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Balancing customary practices with constitutional principles: The best interest of the child in south African law

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Abstract

This paper examines the tension between customary practices and constitutional principles in applying the best interest of the child within South Africa's legal framework. The Constitution of South Africa, 1996, recognizes customary law as valid, alongside common law, while also mandating that children's rights and their best interests be paramount in all matters. This dual recognition creates a unique conflict, particularly in marriage and family law, where customary practices may diverge from constitutional mandates. The study critically analyses how the South African legal system reconciles these tensions, focusing on key legislation such as the Recognition of Customary Marriages Act 120 of 1998 and the Children's Act 38 of 2005, alongside constitutional provisions like section 28(2), which emphasizes the paramountcy of children's best interests. Employing a qualitative methodology, including doctrinal analysis of legislation, case law, and academic literature, the research is grounded in legal pluralism and child rights theories. Preliminary findings reveal that while constitutional protections aim to uphold children's best interests, certain customary practices, such as child marriages, initiation rites, polygamy, and lobolo (bride price), may conflict with these mandates. Consequently, customary law may require modification to align with constitutional principles. The study highlights the challenge of consistently applying the best interest of the child principle across diverse cultural contexts, advocating for ongoing legal reform to ensure that customary practices evolve per constitutional values, thereby safeguarding children's rights within South Africa's pluralistic legal system.

Keywords: Best Interest of the Child; Children's Rights; Customary Traditions; Family Law; Marriage.

1. Introduction

The significance of customary practices in South African law has been the subject of debate since the promulgation of the Constitution of the Republic of South Africa, 1996 (Constitution). Section 211(3) of the Constitution, which guarantees the recognition and protection of customary law, has been subject to extensive commentary [1]. The requirement that all laws must align with the Constitution is often overlooked in discussions about the interpretation and application of customary law and traditions, leading to tensions between modern legal frameworks and traditional practices [1]. This tension is particularly evident in areas such as marriage, child rights, and inheritance, where customary practices may conflict with constitutional principles of equality and non-discrimination [2]. These conflicts necessitate a careful balancing act, as courts and lawmakers strive to uphold the values enshrined in the Constitution while respecting the cultural significance of customary practices. This balancing act requires legal expertise and a deep understanding of the cultural contexts in which these laws operate, ensuring that both constitutional mandates and traditional values are honoured in a way that promotes social cohesion and justice [3]. Therefore, the best interest of the child principle should be encompassed in customary law and integrated into legal frameworks, allowing for a harmonious coexistence that prioritises the welfare of children while acknowledging the importance of cultural heritage.

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1.1. Overview of South Africa's Legal Framework Concerning the Best Interest of the Child

The legal framework in South Africa concerning the best interests of the child is anchored in the Constitution. The principle of the best interest of the child is expressly provided for in section 28(2) of the Constitution which mandates that "a child's best interests are of paramount importance in every matter concerning the child" [4]. This constitutional principle sets the foundation for all subsequent legislation, judicial decisions, and policies related to children's welfare in the country.

1.2. Constitutional Foundation

The Constitution establishes a robust framework for protecting children's rights, emphasising that their best interests should be the primary consideration in all legal and administrative decisions affecting them. The supremacy of the Constitution, as articulated in section 2, ensures that any law or conduct inconsistent with it is invalid, and thus, all other laws, including customary law, must align with this principle [4].

The Constitution's best interest of the child principle applies within the wider context of the rights to parental care, family care, or detention as a measure of last resort (Section 28(1)(b) of the Constitution). In addition, it conveys a value judgment and requires consideration of all circumstances. The weight that should be attached to the best interest of the child in relation to other rights and interests, such as the rights to dignity and freedom, is also arguably unclear (Section 28(1)(g) of the Constitution). The principle is self-evidently relevant when children are deprived of their liberty. However, it can also complicate other situations, such as testatory dispositions (Section 28(1)(b) of the Constitution). This principle aims to ensure that decisions made regarding children prioritise their well-being and development. However, the practical application of this principle can be complex, particularly when it intersects with traditional or customary practices that may not always align with the constitutional framework.

The concept of the "best interest of the child" has therefore become a fundamental principle in South African family law, enshrined in both the country's Constitution and international human rights treaties.

1.3. International and National Treaties

At the international level, the best interest of the child principle is provided for in the United Nations Convention on the Rights of the Child (CRC). This Convention was opened for signature in 1989 and came into force in 1990. Article 3 of the CRC provides for the best interest of the child principle. It states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration (art. 3(1) of the CRC). The same provision is made for children in administrative and judicial proceedings (art. 3(2) of the CRC). Under the third sub-paragraph, States Parties are required to ensure the establishment of social security and childcare. Article 3(3) of the CRC also provides that these obligations apply to all levels of government. These are either legally binding obligations or best endeavours obligations. As such, it was anticipated that they would be ripe for full implementation in the coming years in accordance with the CRC. The CRC is also regarded as an important source of interpretation of the rights of children contained in the Bill of Rights.

Article 3(1) of the CRC therefore explicitly provides for a hierarchy of rights. The best interest of the child is to be regarded as a primary concern, and State Parties are bound to ensure that children are treated accordingly. As South Africa ratified the CRC in 1995, it has a legal obligation to be fulfilled under both interim and final constitutional governments. In 1994, there was a transition to a constitutional democracy, and the interim Constitution was adopted. A decade later, the best interest of the child principle was given statutory recognition in the Children's Act.

1.4. South Africa's legislative framework

South Africa's legislative framework further elaborates on the best interest principle through several key statutes. The Children's Act 38 of 2005 is the primary legislation that gives effect to the constitutional mandate concerning children's rights. Section 9 of the Children's Act explicitly requires that the best interests of the child must be of paramount importance in all matters concerning the care, protection, and well-being of a child [5]. This act provides a comprehensive legal framework for safeguarding children's rights, covering issues such as parental responsibilities, adoption, child protection, and alternative care. The Children's Act also outlines a detailed set of factors that must be considered when determining what constitutes the best interests of the child. These factors include the child's age, gender, stage of development, and any physical or emotional security the child might require [5]. This multifaceted approach ensures that the best interest principle is applied in a manner that is both holistic and sensitive to the unique circumstances of each child.

1.5. Judicial Interpretation

The South African judiciary has played a crucial role in interpreting and applying the best interest principle, often in cases where there is a conflict between statutory or customary law and constitutional imperatives. The Constitutional Court, in *S v M (Centre for Child Law as Amicus Curiae)*, emphasised that the best interest of the child is not just a legal rule but a standard that permeates all aspects of the law affecting children [6]. In this case, the court highlighted that the best interest principle requires courts to consider the impact of their decisions on children, even when the primary issue before the court does not directly concern a child.

Another landmark case, *Minister of Welfare and Population Development v Fitzpatrick*, addressed the issue of intercountry adoption. The court held that the best interest of the child must be the overriding factor in adoption cases, reaffirming the constitutional priority of children's rights over other legal or cultural considerations [7].

1.6. Historical development of customary law and its place within the South African legal system

Customary law in South Africa has a deep and complex history, rooted in the practices and traditions of indigenous African communities dating back to the first colonists in 1600 [8]. It represents a system of norms, values, and rules that govern the social, economic, and political lives of various ethnic groups across the region. It has been defined as the traditions and customs that have accrued over time and have become an accepted rule, bindable in a court of law [9]. For a South African custom to be legally recognised, it must meet certain criteria. Firstly, the custom must have clarity, understood as an accepted convention in a specific culture; it must exist within a community that observes it; it must have a known mechanism for enforcement; it must be reasonable, certain, and lawful; and it must have traditions and customs that date back in time [10].

The historical development of customary law, particularly its interaction with colonial and post-apartheid legal systems, reveals a trajectory marked by adaptation, marginalisation, and eventual recognition within the broader South African legal framework.

1.6.1. Pre-Colonial Period: The Foundation of Customary Law

Before the arrival of European settlers, African communities in the region that would become South Africa were governed by their indigenous laws, now referred to as customary law. These laws were unwritten and passed down orally through generations, and they regulated all aspects of life, including marriage, succession, property rights, and dispute resolution [11]. Customary law was inherently flexible, allowing it to adapt to the changing circumstances within communities. The authority to enforce these laws typically rested with traditional leaders or councils of elders, who played a central role in maintaining social order.

1.6.2. Colonial Period: Marginalisation

The arrival of Dutch settlers in 1652, followed by the British in the 19th century, marked the beginning of the formal marginalisation of customary law. The colonial powers imposed their legal systems, often disregarding or suppressing indigenous practices. Under British rule, particularly with the establishment of the Union of South Africa in 1910, Roman-Dutch law became the official common law, relegating customary law to a subordinate position [12].

However, the colonial administration could not entirely ignore customary law due to its deep entrenchment within African communities. As a result, customary law was partially codified and administered through a system of native courts, which operated under the supervision of colonial authorities. This codification process, however, distorted customary law by freezing it in a form that often did not reflect the lived realities of African communities [11]. The colonial state used customary law as a tool for indirect rule, consolidating power by controlling traditional leaders and using customary law to manage African populations. After colonisation, the traditional courts were formed as a concomitant to the native reserves set aside for the black majority of the population. Assisting the state in the development of customary law was the Council for the Traditional Leaders which was formed through the Traditional Leadership and Governance Framework Act 41 of 2003.

1.6.3. Apartheid Era: Instrumentalisation

During the apartheid era, customary law was further manipulated to serve the interests of the apartheid state. The Bantu Authorities Act of 1951 and subsequent legislation entrenched the system of separate development, or "bantustans," where customary law was used to govern the African population in homelands designated by the apartheid regime. Customary law was administered by traditional leaders who were often appointed or supported by the apartheid government, thereby undermining their legitimacy within their communities [13].

Under apartheid, customary law was officially recognised, but only within the framework of a racially segregated legal system. It was treated as inferior to common law and was often interpreted and enforced in ways that reinforced patriarchal and oppressive structures [2]. The application of customary law was inconsistent, and its development was stifled by the state's interference, which sought to preserve it in a static form that served the apartheid government's objectives.

1.6.4. Post-Apartheid Era: Recognition and Integration

The advent of democracy in 1994 brought significant changes to the legal status of customary law. The Interim Constitution of 1993 and the final Constitution of 1996 marked a turning point by recognising customary law as an integral part of the South African legal system. Section 211 of the Constitution acknowledges the institution, status, and role of traditional leadership, according to customary law, subject to the Constitution [4].

Furthermore, Section 39(3) of the Constitution provides that the courts must apply customary law when applicable, subject to the Constitution and any legislation that specifically deals with customary law. This constitutional recognition underscores the equal status of customary law alongside common law, provided it does not conflict with the Bill of Rights. The Constitutional Court has played a pivotal role in this regard, ensuring that customary law evolves following the values of the Constitution, particularly concerning equality and human rights [15].

The post-apartheid legal framework also promotes the development of customary law through legislative reform. The Recognition of Customary Marriages Act 120 of 1998 is a prime example, as it recognises marriages conducted under customary law as legally valid, thereby affording them the same status as civil marriages [16]. This Act also seeks to align customary marriage practices with constitutional principles, particularly in terms of gender equality.

1.7. Intersection of the Best interest of the child and customary practices

The Constitution acknowledges the place of customary law within the legal system, as articulated in Section 211 of the Constitution which affirms the recognition of customary law, provided it is consistent with the Constitution [4]. This provision establishes a framework for the coexistence of customary practices and constitutional principles, while also ensuring that customary law is subject to the same constitutional scrutiny as any other law. In the landmark case *Alexkor Ltd v Richtersveld Community*, the Court held that customary law is a distinct and independent source of law, but it must be developed following the spirit, purport, and objects of the Bill of Rights [17]. This decision underscores the Court's role in ensuring that customary law evolves in a way that aligns with constitutional principles, particularly in promoting equality and non-discrimination. This requirement has led to a significant legal discourse on the compatibility of certain customary practices, such as child marriages and traditional initiation rites, which have been scrutinised for potentially infringing on children's rights. The Constitutional Court has consistently held that customary practices affecting children must be evaluated against the best interest principle.

In *MEC for Education: KwaZulu-Natal v Pillay*, the Court acknowledged the importance of cultural practices in a child's upbringing but stressed that these practices must not compromise the child's well-being or constitutional rights [18]. This case illustrates the delicate balance that must be struck between respecting cultural practices and safeguarding children's rights within the constitutional framework.

Legislation such as the Children's Act 38 of 2005 also plays a vital role in regulating customary practices concerning children. The Act seeks to ensure that customary practices, including those related to custody, guardianship, and care, are consistent with the best interests of the child [5]. By incorporating constitutional principles into the regulation of customary practices, the Act provides a legal mechanism for harmonising cultural norms with the rights of children.

One of the key issues is the tension between customary law and constitutional rights, particularly concerning gender equality and the rights of children. This intersection is characterised by the need to balance respect for cultural diversity with the imperatives of equality, human rights, and the rule of law. The courts have often had to strike a balance between respecting the cultural significance of customary practices and ensuring that these practices do not violate the rights enshrined in the Constitution [19]. The courts have sometimes had to intervene when customary practices were perceived to infringe upon the rights of children.

Another challenge is the ongoing tension between traditional leadership structures and democratic governance. The role of traditional leaders, who administer customary law, must be reconciled with the principles of democracy and accountability that underpin the broader South African legal system. Legislative and policy reforms are required to address these tensions and to ensure that customary law continues to evolve in a manner that is consistent with constitutional values.

1.8. Key Customary Practices Affecting Children

Customary practices encompass a range of cultural, social, and legal norms that have historically governed family dynamics, education, and socialisation. Certain cultural practices, such as initiation rites, can conflict with the rights of children to protect themselves from harm and to make decisions about their bodies. The tension arises when these practices are defended as cultural rights under Section 31 of the Constitution, yet they may pose risks to children's physical and psychological well-being.

1.8.1. Child Marriages

Child marriages, where individuals under the age of 18 are married, represent a significant customary practice with profound implications for children's rights. Customary law in various communities permits child marriages, often justified by socio-cultural beliefs and economic factors [21]. For instance, in some cultures, marriages are arranged at a young age to strengthen family alliances or as part of traditional practices.

Section 28 of the Constitution guarantees the rights of children, including protection from harmful practices. International instruments such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) also prohibit child marriages, emphasising that such practices violate children's rights to education, health, and protection from exploitation [21]. The constitutional court has addressed this issue in cases such as *Bhe v Magistrate, Khayelitsha*, where it invalidated customary laws that were discriminatory and harmful to women and children [15]. The Recognition of Customary Marriages Act 120 of 1998 seeks to regulate and formalise marriages conducted under customary law, but challenges remain in ensuring compliance with constitutional and international standards.

1.8.2. Initiation Rites

Initiation rites are traditional ceremonies marking the transition from childhood to adulthood. In many South African communities, these rites are integral to socialisation and cultural identity. Initiation often involves rituals and teachings intended to prepare individuals for adult roles and responsibilities [22].

However, initiation rites have faced scrutiny regarding their impact on children's rights, particularly concerning health and safety. Reports of abuse, injury, and even death during initiation ceremonies highlight significant risks associated with these practices [23]. The Children's Act addresses some of these concerns by requiring that initiation rites be conducted in a manner consistent with the best interests of the child, but enforcement remains challenging. The Constitutional Court's approach emphasises balancing respect for cultural practices with the need to protect children from harm and ensure their well-being.

1.8.3. Polygamous marriages

Polygamous marriages which are recognised under customary law, are common in many South African communities. While these marriages are legally valid, they can present challenges in terms of resource distribution and emotional support for children. The potential for unequal treatment among co-wives and their children can lead to disputes over inheritance and access to family resources, which may negatively affect children's well-being [24].

1.8.4. Lobolo (Bride Price)

The practice of *lobolo*, where the groom's family makes a payment to the bride's family, is a deeply rooted custom in many South African communities. While *lobolo* is often viewed as a means of formalising marriage and fostering respect between families, it has been criticised for its potential to commodify women and reinforce gender inequalities. In some instances, children born within marriages where *lobolo* has not been fully paid may face social stigma or lack of recognition, impacting their rights and status within the community [25].

1.8.5. Patrilineal Inheritance

In many customary law systems in South Africa, inheritance rights follow a patrilineal pattern, with property and family rights typically passing down through the male line. This tradition can marginalise children, particularly girls, from an inheritance, leaving them vulnerable to poverty and exclusion. The Constitutional Court has addressed this issue in landmark cases, such as *Bhe v. Magistrate, Khayelitsha*, where the court ruled that the customary rule of male primogeniture, which excluded women and children from inheritance, was unconstitutional [15].

Also, Customary law often places guardianship and custody decisions in the hands of male family members, which can conflict with the constitutional rights of children to have their best interests considered in custody disputes. In the case

of *MM v. MN* case illustrates this conflict, as the court emphasized the need to prioritize the child's best interests over customary practices that may favour male guardianship [26]. This ruling reinforces the constitutional mandate that decisions affecting children must be made with their welfare as the primary consideration.

1.8.6. *Ukuthwala (Abduction for Marriage)*

Ukuthwala is a traditional practice that involves the abduction of a girl or young woman for marriage. Historically, this practice was intended as a form of consensual courtship, but it has often been misused to justify forced and child marriages. The practice has been widely condemned for violating children's rights, particularly the rights of girls to safety, education, and autonomy. Legal reforms have been implemented to curb the misuse of *ukuthwala* and protect children from harmful cultural practices [27].

1.8.7. *Traditional Guardianship and Custody*

Customary practices also influence traditional forms of guardianship and custody. Customary law often prioritises the paternal line in matters of custody and guardianship, which can affect the rights of children, particularly in cases of parental separation or death (Rautenbach, 2014). These practices may conflict with constitutional principles of equality and non-discrimination.

For example, customary law may grant custody rights to male relatives, potentially marginalising the rights and needs of children and their mothers [20]. The Recognition of Customary Marriages Act and the Children's Act attempt to address these issues by integrating customary practices with constitutional principles, ensuring that custody arrangements consider the best interests of the child [16 and 5]. However, practical challenges remain in aligning customary practices with the constitutional mandate.

Customary practices also influence educational and social roles for children. In some communities, education may be perceived as secondary to traditional training, which can impact children's access to formal education and their overall development [22]. Customary norms may prioritize traditional knowledge over formal schooling, affecting children's future opportunities and social mobility.

The Constitution guarantees the right to education for all children, and various educational policies aim to integrate traditional and formal educational practices [4]. Nevertheless, the challenge lies in reconciling these educational approaches to ensure that children receive a holistic education that respects cultural heritage while promoting their rights and development.

Accordingly, key customary practices affecting children in South Africa present complex challenges at the intersection of cultural traditions and constitutional principles. While these practices are integral to cultural identity and social cohesion, they must be continuously evaluated and reformed to align with constitutional and international human rights standards. Ensuring that customary practices uphold the rights and welfare of children requires ongoing dialogue, legal reform, and vigilant enforcement of constitutional protections. The best interest of the child principle therefore carries a hierarchy of interests concerning the child.

1.9. Reconciling Customary Norms

1.9.1. *Mechanisms: Balancing Customary Practices and Constitutional Reviews*

The role of legal principles in the evolution of customary law to meet constitutional standards is a complex and nuanced issue. On one hand, customary law has long been an integral part of many societies, rooted in the traditions and values of indigenous communities [28]. However, as human rights have gained increasing prominence, particularly through constitutions and international covenants, there have been tensions between the principles underlying customary law and the fundamental rights enshrined in these documents [29].

Addressing this tension requires a careful balance, as the courts and legislators seek to preserve the essence of customary law while aligning it with constitutional standards [30]. Customary law is often described as "living law," evolving organically with the needs and practices of the communities it serves [28]. This dynamism can be both a strength and a challenge when it comes to integrating it into a constitutional framework [28]. The judiciary has a crucial role to play in this process, applying the principles of living customary law while also ensuring its alignment with constitutional values [30].

The interplay between customary law and constitutional principles has necessitated mechanisms for subjecting customary practices to constitutional review. This paper explores the mechanisms by which customary law is evaluated against constitutional standards, focusing on judicial oversight, legislative reform, and the role of legal principles in ensuring compatibility with the Constitution.

1.9.2. Judicial Review

The evolution of customary law to meet constitutional standards is a complex interplay of judicial interpretation, societal values, and legal frameworks. Judicial review is a primary mechanism for subjecting customary law to constitutional scrutiny. The South African judiciary plays a critical role in interpreting and applying constitutional principles to customary practices.

In *Bhe v Magistrate, Khayelitsha* the application of customary law regarding inheritance and the rights of women and children were considered. The Constitutional Court found that aspects of the customary law that discriminated against women and children were unconstitutional, thereby reinforcing the supremacy of constitutional rights over customary norms [15].

Another case where the court examined the complexity of customary practices with constitutional practices is the case of *Mthembu v Letsela*. In this case, the Court examined the compatibility of customary practices with constitutional principles. The ruling highlighted the need to harmonize customary law with the values enshrined in the Constitution, particularly concerning gender equality and property rights [31].

Customary law can further adapt to align with constitutional mandates, particularly in the context of gender equality and indigenous rights. In this regard, Constitutional Court's ruling in the *Shilubana and Another v Nwamitwa* emphasised the need for customary law to evolve, particularly regarding male primogeniture, which discriminated against women in chieftaincy succession [32]. The court mandated that customary practices must align with constitutional values of gender equality (Oninku 2024). Despite this, there remains a reluctance within the judiciary to fully develop customary law, often leading to the invalidation of discriminatory practices without providing alternatives [33].

Judicial reviews consequently ensures that customary practices that infringe upon constitutional rights are identified and addressed, promoting a legal system that respects both cultural traditions and fundamental freedoms.

1.9.3. Legislative Reform

Legislative reform is another crucial mechanism for aligning customary law with constitutional principles. The South African legislature has enacted several laws to regulate and reform customary practices in line with constitutional standards. The Recognition of Customary Marriages Act 120 of 1998: aims to formalise and regulate marriages conducted under customary law, addressing issues related to gender equality and property rights. It ensures that customary marriages are recognized legally and aligned with constitutional principles [16].

The Children's Act 38 of 2005 on the other hand incorporates constitutional values into customary practices, particularly in areas such as child protection and welfare. The Act mandates that initiation rites and other customary practices must be conducted in a manner consistent with the best interests of the child [5]. Legislative reforms thus provide a structured approach to reconciling customary law with constitutional norms, ensuring that traditional practices evolve to meet contemporary human rights standards.

1.10. Evolution of Customary Practices to Meet Constitutional Mandates

1.10.1. Integration of Constitutional Principles

The integration of legal principles, such as the rule of law, equality, and non-discrimination, is essential for subjecting customary law to constitutional review. These principles guide the interpretation and application of customary law within the broader constitutional framework.

The Rule of Law ensures that all laws, including customary laws, are consistent with the Constitution and subject to judicial oversight [34]. At the same time, equality and non-discrimination require that customary practices do not perpetuate discrimination or inequality, particularly concerning gender, race, and other protected characteristics [20]. These principles serve as a basis for evaluating the compatibility of customary law with constitutional standards, promoting a legal system that upholds fundamental rights and freedoms.

This approach not only respects cultural diversity but also reinforces the commitment to human rights, ensuring that all children, regardless of their background, are afforded the protection and opportunities they deserve. Furthermore, it emphasises the importance of collaboration between legal practitioners, community leaders, and policymakers to create an inclusive environment where children's voices are heard and considered in decision-making processes. Such collaboration is essential for developing effective strategies that address the unique challenges faced by children in various communities, ultimately fostering a more equitable society. In this regard, ongoing training and education for all stakeholders involved in child welfare are crucial to equip them with the necessary skills and knowledge to advocate effectively for children's rights. This includes understanding cultural sensitivities, recognising signs of abuse or neglect, and being aware of the resources available to support families in need. Additionally, establishing strong partnerships with local organisations can enhance outreach efforts, ensuring that support systems are accessible and responsive to the diverse needs of children and their families. Furthermore, engaging children themselves in the conversation can empower them to express their needs and aspirations, creating a more inclusive approach to policy-making that truly reflects their voices. Incorporating feedback from children and families into program development can lead to more effective interventions and services that address the root causes of issues they face.

This collaborative approach not only fosters a sense of community but also builds trust, encouraging families to seek help when needed. Preliminary findings indicate that while South African law acknowledges the significance of customary practices, inter alia polygamy, lobolo (bride price), and patrilineal inheritance, constitutional limitations are imposed to ensure these practices do not infringe upon children's rights. In so doing, the legal framework necessitates continuous engagement and reform to ensure that customary practices evolve in a manner that is consistent with constitutional values, thereby safeguarding children's rights and welfare. By adopting the approach, South Africa can adapt its customary practices by integrating constitutional principles that prioritise the rights and welfare of children. This includes aligning traditional practices with the South African Constitution, particularly the Bill of Rights, which emphasises the best interests of the child as a fundamental principle (Constitution of the Republic of South Africa, 1996).

1.10.2. Reform of Traditional Courts

South Africa can learn from the evolution of customary courts in Botswana, which have adapted to meet constitutional requirements, suggesting a pathway for reform in RSA's traditional courts [35]. This adaptation highlights a potential pathway for reforming South Africa's traditional courts, ensuring they align more closely with contemporary legal standards and human rights principles [35]. By studying Botswana's approach, South Africa can explore ways to modernise its traditional court system, enhancing its effectiveness and legitimacy while respecting cultural practices. In this regard, training local mediators and legal practitioners in both customary and formal legal systems can enhance the capacity of the judiciary to address child welfare issues effectively. This dual training ensures that all parties involved in dispute resolution are equipped to navigate the complexities of integrated approaches [35].

In addition, South Africa can explore the development of hybrid models that incorporate both traditional and formal legal elements. Such models can create more inclusive and accessible justice systems that respect cultural practices while also prioritising the best interests of the child [35].

1.10.3. Promoting Dialogue

Establishing mechanisms for monitoring and evaluating the implementation of reforms is essential to ensure that customary practices evolve in a manner that consistently upholds the rights of children. This can include feedback from community members and stakeholders involved in child welfare. Encouraging dialogue among different cultural groups can therefore lead to innovative solutions that bridge gaps between varying legal interpretations. This can help ensure that justice is perceived as fair and equitable, particularly concerning children's rights [35].

2. Conclusion

By harmonising traditional practices with modern legal standards and human rights principles, South Africa can establish a more inclusive and accessible justice system that reflects the cultural values of its diverse communities. The active involvement of local populations in this reform initiative is crucial, as it cultivates a sense of ownership and trust, paving the way for a collaborative framework that merges traditional and formal legal elements. The introduction of hybrid models, alongside community education and mediator training, will strengthen the judiciary's ability to tackle complex issues, particularly in child welfare. This integration not only boosts public confidence in legal processes but also fosters dialogue and understanding among various cultural groups, enriching the overall legal landscape. Through these strategies, South Africa has the potential to evolve its customary practices to better align with constitutional standards, particularly regarding the best interests of the child, ultimately contributing to a more resilient and equitable society.

Compliance with ethical standards

Disclosure of conflict of interest

The author has no conflict of interest to disclose and confirm compliance with ethical standards.

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