

Legally recognising child-headed households through a rights-based approach: The case of South Africa

by

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DECLARATION

I hereby declare that this thesis, which I submit for the degree Doctor of Laws (LLD) at the University of Pretoria, is my own work and has not previously submitted by me for a degree at another university. Both primary and secondary sources used have been duly acknowledged.

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Lim Hye-Young

Date

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SUMMARY

Focusing on the rights of children who are deprived of their family environment and remain in child-headed households in the context of the HIV epidemic in Africa cannot be more relevant at present as the continent faces a significant increase in the number of children who are left to fend for themselves due to the impact of the epidemic. The impact of the epidemic is so severe that it is likened to an armed conflict. In sub-Saharan Africa, an estimated 22.4 million people are living with HIV, and in 2008 alone, 2 million people died of AIDS-related illnesses. Such massive loss of human lives is itself a tragedy. However, the repercussions of the epidemic suffered by children may be less visible, yet are just as far-reaching, and in all likelihood longer lasting in their effects. Initially, it appeared that children were only marginally affected by the epidemic. Unfortunately, it is now clear that children are at the heart of the epidemic. In sub-Saharan Africa, an estimated 14 million children lost their parents to AIDS-related illnesses and an unimaginable number of children consequently find themselves in deepened poverty.

Traditionally, children who are deprived of their family environment in Africa have been cared for by extended families. However, the HIV epidemic has dramatically affected the demography of many African societies. As the epidemic continues to deplete resources of the affected families and communities, extended families and communities find it more and more difficult to provide adequate care to the increasing number of children who are deprived of parental care. As a result, more and more children are taking care of themselves in child-headed households.

The foremost responsibility of states with regards to children who are deprived of parental care is to support families and communities so that they are able to provide adequate care to children in need of care, thereby preventing children from being deprived of their family environment. While strengthening families and communities, as required by articles 20 of the Convention of the Rights of the Child and 25 of the African Charter on the Rights and Welfare of the Child, as well as other international guidelines such as the 2009 UN Guidelines for the Alternative Care of Children, states also have the responsibility to provide ‘special protection and assistance’ to children who are already deprived of their family environment and are living in child-headed households. The important question is how to interpret the right to alternative care, and special protection and assistance, with

respect to children in child-headed households. The study examines the international standards and norms regarding children who are deprived of their family environment including children in child-headed households and explores the ways those children are supported and protected in South Africa, against the background of related developments in a number of different African countries, including Namibia, Southern Sudan and Uganda. .

In 2002, the South African Law Reform Commission made the important recommendation that child-headed households should be legally recognised. The Children's Amendment Act (No 41 of 2007), which amended the comprehensive Children's Act (No 38 of 2005) gave effect to this recommendation by legally recognising child-headed households under prescribed conditions. It is a bold step to strengthen the protection and assistance given to children in child-headed households. However, child-headed households should not be legally recognised unless all the necessary protection and assistance measures are effectively put in place. In order to design and implement the measures of protection and assistance to children in child-headed households, a holistic children's rights-based approach should be a guiding light. A rights-based approach, which articulates justiciable rights, establishes a link between the entitlement of children as rights-holders and legal obligations of states as duty-bearers. States have the primary responsibility to provide appropriate protection and assistance to children who are deprived of their family environment. This is a legal obligation of states, not a charitable action. A rights-based approach is further important in that it ensures that both the process of mitigation strategies and the outcome of such efforts are firmly based on human rights standards.

The study argues that legal recognition should be given to child-headed household only after a careful evaluation based on the international standards with regard to children deprived of their family environment. It further argues that measures of 'special protection and assistance' should be devised and implemented using a rights-based approach respecting, among others, children's rights to non-discrimination, to participation and to have their best interests given a priority.

Key words: child-headed households, children deprived of their family environment, right to alternative care, and special protection and assistance, children's rights, rights-based approach, HIV and AIDS, parental care, extended family, community-based care, orphaned and vulnerable children, foster care, institutionalised care, adoption.

OPSOMMING

Teen die agtergrond van die beduidende toename in die aantal kinders wat vandag na hulleself moet omsien weens die MIV-epidemie in Afrika, is ‘n fokus op die regte van kinders in huishoudings waarvan kinders aan die hoof staan (*child-headed households*) meer relevant as ooit tevore. Die impak van die epidemie is so erg dat dit aan ‘n gewapende konflik gelykgestel kan word. In sub-Sahara Afrika leef ‘n geraamde 22 miljoen mense met MIV, en net in 2007, het 1.5 miljoen mense gesterf aan VIGS-verwante siektes. Lewensverlies op so ‘n massiewe skaal is op sigself ‘n tragedie. Die effek van die epidemie op kinders is miskien minder sigbaar, maar is net so verreikend en het waarskynlik meer diepgaande gevolge. Aanvanklik is aangeneem dat kinders nie ingrypend deur die epidemie geraak word nie. Ongelukkig is die realiteit nou klinkklaar dat kinders sentraal staan tot die epidemie. In die streek het ‘n geraamde 12 miljoen kinders hulle ouers aan VIGS-verwante siektes afgestaan, en gevolglik bevind ‘n onvoortselbare hoeveelheid kinders hulleself in ‘n situasie van diepgaande armoede.

Tradisioneel is kinders in Afrika wat van hulle familie-omgewing ontnem is, versorg deur die netwerk van die uitgebreide familie. Oor die laaste paar dekades het die MIV-epidemie die demografie van baie Afrikastate dramaties verander. Soos die epidemie voortgaan om die hulpbronne van families en gemeenskappe te verteer, vind uitgebreide famielies en gemeenskappe dit al moeiliker om voldoende sorg te voorsien aan die toenemende getal kinders sonder ouerlike sorg. Meer en meer kinders sorg gevolglik vir hulleself in huishoudings waarvan kinders die hoof is (*child-headed households*).

Die belangrikste verantwoordelikheid van state met betrekking tot kinders wat ontnem is van ouerlike sorg is om families en gemeenskappe te ondersteun sodat hulle behoorlike sorg kan voorsien aan sorgbehoewende kinders, on sodoende te verseker dat kinders nie ontnem word van ‘n familie-omgewing nie. Terwyl state families en gemeenskappe steun, soos artikel 20 van die ‘Convention of the Rights of the Child’ en article 25 van die ‘African Charter on the Rights and Welfare of the Child’ vereis, het hulle steeds die verpligting om ‘special protection and assistance’ te verskaf aan kinders wat reeds van hulle familie-omgewing ontnem is en in kinder-beheerde huishoudings (*child-headed households*) leef. Die belangrike vraag is hoe die reg op alternatiewe sorg (*alternative care*), en spesiale beskerming en bystand (*special protection and assistance*),

met betrekking tot kinders in kinder-beheerde huishoudings, geïnterpreteer moet word. Hierdie tesis ondersoek hierdie vraag met verwysing na Suid-Afrika, teen die agtergrond van ontwikkelings in ander Afrikalande soos Namibië, Suid-Soedan, en Uganda.

In 2002 het die Suid-Afrikaanse Regshervormingskommissie die belangrike aanbeveling gemaak dat kinder-beheerde huishoudings regserkenning behoort te geniet. Die ‘Children’s Amendment Act’ (41 of 2007), wat die omvattende ‘Children’s Act’ (38 van 2005) wysig, en in werking getree het in 2008, gee hieraan uiting deur child-headed households’ (onder sekere voorwaardes) amptelik te erken. Dit was ‘n waagmoedige stap om die beskerming en bystand aan kinders in kinder-beheerde huishoudings te verseker. Kinder-beheerde huishoudings behoort egter slegs regserkenning te geniet indien die vereiste maatreëls ter beskerming en bystand in plek is. Om die maatreëls ter beskerming en bystand vir kinders in kinder-beheerde huishoudings te ontwerp en te implementeer, behoort ‘n holistiese regs-gebaseerde benadering die rigsgaande te wees.

‘n Regsgebaseerde benadering, wat beregbare (*justiciable*) regte bevat, trek ‘n verband tussen die aansprake van kinders-as-draers-van-regte en die regsverpligtinge van state as draers-van-verpligtinge. State het die primêre verantwoordelikheid om gepaste beskerming en bystand te verleen aan kinders wat van hulle familie-omgewing ontnem is. Dit is ‘n regeeringsverpligting, en nie ‘n weldoeningsdaad nie. ‘n Regsgebaseerde benadering is verder belangrik omdat dit verseker dat beide die strategieë om die negatiewe impak op kinders tot die minimum te beperk en die uitkomst van sulke pogings gebaseer is op menseregtebeginsels.

Die studie voer aan dat regserkenning van kinder-beheerde huishoudings nie, as sodanig, kinders se reg tot alternatiewe sorg en tot spesiale beskerming en bystand skend nie. Sodanige erkenning moet egter alleen verleen word ná ‘n sorgvuldige evaluasie vanuit ‘n regsgebaseerde perspektief. Die studie kom verder tot die gevolgtrekking dat maatreëls ter spesiale beskerming en bystand (‘special protection and assistance’) geformuleer en geïmplementeer behoort te word volgens ‘n regsgebaseerde benadering waarvolgens kinders se reg teen diskriminasie, hul reg op deelname en die beginsel van die beste belang van die kind, voorrang geniet.

LIST OF ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
ACPF	-	African Child Policy Forum
ACRWC	-	African Charter on Rights and Welfare of the Child
AIDS	-	Acquired Immune Deficiency Syndrome
ART	-	Anti-retroviral Treatment
ARV	-	Anti-retroviral
AU	-	African Union
CABA	-	Children Affected by HIV and AIDS
CC	-	Constitutional Court
CEDAW	-	Convention on Elimination of all Discrimination against Women
CESR	-	Committee on Economic, Social and Cultural Rights
CRC	-	Convention on the Rights of the Child
DRC	-	Democratic Republic of Congo
EU	-	European Union
FGM	-	Female Genital Mutilation
GA	-	General Assembly
HDR	-	Human Development Report
HIV	-	Human Immunodeficiency Virus
HRC	-	Human Rights Committee
HSRC	-	Human Science Research Council
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ILO	-	International Labour Organisation
IRC	-	International Research Centre
ISS	-	International Social Services
NGO	-	Non-governmental Organisation
OHCHR	-	Office of the High Commissioner for Human Rights
OVC	-	Orphans and Vulnerable Children
SALRC	-	South African Law Reform Commission
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNAIDS	-	The Joint United Nations Programme on HIV/AIDS



- UNDP - United Nations Development Programme
- UNGASS - United Nations General Assembly Special Session
- UNICEF - United Nations Children's Fund

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Malawian cases

In the matter of Adoption of Children Act CAP 26:01 and in the matter of David Banda (a male infant), Adoption case No 2 of 2006, Malawi [2008] MWHC 3

In the matter of Adoption of Children Act CAP. 26:01 and in the matter of Chifundo James (a female infant) of C/O Mr. Peter Baneti, Adoption case No 1 of 2009 [2009] MWHC 3

South African cases

AD and Other v DW and others, CCT 48/7, 2008 (3) SA 183 (CC)

Bhe and Others v Khayelitsha Magistrate and Others, 2005 (1) BCLR 1 (CC)

Centre for Child Law v MEC for Education, unreported case no. 19559/06(T)

Centre for Child Law v Minister of Home Affairs, 2005 (6) SA 50 (T)

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development for Others, CCT 36/08, 2009 (7) BCLR 367 (CC)

Irene Grootboom and others v the Government of the Republic of South Africa, Case No 6826/99, 2000 (3) BCLR 277 (C)

Lesbian and Gay Equality Project and others v Minister of Home Affairs and others, CCT/10/05, 2006 (3) BCLR 355 (CC)

M v S, 2007 (12) BCLR 1312 (CC)

Minister of Health and others v Treatment Action Campaign and others, CCT 8/00, 2002 (5) SA 721 (CC)

Minister of Home Affairs and Another v Fourie and Another, CCT 60/04, 2006 (3) BCLR 355 (CC)

Nontembiso Norah Kate v The MEC for the Department of Welfare, Eastern Cape, ECJ 2004/028, [2005] 1 All SA 745 (SE)

The Government of the Republic of South Africa v Grootboom and others, CCT 11/00, 2001 (1) SA 46 (CC)

The Minister for Welfare and Population Development v Fitzpatrick, CCT 08/00, 2000 (3) SA 422 (CC)

The permanent secretary, department of welfare, Eastern Cape provincial government and others v Ngxuza and others, 493/2000, [2001] ZASCA 85 (31 August 2001)

Vumazonke and others v The MEC for Social Development and Welfare for Eastern Cape, ECJ 050/2004, [2004] ZAEHC 40 (25 November 2004)

Cases before the European Court of Human Rights

Keegan v Ireland, Application no 16969/90 (1994)

X, Y and Z v The United Kingdom, Case no 75/1995/568/667 (1997)

Communications before the Human Rights Committee

A.S v Canada, Communication No 68/1980, UN Doc. CCPR/C/12/D/68/1980 (1981)

Balaguer Santacana v Spain, Communication No 417/1990, UN Doc. CCPR/C/51/D/417/1990 (1994)

Hopu and Bessert v France (1997) Communication No 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1

Wim Hendriks, Sr. v The Netherlands, Communication No 201/1985, UN Doc. CCPR/C/33/D/201/1985 (1988)

TABLE OF SELECTED LAWS

South Africa

Basic Conditions of Employment Act No 75 of 1997

Child Care Act No 94 of 1983

Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007

Constitution of South Africa Act No 108 of 1996

Criminal Procedure Act No 51 of 1977

General Regulations regarding Children, 2010, Children's Act No 38 of 2005

National Norms and Standards for Child Protection, General Regulations regarding Children, 2010, Children's Act No 38 of 2005

South African Schools Act Amendment Bill, a private members' bill, submitted under section 73(2) of the Constitution

South African Schools Act No 84 of 1996

Social Assistance Act No 13 of 2004

Southern Sudan

The Child Act 2008

Zambia

Adoption Act Chapter 54 of the Law of Zambia

TABLE OF NATIONAL CONSTITUTIONS CONSULTED

Constitution Law of Angola, 1975 (as amended on 26 August 1992)

Constitution Law of Benin, 1990

Constitution Law of Burkina Faso, 1991 (as amended on 11 April 2000)

Constitution Law of Burundi, 2004

Constitution of Cameroon, 1972 (as amended on 18 January 1998)

Constitutional Law of Cape Verde (as amended in 1999)

Constitutional Law of Chad, 1996

Fundamental Law of Union of Comoros, 2001

Constitution of Equatorial Guinea, 1991

Constitution of Eritrea, 1997

Constitution of Ethiopia, 1994

Constitution of Gabon, 1991 (as amended on 22 April 1997)

Constitution of Ghana, 1992 (as amended on 16 December 1996)

Fundamental Law of Second Republic of Guinea, 1990

Constitution of Lesotho, 1993 (as amended in 2001)

Constitution of Madagascar, 1992 (as amended in 1998)

Constitution of Malawi, 1994 (as amended in 2001)

Constitution of Mauritius, 1968 (as amended in 2001)

Constitution of the People's Republic of Mozambique, 1990

Constitution of Namibia, 1990

Constitution of Republic of Congo, 2001

Constitution of Rwanda, 2003

Political Constitution of Sao Tome and Principe, 1975 (as amended on 10 September 1990)

Constitution of Senegal, 2001

Constitution of Seychelles, 1993 (as amended in 1996)

Constitution of Sudan, 1998

Constitution of the Kingdom of Swaziland, 2005

Constitution of the Second Republic of The Gambia, 1996 (as amended in 2001)

Constitution of Zambia Act 1 of 1991 (as amended in 1996)