. See also P Liebhardt “A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting” available at www.mediterraneas.org.

³⁴ A Packer n 32 above, 20. See also T Kaime “The Convention on the Rights and Welfare of the Child and the cultural legitimacy of children’s rights in Africa: Some reflections” *African Human Rights Law Journal* v 5 (2005) 272. See also L Almroth *et al* “Male complications of Female Genital Mutilation” *Social Science and Medicine* vol 53 (2001) 1459. The rest of the paragraph originates from the same sources unless otherwise indicated.

the head of the emerging baby, the baby would die;³⁵ the clitoris would grow to the size of the penis;³⁶ enhancement of fertility;³⁷ improves male sexual performance and pleasure;³⁸ reduces teenage pregnancy³⁹ and prevents protracting genitalia.⁴⁰ They are so focused on these factors that the harmful effects thereof are completely ignored. Another reason that is not common is that it delineates maleness and femaleness.⁴¹ In other words, a girl is not “complete” without the operation.

2.4.2. Nature and procedure

There are two main forms of Female Circumcision.⁴² The two main forms are clitoridectomy and infibulation.⁴³ Clitoridectomy has two categories. Type 1 clitoridectomy involves the removal of part or the whole clitoris.⁴⁴ Type 2 clitoridectomy involves the excision of the labia minora and part of the labia majoris thereof.⁴⁵ Infibulations also has two categories. Type 1 infibulation involves the removal of the clitoris and the labia minora, and the incision of the labia majora to create raw surfaces.⁴⁶ Then raw surfaces are then stitched together, using a thorn to cover the urethra and the opening of the vagina with a hood of skin. A small opening is left for the passage of urine and menstrual blood. Type 2 infibulation is a milder form. It involves the same amount of cutting, but only two thirds of the labia majora are stitched together. The operation is performed by traditional excisors. A kitchen knife; a razor blade; a piece of glass or a sharp finger nail is used for the operation. These instruments are used repeatedly on all the girls, thus exposing them to the danger of blood transmitted diseases. The wounds are then dabbed with a wide

³⁵ Packer n 32 above, 20. See also Kaime n 34 above, 272.

³⁶ However, the irony in this is that other tribes, like the Venda tribe, actually do the opposite. They pull out the labia minora. This is proof that there is no consistency in these practices.

³⁷ Packer n 32 above, 20.

³⁸ It is believed that the opening of the vagina is reduced through circumcision and increases friction.

³⁹ E Bonthuys & E Curran “Customary Law and Domestic Violence in Rural South African communities” (2005) 21 *South African Journal on Human Rights* 264.

⁴⁰ Packer n 32 above, 20. It is submitted that this is a major inconsistency because if culture requires that female genitalia should not protrude, then why do other tribes have the practice of pulling out the labia minora?

⁴¹ “The rationale for male and female circumcision is that it is necessary to make a child a real male or female. This leads to a further explanation that ‘men are hard and women are soft’, and that the ‘soft’ part of the man’s genital, e.g., the pre-purice or foreskin and the hard part of the female genitalia, e.g. the clitoris (possibly erectile) must be removed in order to make them truly male-all hard and female-all soft.”

⁴² The forms illustrated in this definition exclude the expansion and pulling of the clitoris.

⁴³ N Toubia “Female Circumcision as a Public Health Issue” *The New England Journal of Medicine* September 15, 1994 vol 311:712. See also Dorkenoo n 30 above, 88.

⁴⁴ As above.

⁴⁵ “Razor’s Edge: The Controversy of Female Genital Mutilation” n 32 above.

⁴⁶ As above.

range of treatment. These include alcohol; lemon juice; ash; soil; herbal mixtures and cow dung. The legs are bound together until the wounds have completely healed. The healing process can take up to forty days.⁴⁷ They are then fed dry food to prevent them from urinating⁴⁸ because urinating aggravates the pain.

Female circumcision is so damaging that public health perceives it as an equivalent of the amputation of the penis.⁴⁹ It is not only a painful exercise, it also has serious health implications, and these implications are irreversible. Immediate complications include haemorrhage; shock due to blood loss and pain; blood poisoning; infections to the wound; acute urinary tension; injury to adjacent tissues and pelvic infections. Intermediate complications include dysmenorrhoea; cysts and hardening of the scars. Complications that may arise over a period of time include infertility due to chronic infection; difficulty in passing urine and menstrual blood and hypersensitivity. Complications also occur during sexual intercourse. These include difficulty in penetration; painful penetration; failure of the circumcision scar to dilate and lack of orgasm. Other consequences include anxiety and depression.⁵⁰

In 2007, a 12 year old girl died while undergoing Female Circumcision. She died of heavy haemorrhaging caused by the cutting.⁵¹ This truth was only unleashed when the doctor demanded to know the cause of the death before issuing a burial license.⁵² This incident occurred despite the fact that Female Circumcision had been officially abolished in that State (Egypt) in 1997. Therefore, although the law prohibiting it was in place, some people still deviated from it. For this reason, continued community education is necessary. It should be noted that traditional and religious leaders; young girls and their parents and everyone in the community are being educated about the dreadful harms of FGM.⁵³ This death and other reported deaths also led to stricter law enforcement. Female Circumcision is now seen as

⁴⁷ Dorkenoo n 30 above,87. The rest of the paragraph originates from the same source unless otherwise indicated.

⁴⁸“Stronger Campaign needed to end Female Genital Mutilation” Available at <http://www.mediterranean.org/erticle.php?id-article=375>.

⁴⁹ As above.

⁵⁰ Dundes n 32 above,32.

⁵¹ For full details, see A Ramsis “Abolishing Female Genital Mutilation” Available at <http://www.diakonia.se/sa/node.asp?node=2236>.

⁵² As above.

⁵³ As above.

a violation of law which is punishable. The doctor who had performed the operation had his medical license withdrawn and his private practice was closed down.⁵⁴

Although Female Circumcision has been acknowledged to be a practice that oppresses women, some women still favour its continuation.⁵⁵ Feminists see women's support for the practice as a consequence of their having been victims of patriarchal systems.⁵⁶ From a feminist perspective, FGM is seen as attributable to far-reaching male domination of women (and children) in traditional communities.⁵⁷

As already established, the CRC prohibits traditional practices that are prejudicial to the health of the child. It focuses on eliminating the negative elements of tradition.⁵⁸ Article 24(3) of the CRC provides as follows:

“States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment; degradation and abuse. More specifically, by ratifying the CRC, it undertook to take all appropriate measures to protect the child from violence; injury and abuse.⁵⁹

The CRC seeks to protect and preserve traditional values which are consistent with the rights of the child. A duty is being placed on children to uphold their culture. This is also provided for under the ACRWC which places traditional duties on then child. Article 31(d) of the ACRWC provides that the child shall have the responsibility to preserve and strengthen cultural values.⁶⁰ Therefore it shows that culture and

⁵⁴ As above.

⁵⁵ As above.

⁵⁶ Dundes n 32 above,32.

⁵⁷ H Dahan-Kalev “Cultural Rights or Human Rights: The case of Female Genital Mutilation” *Sex Roles*, vol 51.Nos 5/6, September 2004, 340.

⁵⁸ A Eide & W Eide *A commentary on the United Nations Convention on the Rights of the Child: Article 24 The Right to Health* (2006) 46.

⁵⁹ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051. Paragraph 40 of judgement.

⁶⁰ Article 31(d) of the ACRWC provides as follows: “Every child shall have the responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have

tradition are not being arbitrarily dismissed. They will be upheld, but only to the extent that they do not violate the rights of the child.

2.5. Some remarks by supporters of Female Circumcision

Supporters of Female Circumcision argue that people have a negative opinion about Female Circumcision. They argue that the issue is misrepresented as a form of child abuse and a tool of the female gender oppression.⁶¹ “The language and tone of the outcry in most case reflects a total lack of respect for the culture of other peoples’ cultures. Even more bothersome is the false portrayal; the falsification of statistics and successful demonization of the practitioners”, Iweriebor argues. She argues further that Female Circumcision is not performed to oppress, and that it is done with the noblest of reasons, the best intentions and good faith.

Governments that are against Female Circumcision are accused of valuing colonial or Western ways and abandoning their roots.⁶² They also argue that people do not understand the beauty of the practice, due to the use of Western cultural perspectives in assessing African cultural experiences as well as the discussion of the practice in isolation of its full cultural context. Apena argues that female circumcision is a collective experience and that there is no room for raising individual in this matter. She argues as follows: “Consequently, the young girls and women who undergo circumcision do not have individual legal status and rights apart from those of their communities and cannot challenge the collective wisdom of their communities. This study argues that circumcision is an issue that goes beyond gender, being affected by age; class and power. Therefore, for more effective analysis and interpretation of circumcision, youth culture in Africa needs to be examined in relation to the practice. African tradition does not ascribe equal status to both the young and the elderly”.⁶³ Her arguments seem uninformed. Arguing that children do not have individual human rights, is against any human rights instrument.

the duty to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society”.

⁶¹ Iweriebor “Brief Reflections on Clitorodectomy” *Africa Update Archives* vol III, Issue 2 (Spring: 1996) available at http://web.ccsu.edu/afstudy/upd3_2.html.

⁶² G Emeagwali “Female Circumcision in Africa” *Africa Update Archives* vol III, Issue 2 (Spring:1996) Available at http://web.ccsu.edu/afstudy/upd3_2.html.

⁶³ A Apena “Female Circumcision in Africa and the Problem of Cross-Cultural Perspectives” available at http://www.web.ccsu.edu.afstudy/upd3_2.html.

In fact, every human rights instrument, including those that advocate for culture, also emphasise the individual rights of human beings.

2.6. **The ACRWC and cultural practices**

The ACRWC is unequivocal with respect to the relationship between culture and children's rights.⁶⁴ It asserts its supremacy over any practice, whether traditional; cultural or religious, that is inconsistent with the rights and obligations under the ACRWC.⁶⁵ This is indicated under Article 21(1) which provides as follows:

“State Parties shall 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:

- a) those customs and practices prejudicial to the health or life of the child; and
- b) those customs and practices discriminatory to the child on the grounds of sex or other status”.

The ACRWC (like the CRC) encourages those cultural practices which advance the protection and promotion of children's rights and overrides cultural practices which have the potential to harm children.⁶⁶

Where a cultural practice relates only to girls, it infringes their right not to be discriminated against. Children's right not to be discriminated against is provided for at international level. Article 3 of the ACRWC provides as follows:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Chapter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group color, sex, language, religion,

⁶⁴ Kaime n 34 above, 288. See also C Himonga “African Customary Law and Children's Rights: Intersections and Domains in a New Era” in J Sloth-Nielsen *Children's Rights in Africa* (2008), 75. See also Dundes n 32 above, 17.

⁶⁵ As above.

⁶⁶ See Kaime n 34 above. See also Dundes n 32 above, 17.

political or other opinion, national and social origin, fortune, birth or other status”.

Since children who are affected by these practices are girls, it is important to look at other instruments that protect women (girl children in this case). The Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR) provide for the right to life and to liberty and security of the person.⁶⁷ The violation of autonomy and the infringement of the right to corporeal non-interference is an important reason for recognising FGM as a violation of the human rights of women (girl children).⁶⁸ Fleeing FGM is also recognised as a ground entitling a person to protection under the UN Refugee Convention of 1951.⁶⁹ Secondly, although CEDAW does not explicitly address FGM, its Committee has addressed the practice in a number of General Recommendations.⁷⁰ The Committee highlights the importance of working with religious and community leaders; politicians and professionals in order to address the issue.⁷¹ The Committee also points out that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles” was one of the main causes of FGM. The Committee suggested education; law reform and an attempt to cultural change, to be the solution to the problem.

A Special Rapporteur on Violence Against Women was appointed in 1994 to help highlight the urgency of eradicating FGM.⁷² The Special Rapporteur took up the definition of gender-based violence found in the UN General Assembly Declaration in 1993.⁷³ It identified FGM as a manifestation of gender-based violence.⁷⁴ The Special Rapporteur has stated that practices that constitute definite forms of violence

⁶⁷ Universal Declaration of Human Rights, Art 3 and International Covenant on Civil and Political Rights, Art 6(1)

⁶⁸ H Crawley *Refugees and Gender: Law and Process* (2001) 185-186.

⁶⁹ In 1996, Fauzia Kassindja was the first woman to receive asylum in the US on the grounds that she would be subjected to FGM if she was deported to her native land in Nigeria. See “Razor’s Edge-The Controversy of Female Genital Mutilation” n 32 above.

⁷⁰ CEDAW General Recommendation No 14 (Ninth Session, 1994), Female Circumcision UN Doc A/45/38.

⁷¹ CEDAW General Recommendation No 14, paragraph (a) (iii).

⁷² Banda n 18 above, 221.

⁷³ As above.

⁷⁴ Special Rapporteur on Violence against Women, its Causes and Consequences. Ms Rhadika Coomaraswamy Submitted in Accordance with Commission on Human Rights Resolution 1995/85 (5 February 1996) E/CN.4/1996/53.

against women cannot be overlooked nor justified on the grounds of tradition, culture or social conformity.⁷⁵

2.7. Female Circumcision in South Africa

There is no evidence of Female Circumcision being practiced in South Africa.⁷⁶ The Research Directory of Immigration and Refugee Board of Canada consulted sources and could not find specific reports on Female Circumcision cases being carried out in any parts of South Africa. In its report of Female Circumcision cases, UNICEF shows a statistics of 0% of Female Circumcision in South Africa.⁷⁷

The Children's Act⁷⁸ prohibits Female Genital Mutilation of children.⁷⁹ The South African Constitution also guarantees girls (women) those rights contained under CEDAW;⁸⁰ as well as the CRC and the ACRWC. These rights include freedom from harmful traditional practices, of which Female Circumcision is no exception.

The Inter Parliamentary Union (IPU) reports that even during the time when South Africa did not have legislation addressing the practice, in terms of South African common law, FGC would have amounted to assault. In terms of the Criminal Procedure Act 51 of 1977, FGC would have also amounted to a Schedule 1 offence, namely assault when a dangerous wound is inflicted. In these instances, the victim would have recourse to criminal courts. In terms of South African law of delict, FGC would constitute an infringement of a child's personal integrity. Recourse would be a civil claim for damages.⁸¹

⁷⁵ As above.

⁷⁶ Immigration and Refugee Board of Canada, South Africa: Reports of Female Genital Mutilation (FGM) and Female Circumcision; where practiced (urban and/or rural areas); the tribes; religions and cultures that practice it; whether it is legal or not; the government's position and the availability of State protection. Available at <http://www.unhcr.org/refword/docid/3f7d4e3e2a.html>.

⁷⁷ See http://www.unicef.org/infobycountry/southafrica_statistics.html

⁷⁸ Act 38 of 2005. The Children's Act defines genital mutilation as the "partial or complete removal of any part of the genitals, and includes circumcision of female children".

⁷⁹ Section 12(3) of the Children's Act provides as follows: "Genital mutilation or the circumcision of female children is prohibited".

⁸⁰ South Africa ratified CEDAW on 15 November 1995.

⁸¹ "Stop Violence Against Women: Female Genital Mutilation" Parliamentary Campaign, Available at <http://www.ipu.org/wmen-e/fgm-prov-p.htm>. See also Immigration and Refugee Board of Canada, South Africa: Reports of Female Genital Mutilation and Female Circumcision, n 76. above.

2.8. The Venda custom

2.8.1. U kwevha

The definition of FGM adopted by UNICEF is a milestone with respect to the unique “mutilation” of the female genitals that does not include cutting.⁸² The Venda tribe practices the so-called *u kwevha*. This is a form of FGM. This practice entails the pulling and expansion of the labia minoris.⁸³ As soon as girls attain the age of six, they begin to practice *u kwevha*.⁸⁴ They are instructed to do so by older women. They have to go to the river periodically to be inspected. They are inspected as a group to see the progress. If they do not have protracting labia, they are insulted. It is only those with protracting labia whose dignity will remain intact.

The purpose of *u kwevha* is to create more excitement for men during sexual intercourse. The belief is that the longer the labia minoris protracts, the better the sexual intercourse will be for the man. The practice has nothing to do with children as individuals, it is for the men, only it is performed on their body. This is a gross violation of their right not to be discriminated against. This discrimination is based on the grounds of gender. It is only girls who have to do this and it is all aimed at satisfying a man.

The practice of *u kwevha* does not only leave the genital area deformed, it is also a health hazard in that the expanded labia trap fluids produced by the vagina, this includes urine. In the event that they start indulging in sexual activities, it is likely that it will increase their chances of contracting Sexually Transmitted Infections by trapping male semen and other bodily fluids.

2.8.2. Vhusha

Among the Venda group, when girls have their first period, they must report to the elders.⁸⁵ On the same night, they have to dance naked. By doing this, they are completely stripped off of their dignity. The very next morning, they taken to the river where they have to get into very cold water this is called *u kamisa*. It is only when they start shivering that they are said to have completed the process.

⁸² Banda n 18 above, 209.

⁸³ “Growing up sexually: Vhavenda” available at <http://www.krugerpark.co.za/africa-venda.html>.

⁸⁴ H Stayt *TheBavenda* (1968) 47.

⁸⁵ “Vhusha” available at <http://www.sapir.ukc.ac.uk/KUB/vhusha/V-text1.html>.

Vhusha is characterised with activities such as learning foul language; learning how to respond to male advances as well as learning how to have sexual intercourse.⁸⁶ *Vhusha* also includes the process of *u davhula*. *U davhula* entails the insertion of the penis between the girls' thighs, to give them a feel, of the male genitalia and to mimic sexual intercourse.⁸⁷ This is ironic because those who advocate for the initiation claim that they intend to preserve virginity and promote chastity. But on the other hand, they demonstrate the wish to train girls sexually.

After completion of this process, sexual intercourse is also permitted as long as the girls are not penetrated.⁸⁸ This is the time when they actually exercise what they have been taught *u davhula*.⁸⁹

⁸⁶ J Blacking "Movement, Dance, Music and the Venda Girls' Initiation Process" in P Spencer (ed) *Society and Dance* (1985), 64.

⁸⁷ Stayt n 84 above, 209.

⁸⁸ As above.

⁸⁹ See definition above.

Chapter 3: Harmful traditional practices in the context of domestic law

3.1. Virginity testing

3.1.1. Introduction

Another practice that is aimed primarily at girl children is virginity testing. Girls often have to undergo this ritual when they reach puberty. Virginity testing entails looking for an intact hymen in the vaginal canal.⁹⁰ The test is unreliable because the hymen can be broken for other reasons other than sexual penetration.⁹¹ A girl may have been born without a hymen; the hymen can be ruptured during normal physical activities including sport, and it can be stretched open by the use of tampons. Sometimes it can even be broken as a consequence of sexual abuse.⁹²

Section 28 of the Constitution⁹³ provides that the best interests of the child shall be of paramount importance in every matter concerning the child. This includes the child's right to have their bodily integrity respected,⁹⁴ which links directly to virginity testing. This right is also provided for in section 12 of the Constitution which provides for freedom and security of the person, which includes the right to bodily and physical integrity.

Virginity testing not only disregards the dignity of the child, it also has a psychological impact.⁹⁵ In the event that the girl allegedly fails the test, she will be

⁹⁰ "Virginity Testing Puts South African Government, Zulu Tribe at Odds" Medical News Today. Available at <http://www.medicalnewstoday.com/articles/123522.php>. See also "Virginity Testing" Available at <http://webster.edu/~woolf/flm/virginitytest.html>. See also "Virginity Testing and the Children's Bill" Discussion Paper, 11 October 2005, Children's Institute, University of Cape Town, 5.

⁹¹ "Virginity Testing Discriminates on the Grounds of Gender Equality" Commission on Gender Equality : Media Statement, 11 September 2007. Contact Inquiries: Y Mogadime CGE Communication tel: 011 403 7182; fax: 011 463 7188.

⁹² "Virginity Testing" n 90 above.

⁹³ Constitution of the Republic of South Africa, 1996.

⁹⁴ Media Statement: Commission on Gender Equality, n 91 above.

⁹⁵ As above.

ostracised by other children and she will be labelled as being promiscuous.⁹⁶ Since the practice is primarily aimed at girl children, it violates their right to equality.⁹⁷

During the Middle Ages, there were other means used to detect virginity. These included urine tests.⁹⁸ It was believed that the urine of a virgin is clear and sparkling. The other test used was examining the shape of the girls' breasts. It was believed that a virgin's breasts would point up and be firm.⁹⁹ Sometimes when a girl got married, the bed sheets of the couple on the wedding night would be inspected to see if there was any blood on them.¹⁰⁰ It was believed that a virgin would bleed on her first sexual encounter.¹⁰¹

Proponents of virginity testing believe that virginity testing prevents pre-marital sex; HIV/AIDS and teenage pregnancy.¹⁰² This is achieved by the stigma attached to a situation where a girl is found not to be a virgin. This results in a lot of psychological pressure. As a consequence, girls often resort to extreme measures such as insertion of toothpaste or a piece of raw meat in the vagina, to mimic the presence of an intact hymen.¹⁰³ Some girls resort to anal sex, in order to preserve the intact hymen.¹⁰⁴ This increases their chances of contracting HIV/AIDS.

Opponents of virginity testing argue that the fear of detection of loss of virginity is used to control girls' sexual behaviour, while boys are free to do as they please.¹⁰⁵ This is an unfair burden imposed on girls.¹⁰⁶

⁹⁶ Women's Health Information Centre available at

<http://www.amaassn.org/special/woman/library/readroom/vol2839/sif90010.html>.

⁹⁷ "Virginity Testing and the Children's Bill" Discussion Paper, 11 October 2005, Children's Institute, University of Cape Town, 8.

⁹⁸ "Virginity Testing" n 90 above. See also <http://www.lynx.doc.neu.edu/kakaelly/virgins.html>.

⁹⁹ As above.

¹⁰⁰ See "Virginity Testing" n 90 above. See also <http://www.saartjie.co.za/feb/2000/hymen23.html>.

¹⁰¹ But the fact is not all girls bleed on their first sexual encounter. This is what girls are still told today. I grew up with this "knowledge" myself.

¹⁰² "Virginity Testing Puts South African Government, Zulu Tribe at Odds" n 90 above. See also Media Statement: Commission on Gender Equality n 91 above. See also "Virginity testing and the Children's Bill" Discussion Paper n 97 above, 6.

¹⁰³ L Le Roux "Harmful Traditional Practices (male circumcision and virginity testing of girls) and the legal rights of children" LLM Dissertation, University of Western Cape (2006) 67.

¹⁰⁴ F Mulaudzi "Women and Sexually Transmitted Diseases: An Exploration of Indigenous Knowledge and Health Practices Among the Vhavenda" Doctoral Thesis (Literature and Philosophy), Department of Health Studies, University of South Africa, 2003, 73. See also W Hlongwa "Teens turn to anal sex to keep virginity" South Africa: www.news24.com.

¹⁰⁵ Bonthuys & Curran n 39 above 624.

3.2. Virginity testing and the Children's Act¹⁰⁷

The Children's Act¹⁰⁸ addresses the issue of virginity testing. During the drafting process of the Children's Bill, a lot of commotion arose from the public. Traditional Leaders protested against the ban saying that it was an invasion of their cultural rights.¹⁰⁹ The Portfolio Committee on Social Development requested experts in academia; the Children's Bill Working Group; the Department of Justice and Traditional Leaders to make recommendations.¹¹⁰ Sibusiso Nkosi, from the National House of Traditional Leaders said the following:

"If you want to stay pure it means that you are not going to have sex, you know you are not going to get HIV/AIDS. So in other words, it encourages you to stay pure."¹¹¹ This is just one of the many comments that traditional leaders had to make. Their arguments circulated around the fact that virginity testing would prevent pre-marital sex, thus prevent teenage pregnancy and HIV/AIDS. The conditions under which virginity tests are conducted also pose health risks. These conditions expose children to HIV/AIDS¹¹² (that which they are supposedly trying to avoid). If the first girl being inspected is HIV positive and the same pair of gloves is used on other girls, they can all be infected with HIV.¹¹³

Nomagugu Ngobese, who says that she has trained around 800 virginity testers, said that "Human rights are individual rights, which is not the way for us. We live communally."¹¹⁴ Some supporters of virginity testing said that the ban of the practice was a sign that the South African government is adopting Western cultures.¹¹⁵ Phathekile Holomisa, the President of the Congress of Traditional Leaders said that the interpretation of the Constitution has been "negative towards African cultural practices".¹¹⁶

¹⁰⁶ As above.

¹⁰⁷ Act 38 of 2005.

¹⁰⁸ As above.

¹⁰⁹ "Virginity Testing and the Children's Bill" Discussion Paper n 91 above, 4.

¹¹⁰ www.childrenfirst.org.za

¹¹¹ As above.

¹¹² "Virginity Testing" see n 90 above.

¹¹³ There is no guarantee that the testers always use gloves. Some of them are so ignorant that they would not know the risk involved in not using gloves. See also <http://www.hst.org.za/update/44/policy>.

¹¹⁴ "Virginity Testing Puts South African Government, Zulu Tribe at Odds" n 90 above.

¹¹⁵ As above.

¹¹⁶ As above.

Virginity testing is not an effective way to achieve the intended goals. Educating children (both boys and girls) about sex; teenage pregnancy; condoms and HIV/AIDS is a better option to address these issues.¹¹⁷ However, proponents of virginity testing argue that this approach is wrong because it will make children curious and encourage sexual activity amongst children.

During the drafting process of the Children's Act, the Commission on Gender Equality (hereinafter referred to as CGE) made a submission to the National Assembly regarding the Children's Bill. Their submission was mainly about girl children. The CGE submitted that cultural as well as social responsibilities are disproportionately borne by girl children and women.¹¹⁸ This is true, given the fact that boys do not have to preserve themselves until marriage. In fact, it is shameful for young men to be virgins. This is impractical because boys must have partners in order to lose their virginity, but on the other hand, girls are expected to remain virgins.

The National Council of Provinces recommended that virginity testing should be restricted to girls over the age of sixteen years and it should be carried out with the consent of the child and after counselling.¹¹⁹ The proposals were accepted by the National Assembly and the recommendation about the age of the child was retained and is contained in section 12 of the Children's Act.¹²⁰ Section 12 of the Children's Act provides as follows:

12(4) Virginity testing of children under the age of 16 is prohibited

(5) Virginity testing of children older than 16 may only be performed –

(a) if the child has given consent to the testing in the prescribed manner;

(b) after proper counselling of the child; and

(7) The body of a child who has undergone virginity testing may not be marked.

¹¹⁷ "Virginity Testing" n 90 above.

¹¹⁸ Submission to the South African Parliamentary National Assembly by the Commission on Gender Equality: Portfolio Committee on Social Development, 10 August 2004, 4.

¹¹⁹ As above.

¹²⁰ Act 38 of 2005. Note that section 12 of this Act is not yet in operation. See the Children's Institute website.

The implication of section 12(5) above is that only children above the age of sixteen may be considered as candidates for virginity testing. Prior to the new law, children did not receive any counselling. They would all gather and lie on their backs as while the testers did their job. They would then be marked on the thigh as symbol of them having passed their virginity tests. This would put them in a vulnerable position, given the myth that sexual intercourse with a virgin cures HIV/AIDS.¹²¹ They would thus be at risk for seduction and rape.¹²²

Section 14 of the Constitution provides that everyone has the right to privacy. Virginity testing as a practice, infringes the right to physical integrity and it is an invasion of privacy.¹²³ Disclosing the results of the test to anyone else other than the child in question is a further invasion of privacy.¹²⁴

The Commission on Gender Equality also refers to the Preamble of the Constitution wherein it states that there is a need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. The Commission submits that virginity testing of girls will fail to heal the gender inequalities of the past.

¹²¹ “Virginity Testing and the Children’s Bill” Discussion Paper, n 97 above, 10.

¹²² “Virginity Testing” n 87 above. See also Mulaudzi n 104 above, 90. See also “Virginity Testing and the Children’s Bill” Discussion Paper, n 97 above, 8.

¹²³ Media Statement: Commission on Gender Equality n 91 above.

¹²⁴ As above.

Chapter 4: the culture defence versus the best interests of the child

4.1. Introduction

Those who compel children to undergo these practices (FGM and virginity testing) often raise the defence of the right to culture. Section 30 of the South African Constitution provides that everyone has the right to participate in their cultural life.¹²⁵ Section 31(1)¹²⁶ of the Constitution¹²⁷ provides for the right to participate in one's cultural practices. However, this provision is qualified by sub-section (2) of the same provision which provides that these rights may not be exercised in a manner inconsistent with any provisions in the Bill of Rights.¹²⁸ The right to participate in one's cultural practices is also recognised under Article 17(2) of the African Charter on Human and Peoples' Rights.¹²⁹ However, directly linked to exercising these cultural rights, is the violation of children's rights.

The interests of children that are likely to be affected in the execution of traditional practices include: the right to privacy; the right to dignity; the right to health and the right to participate in decision-making.

As already established, the CRC provides for the abolishing of traditional practices that are harmful to children's health.¹³⁰ The ACRWC asserts its supremacy over any practice, whether traditional; cultural or religious, that is inconsistent with the rights and obligations guaranteed under it.¹³¹ It is unequivocal with respect to the relationship between culture and children's rights.¹³² This is indicated under Article 21(1) which provides as follows:

¹²⁵ Section 30 of the Constitution provides as follows: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions in the Bill of Rights" The limitation in this provision is inherent. It is contained in the same provision.

¹²⁶ Section 31(1)(a) of the Constitution provides as follows: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language".

¹²⁷ Constitution of the Republic of South Africa, 1996.

¹²⁸ "Virginity Testing and the Children's Bill" Discussion Paper n 97 above, 1.

¹²⁹ Article 17(2) of the African Charter on Human and Peoples' Rights provides as follows: "Every individual may freely, take part in the cultural life of his community".

¹³⁰ Article 24(3) of the CRC provides as follows: "State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children".

¹³¹ Kaime n 34 above, 227.

¹³² As above.

“State Parties shall take all appropriate measures to abolish customs and practices harmful to the welfare, normal growth and development of the child and in particular:

- a) those customs and practices prejudicial to the health or life of the child

It has already been established that both FGM and virginity testing carry harmful effects, and these are irreversible.

4.2. **Cases where the culture defence was raised**

In the case of *Mabuza v Mbatha*¹³³ the Constitutional Court made the following observation: “Any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny.”¹³⁴

In the case of *Christian Education South Africa v Minister of Education*¹³⁵ the Constitutional Court was confronted with two conflicting rights. The rights to religion and culture were in conflict with the statutory provision prohibiting corporal punishment. This was in terms of section 10 of the South African Schools Act.¹³⁶ The contention was brought by a voluntary association asking that the section be declared unconstitutional as it violated the rights to culture and religion as provided for under sections 30 and 31(1) of the Constitution respectively.

The court a quo had dismissed the application. On appeal, the Constitutional Court acknowledged that section 10 of the South African Schools Act limited the parents’ religious rights to chastise their children. The crucial question was whether the limitation was reasonable and justifiable. The Court made the following remarks:

“It is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter-some overlapping, some competing. The parents have a general interest in living their lives in a community setting according to their religious beliefs.”¹³⁷

¹³³ 2003 (7) BCLR 743 (CC)/ 2000 (4) SA757 (CC).

¹³⁴ Paragraph 30 of judgement.

¹³⁵ 2000 (5) BCLR 491(CC).

¹³⁶ Act 84 of 1996.

¹³⁷ Paragraph 15 of judgement.

The Court went further to say:

“The child, who is at the centre of the enquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the same child is also an individual person who may find himself ‘at the other end of the stick’, and as such is entitled to the protection of sections 10, 12 and 28.....”¹³⁸

“The overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated.”¹³⁹ This raises the issue of dignity of two parties being in conflict. In order to arrive at a just solution, the court would have to look at the extent that the parents’ exercise of the right limit the child’s right to dignity. Tradition forms an important element of dignity. So when that right is being limited, it follows that dignity would also be impaired.

On the one hand, the dignity of the parents may be negatively affected when the State tells them how to bring up and discipline their children and limits the manner in which they may express their religious beliefs..... On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting.”¹⁴⁰

The Court held that the State was under an obligation to uphold children’s rights.¹⁴¹ After applying the 5-step approach as provided for in section 36¹⁴² of the

¹³⁸ As above.

¹³⁹ As above.

¹⁴⁰ The Constitutional Court applied section 36 of the Constitution, the limitation clause. It also referred to the case of *S v Manamela* where it was stated that: “In essence, the court must engage in a balancing exercise and arrive at a global judgement on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure of the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected”. See paragraph 31 of judgement.

¹⁴¹ Paragraph 40 of judgement.

¹⁴² Section 36(1) provides as follows: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:
a) the nature of the right;

Constitution, the limitation clause, the Court found that the rights to religion and culture were justifiably limited in the circumstances.

The level of justification that is required to warrant the limitation of a right depends on the extent of the limitation.¹⁴³ The more invasive the infringement, the stronger the justification must be.¹⁴⁴ The limitation clause is a central tool with which a human rights violation may be justified by other constitutional values.¹⁴⁵

Another cultural defence was raised in the English case of *R v Adesanya* (1974).¹⁴⁶ Mrs Adesanya, a Nigerian woman living in England and who was part of the Yoruba tribe had cut her two sons' faces as part of celebrating the festive season. She was charged with assault. Her defence was that she had made these marks on their faces so that they could perceive themselves as part of the Yoruba tribe. From her cultural perspective, the failure to make the facial marks would be condemned. Without these marks, her sons would be unable to participate in Yoruba activities. The Court rejected this argument and held that the practice was harmful to children.

It is expected for parents to feel that in order to fulfil their parental responsibilities, they have to teach their children norms that they have inherited from previous generations. The pressure is even more in the Black community. Parents will sometimes uphold harmful traditional practices for fear of being labelled as having abandoned their roots and adopting the Western culture.

4.3. **Competing rights: the best interests principle's paramountcy**

The best interests of the child are of importance in every matter concerning the child. For this reason, the "best interests" principle was adopted and it is internationally

-
- b)the importance of the purpose of the limitation;
 - c)the nature and extent of the limitation;
 - d)the relationship between the limitation and its purpose and
 - e)less restrictive means to achieve the purpose

¹⁴³*Manamela* at paragraph 34.

¹⁴⁴ Submission by the Commission for Gender Equality n 118 above, 4.

¹⁴⁵ Lenhart n 2 above, 248.

¹⁴⁶ Cambridge Journals vol 24, issue 1, January 1975, 136. Cambridge: Cambridge University Press. Available at <http://www.journals.cambridge.org/action/display/aid=14797712>.

recognised.¹⁴⁷ It applies to every matter concerning the child.¹⁴⁸ This principle connotes the yardstick by which to measure all actions affecting children.¹⁴⁹ Article 41(1) of the ACRWC provides as follows:

“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

The best interests of the child principle entails that every child has inherent right to life; survival and development.¹⁵⁰ All actions concerning the child should take full account of the best interests of the child, and the child has the right to express their opinion freely.¹⁵¹

There is an apparent conflict in the CRC between a child's autonomy rights¹⁵² and the issue of legal paternalism, namely the rights of parents to assist the child in making decisions.¹⁵³ This would be the case where a child asserts her views by refusing to undergo FGM/virginity testing, and the parents' understanding is that it is for the child's own good.¹⁵⁴ Parents are likely to have this concern in communities where marriage still forms an integral part of a girl's life and where FGM and virginity testing is a prerequisite for marriage.¹⁵⁵ Parents should exercise their responsibility over children in a way that is consistent with upholding the child's best interests.¹⁵⁶

The “best interests of the child” principle was explored in the case of *M v S (Centre for Child Law Amicus Curiae)*.¹⁵⁷ The case dealt with an appeal wherein a mother of three dependent children had been convicted of fraud and sentenced to

¹⁴⁷ C Davel & A Skelton (eds) *Commentary on Children's Act* (2007) 2-9. It is also provided for under section 28(2) of the Republic of South Africa, 1996.

¹⁴⁸ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

¹⁴⁹ Mezmur n 6 above, 18.

¹⁵⁰ A Lloyd “A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child” *African Human Rights Law Journal* vol 2 2002, 25.

¹⁵¹ As above

¹⁵² Article 12 of the CRC.

¹⁵³ Banda n 18 above, 226.

¹⁵⁴ As above.

¹⁵⁵ J Kabereri-Machaira “Female Genital Mutilation and the Rights of the Girl Child in Kenya” in W Ncube (ed) *Law, Culture and Children's Rights in Eastern and Southern Africa: Issues in Law and Society* (1998), 56. See also Packer n 32 above, 20. See also Kaime n 34 above, 272 and Almroth *et al* n 34 above.

¹⁵⁶ M Freeman “Cultural Pluralism and the Rights of the Child” in J Ekelaar & T Nhlapo (eds) *Changing Family* (1998) 289.

¹⁵⁷ 2007 (12) BCLR 1312 (CC).

imprisonment. This clearly had a direct impact on the children seeing that the mother was a primary caregiver. The Court made reference to section 28 of the Constitution and stated that this section “must be seen as responding in an expansive way to our international obligation as a State Party to the CRC.”¹⁵⁸ The Court said that in order to give effect to the enjoyment of childhood, children must be able to live in an environment free from violence, fear and avoidable trauma.¹⁵⁹ As already established, FGM can result in the child being traumatised for the rest of her life, which will in turn affect her sexually. This trauma can be avoided by simply not performing the operation.

4.4. **Participation**

A longstanding traditional value exists, that is the high value placed on child protection at the expense of child participation.¹⁶⁰ Parents make decisions for their children, especially in matters having long term effects. The rights of children to consent to issues concerning them have not been traditionally encompassed in childhood.¹⁶¹ In most African societies, the right to consent distinguishes childhood from adulthood.¹⁶² The moment a child starts asserting their views, the parents usually respond by saying that the child is being disrespectful and that if they feel that they are adults, they should move out of the house and find a place of their own.

Section 10¹⁶³ of the Children’s Act¹⁶⁴ provides for the right of the child to participate and express their views in all matters concerning them and the right of their views to be given due consideration. This right is also provided for in the ACRWC.¹⁶⁵

Although participation is explicitly provided for, its application is problematic. Consent is also problematic. A vast majority of girls consent to FGM and virginity testing

¹⁵⁸ Paragraph 16 of judgement.

¹⁵⁹ Paragraph 19 of judgement.

¹⁶⁰ G Van Beuren “Children’s Rights: Balancing traditional values and cultural plurality” in G Douglas and L Sebba (eds) *Children’s Rights and Traditional Values* (1998), 17.

¹⁶¹ Lloyd n 150 above, 16.

¹⁶² As above.

¹⁶³ “Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views by the child must be given due consideration”.

¹⁶⁴ Act 38 of 2005.

¹⁶⁵ Article 7 of the ACRWC provides as follows: “Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.” See also Mezmur & Sloth-Nielsen n 5 above, 345.

because of fear of stigmatisation.¹⁶⁶ Another reason is ignorance.¹⁶⁷ Sometimes even those who know their rights may do so just to be “part of the group”. Participants who appear to participate voluntarily do not do so freely, they are influenced by social pressure driven by culture.¹⁶⁸ Some girls may be above the age of sixteen, which is the consenting age, does not necessarily mean that they have the capacity to make rational decisions as well as the necessary comprehension of the implications of their decisions. The level of maturity plays a role. The legislature placed the age of sixteen as a benchmark for virginity testing, but one has to acknowledge that children do not mature at the same pace.

¹⁶⁶ Advocate T Thipanyane of the South African Human Rights Commission holds the same view. See www.abc.et/au/ogi-bin/common.

¹⁶⁷ “Action on Gender Equality, Women’s Empowerment and Ending Violence Against Women in Africa ” Issue Paper 1, The Sixth African Development Forum, 19-21 November 2008, Addis Ababa, Ethiopia .

¹⁶⁸ V Louise “Virginity testing in South Africa: Re-traditioning the post-colony *Culture, Health and Sexuality* (2006) 8 (1):20. Parental compulsion and duress also contribute towards the involuntary “consent” that children may give for virginity testing. See Commission for Gender Equality Media Statement n 91 above.

Chapter 5: Conclusion

5.1. Introduction

The expansion of children's rights movement and the increasing recognition showed worldwide to children's rights shows that there is a common understanding of the need to set basic minimum standards to which States must adhere.¹⁶⁹ One has to acknowledge that the human rights approach in protecting children against harmful practices has influenced the enactment of legislation in different States.¹⁷⁰ Be that as it may, the law does not appear to be the most popular tool in eradicating the practices.¹⁷¹ This is due to the fact that the law is not the best way to deal with issues that are so deep rooted in cultural beliefs.¹⁷² Most States have legislation prohibiting FGM.¹⁷³ But this has proved not to be effective.¹⁷⁴

Participants at the Global Consultation on FGM have called on religious and traditional leaders to dispel myths that are attributed to the continuation of the practice.¹⁷⁵ Religious and traditional leaders have a great influence on society. This will be subsequently indicated.

Although many States are attempting to abolish FGM together with its harmful practices, some communities remain reluctant. For example, in Mfuni village, Cameroon, a Bishop was refused an audience by the Chief when he wanted to address the community about FGM. He decided to confront the Chief about this matter. The Chief got angry about this and he warned the Bishop to watch his back.

¹⁶⁹ Banda n 18 above, 229.

¹⁷⁰ The Inter-Africa Committee on Traditional Practices has adopted a Common Agenda for Action on Zero Tolerance for FGM/C by 2010. It has also declared the 6th of February as "International Day of Zero Tolerance Against FGM".

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ These countries include Benin; Burkina Faso; Central African Republic; Chad; Cote; d'Ivoire; Djibouti; Egypt; Ethiopia; Ghana; Guinea; Kenya; Niger; Senegal; Tanzania; Togo and Nigeria. See Centre for Reproductive Rights, available at www.crip.org Some States had to criminalise the practice as a consequence of having been recipients of people fleeing from FGM. These States include Australia; Belgium; Canada; Denmark; New Zealand; Norway; Spain; Sweden; United Kingdom and United States. See www.crip.org

¹⁷⁴ As above.

¹⁷⁵ "The Female Genital Cutting Education and Networking Project" Available at <http://www.fgmnetwork.org.gonews.php?subaction=showfull&id=11865193748>.

The Bishop was subsequently killed and the suspects who had allegedly killed him confessed to having been sent by the Chief.¹⁷⁶

Sometimes children believe that these practices are a part of their culture and identity that even when the law abolishes them, they opt for performing the operations themselves. In Kenya, the girls of Meru District resorted to cutting themselves consequent to the ban of female circumcision.¹⁷⁷

In December 2005, West African religious and traditional leaders met with political officials and committed themselves to eradicate FGM.¹⁷⁸ They also highlighted that abandoning the practice is not to reject traditional or religious values. Other countries that are of the view that eradicating FGM is by no means abandoning culture include Burkinafaso.¹⁷⁹ They also raised an important point when they said that traditional and religious leaders are vital to changing the societies' attitudes towards FGM.¹⁸⁰ Another valid point was raised by Abdoul Aziz Kebe, an expert in Islam; population and development when he said: "The problem is we talk about it [FGM] in our workshops and conferences, but we do not integrate it into our sermons and media programmes, largely because it is easier to simply lay down a moral law than engage in scientific explanations for barring FGM."¹⁸¹

Melegue Traore, a traditional Chief and former President of Burkina Faso's National Assembly said the following during a conference organised by UNICEF (In Senegalese Capital). "We are in no way abandoning African culture when we abandon FGM." He went further to say that as a traditional leader, he had a lot of influence. Therefore it is important to target religious and traditional authorities when addressing these issues.

¹⁷⁶ A Arrey "Female Genital Mutilation in Cameroon-Man of God killed by Chief's henchmen". Available at <http://www.fgmnetwork.org/articles/arrey-cameroon.php>.

¹⁷⁷ Banda n 18 above, 230. See also "Action on Gender Equality, Women's Empowerment and Ending Violence Against Women in Africa" n 167 above.

¹⁷⁸ West Africa: Religious leaders denounce FGM" Available at www.fgmnetwork.org/gonews.php

¹⁷⁹ "West Africa: Rejecting FGM not an affront to tradition" available at <http://www.escueladefeminism.org/spin.php?article51>.

¹⁸⁰ As above.

¹⁸¹ As above.

5.2. Alternative rituals/rites

In most countries, FGM serves as an initiation rite.¹⁸² It serves as a symbolic transition from childhood to womanhood. Therefore in efforts to eradicate it, this must be taken into account. Some of the most successful efforts include places where FGM was replaced with “initiation without mutilation/cutting” programs.¹⁸³ This means that girls still undergo initiation, but in less harmful means. These countries include Ghana and Kenya.¹⁸⁴

The purpose of these rites is to uphold and maintain the cultural and educational elements attached to the “ritual”, whilst abandoning the harmful effects thereof.¹⁸⁵ One of the new rites is called *ntanira na mugambo* which means “circumcision through words”.¹⁸⁶ All the formalities that would accompany FGC are still followed, namely: the week of seclusion, which would traditionally be used for the “genital cutting” to heal, is now used to impart family life skills and “traditional wisdom”.¹⁸⁷

A certain tribe in South of Malawi used to have a practice called the *fisi*. In terms of this practice, during the initiation of girls, a man would be allowed into the initiates’ compound. This man would then have sexual intercourse with all of them.¹⁸⁸ A group of human rights activists approached them and asked them why they did this. Their response was that by having a man have sexual intercourse with these girls, trains them to become better wives because no man wants an inexperienced woman for a wife.¹⁸⁹ On this account, one can argue that they had good intentions, because according to them, an “experienced” wife would then bring happiness into the family.

¹⁸² “Gambia takes on as National Program UAB Project to abolish FGM” Published 5 February 2009. Available at <http://www.eurecalert.org/pub-releases/2009-02/uadb-gto020509.php#>. See also “Action on Gender Equality; Women’s Empowerment and Ending Violence Against Women in Africa” n 167 above.

¹⁸³ M Sarkis “The Female Genital Cutting Education and Networking Project: Female Genital Cutting: an introduction” Available at www.fgmnetwork.org/intro/fgmintro.php. See also Ibhawoh “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” *Human Rights Quarterly* 2000 vol 22, 857.

¹⁸⁴ As above.

¹⁸⁵ “Razor’s Edge-The Controversy of Female Genital Mutilation” n 32 above. See also “Gambia takes on as National Program UAB Project to Abolish FGM” See n 182 above.

¹⁸⁶ M Reaves “Alternative Rites to Female Circumcision Spreading in Kenya” Africa News Online. Available at <http://www.africanews.org/specials-fgm.html>. Gambia has created a national programme based on the “Initiation Without Mutilation” method. See www.eurecalert.org/pub-releases/2009/02-uadb-gto0200509.php#. See also Ibhawoh n 183 above, 858.

¹⁸⁷ As above.

¹⁸⁸ Kaime n 34 above, 236.

¹⁸⁹ As above.

The human rights activists had to explain to them the dangers associated with the practice, particularly HIV/AIDS. They explained to these people that if they continued the *fisi* practice, there would be no “happy family” because the wives would be sick from HIV/AIDS or even dead. As a consequence, the *fisi* practice has been abolished.

It appears that there is an emerging trend, namely medicalisation of Female Circumcision.¹⁹⁰ The aim is to minimise immediate health complications, including pain and bleeding.¹⁹¹ But this does not begin to solve the problem. Children need to be completely free from this harmful practice. It is not enough to simply minimise immediate health complications. Under no circumstances should Female Circumcision be performed.¹⁹²

The UN, UNICEF and WHO have considered FGM to be a violation of human rights.¹⁹³ They have also made recommendations to eradicate the practice.¹⁹⁴ However, trying to fight FGM on legal terms has proven to be ineffective since those who practice it usually do not report it. FGM is also usually practiced in remote places and villages where government officials do not have easy access to.¹⁹⁵

Article 2(f) of CEDAW gives room for the possibility of internal reform of cultural norms which will hopefully result in the eradication of discriminatory ones.¹⁹⁶

5.3. **Recommendation**

International and national cooperation is not enough. Anthropologists, educators and activists have to go to the villages and educate people about FGM and its effects.¹⁹⁷ FGM can successfully be addressed by the “grassroots approach” which would take cognisance of all aspects of particular cultures and try to work within that system of

¹⁹⁰ P Liebhardt “A Holistic Approach to Abolish Female Genital Mutilation/ Cutting”, November 2007.

¹⁹¹ As above.

¹⁹² Declaration by the United Nations Population Fund (UNPFA); the World Health Organisation (WHO) and the United Nations Children’s Fund”.

¹⁹³ Sarkis, n 183 above. See also “Razor’s Edge-The Controversy of Female Genital Mutilation” n 32 above.

¹⁹⁴ As above.

¹⁹⁵ As above.

¹⁹⁶ Banda n 18 above,305.

¹⁹⁷ As above

beliefs to eradicate the practice.¹⁹⁸ The UNFPA refers this as the “culture lens” approach.¹⁹⁹ This approach is an analytical programming tool that helps policy-makers and development practitioners to understand and utilize positive cultural values in order to reduce resistance.²⁰⁰ In other words, a thorough exploration of the values and beliefs that underlie the practice is imperative.

A thorough understanding of different cultures is necessary. Human rights (children’s rights) practitioners have to understand that by merely drafting legislation²⁰¹ and policies aimed at protecting children’s rights and imposing certain standards, they cannot achieve the purpose. It becomes effective when integrated into other aspects of comprehensive eradication strategies.²⁰² The better protection of children’s rights can be better achieved by a constant dialogue between legislation drafters; government and communities.²⁰³ With the knowledge and understanding that change cannot be imposed from outside, the UNFPA also promotes community dialogue with law-makers.²⁰⁴

There is usually a clash between the universal discourse of human rights and collective cultural rights.²⁰⁵ An example is the subordinate status of women and children in Africa, while the universal human rights standards guarantee equality. Other cases would be instances where culture encourages forced marriages; early marriages and child labour. Among the Venda culture, women are subordinate to men.²⁰⁶ The discrimination begins at birth. When a boy is born, there is much celebration. But when a girl is born, people simply carry on with their lives. South Africa is one of the most culturally diverse countries. This necessitates the thorough understanding of different cultures in order to respect and protect children’s rights.²⁰⁷

¹⁹⁸ As above

¹⁹⁹ Liebhardt n 33 above.

²⁰⁰ As above.

²⁰¹ Ibhawoh n 183 above, 857.

²⁰² As above.

²⁰³ As above, 238.

²⁰⁴ Liebhardt n 33 above. This point was also raised on a TV show called 3 Talk that is hosted by Noeleen Maholwana-Sanqu, on SABC 3 on the 16th November 2009. The topic of the discussion was “Culture and Morality”

²⁰⁵ Ibhawoh n 183 above, 835.

²⁰⁶ Mulaudzi, n 104 above, 23.

²⁰⁷ “Violence Against Women: Harmful traditional and cultural practices in the Asian and Pacific region” Based on the report of the Expert Group Meeting on Regional Strategies for Implementing the Recommendations from the Secretary General’s In-depth Study on All Forms of Violence Against Women, with particular emphasis on

Prohibition alone is also not sufficient.²⁰⁸ FGM and virginity testing are so deeply rooted in certain communities and is sometimes referred to by members of those communities as important in defining their identity.²⁰⁹ If the children's rights discourse is to be meaningfully applied, the reasons for which FGM and virginity testing are performed must be understood and must be met with compelling arguments to the contrary, but within a cultural lens.²¹⁰

5.3.1. Empowerment of victims

The importance of educating girls cannot be underestimated.²¹¹ This way, they will be empowered. Since children are brought up to believe that harmful traditional practices are the natural order of things.²¹² Girls find it difficult to resist these practices because of the subordinate status they hold in society. They should receive human rights education. Changing the social position of women and children in society will make them aware of their oppression in society²¹³ and will give them the challenge to overcome this. Empowered girls will also grow up to be strong women and will in turn protect the next generation from these harmful traditional practices.²¹⁴ They will then be able to make decision about their bodies, without fear.

5.3.2. Empowering and enabling community leaders to lead in advocating for the abolishment of harmful traditional practices²¹⁵

Community leaders want to feel that they are in control. They also want to feel that they have a say in how "their people" live their lives and how they are governed. Educating community leaders is likely to be effective in combating harmful traditional practices because if traditional leaders support the abolition thereof, people are likely to do the same.

harmful traditional and cultural practices and the role of national women's machineries. April 2007, UN Conference Centre. Available at www.unescap.org/ESID/GAD/Publication.pdf

²⁰⁸ Van Beuren n 19 above, 17.

²⁰⁹ As above.

²¹⁰ Packer n 32 above, 93. See also Ibhawoh n 183 above, 847.

²¹¹ UNHCR Policy on Harmful Traditional Practices. Available at www.unhcr.org/refword/pdfid/3efc79f34.pdf

²¹² Packer n 32 above, 36.

²¹³ "Stronger campaign needed to end Female Genital Mutilation" n 48 above.

²¹⁴ "Global Issues: Women's Rights" Available at <http://www.globalissues.org/article/166/womens-rights#womenandchildrenthedoubledividedgenderequality>

²¹⁵ Liebhardt n 33 above.

5.3.3. Educating men

Seeing that some men still see FGM as a prerequisite for marriage, it is important that they are educated about the harmful effects of FGM.²¹⁶ Men and boys also need to be involved in programmes that are aimed at empowering women.²¹⁷

5.3.4. Offering traditionally acceptable alternatives²¹⁸

Development of “unwritten” customary law gives due recognition to customary values, in that it ensures the continued application of custom, in a developed way that is consistent with human rights standards.²¹⁹ A practical application of the issue at hand would mean that children would be given a chance to undergo initiation (if they wish to) which does not involve any harmful practices. This means that those practices should be in line with human rights.

The upholding of human rights must be done in such a way that communities do not feel that the integrity of their culture is being compromised. This way parents and society as a whole will be able to feel that they are not losing their heritage, on the other hand children’s rights would be preserved. It is important for communities to feel that their traditions and cultures are not being disregarded. The community should also be included in the process.²²⁰ When educating the society about harmful traditional practices, focus should be on the negative consequences rather than the human rights or legal aspects.²²¹ That way, people would be more likely to accept what they are being taught.

5.3.5. Media as a way of educating society

Media has been identified as having the unique capacity to convey messages and to influence vast members of the community.²²² It has great potential to impact on people’s attitudes.²²³ It is also one of the quickest ways to impart information. It can

²¹⁶ “Stronger Campaign needed to end Female Genital Mutilation” n 48 above. See also Liebhardt n 33 above.

²¹⁷ As above. See also UNV Pilot Project Report January 2006-August 2007” Volunteerism and Community Mobilization for Combating FGM” Available at www.ahfad.org.

²¹⁸ As above.

²¹⁹ Lenhart n 2 above, 254.

²²⁰ Ibhawoh n 183 above, 858.

²²¹ UNHCR Policy on Harmful Traditional Practices, n 211 above.

²²² “Violence Against Women: Harmful traditional and cultural practices in the Asian and Pacific region” n 207 above.

²²³ As above.

be a useful tool in educating the society about the harmful effects of FGM and virginity testing, as well as proposals to better uphold culture and tradition without compromising the rights of children. For instance, videos are an effective way to demonstrate effects of any practice.²²⁴ Videos depicting FGM actually being performed are likely to an impact on viewers.

South Africa has created a short film called “Cutting Silence”.²²⁵ The film looks at FGM in North African countries. It was written and directed by R Loader. She was inspired to create the movie after having read “Desert Flower” by W Diri. Diri had written about the painful experiences she was subjected to as a child, all in the name of culture. “The purpose of the film is to restore an awareness of the plight of women in these communities. We want to make people aware of the fact that what is happening does not need to happen. This brutality can be offset by a symbolic ceremony” said K Reynolds, the producer. Loader went further to say that he hoped that the audience would realise that what the film represents is the truth and it is currently happening.²²⁶

5.4. The necessity of using the law to address the problem

Using the law to address harmful traditional practices is necessary. The law should be viewed as a primary tool to change the legal and social setting.²²⁷ The benefits of using law to address these issues include sending out a message to the society as a whole, that these practices are a violation of children’s rights and that they will not be tolerated.²²⁸ This also builds a sense of understanding that girls are as important and individuals as their male counterparts.

As already established, merely outlawing the practice usually results in resentment and resistance. It is therefore necessary to supplement the law with more practical methods including peer education; engagement with State actors; engaging with traditional and religious leaders as well as developing symbolic alternatives. There is

²²⁴ UNHCR Policy on Harmful Traditional Practices, n 211 above.

²²⁵ “SA Film breaks silence on Female Circumcision” Available at <http://www.sagoodnews.co.za/index2.php>.

²²⁶ As above. The film has been selected to appear at the Pan African Film Festival. This festival is attended by over 200 000 people/. The festival was started in 1992 and promotes works of creative arts that uphold cultural and racial education.

²²⁷ Mezmur & Sloth-Nielsen n 5 above, 339.

²²⁸ Banda n 18 above, 235

a need for the institutionalisation of human rights, however given the complexities of the different cultures, the institutionalisation of human rights should be a process.²²⁹

(WORD COUNT: 13 402)

²²⁹ M Mandy *Law and Anthropology* (2002) 7.

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