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 rege 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 onvoortsetbare hoeveelheid kinders hulleself in ‘n situasie van diepgaande armoede.

Tradisioneel is kinders in Afrika wat van hulle familie-omgewing onttrek is, versorg deur die netwerk van die uitgebreide familie. Oor die laaste paar dekades het die MIV-epidemie die demografie van baie Afrikaanse lande dramaties verander. Soos die epidemie voortgaan om die hulpbronne van families en gemeenskappe te verteer, vind uitgebreide familie- en gemeenschapsgroottes dit al moeilik 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 verantwoordelijkheid van state met betrekking tot kinders wat onttrekk is van ouerlike sorg is om families en gemeenskappe te ondersteun sodat hulle behoorlike sorg kan voorsien aan sorgbehoewende kinders. Daarom is dit verplig om kinders nie onttrek nie 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 onttrek 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 rigsnooier wees.

‘n Regsgebaseerde benadering, wat beregbare (justiciable) regte bevat, trek ‘n verband tussen die aansprake van kinders-as-draers-van-regte en die regsverplichtinge van state as draers-van-verplichtinge. State het die primêre verantwoordelijkheid om gepaste beskerming en bystand te verleen aan kinders wat van hulle familie-omgewing ontneem is. Dit is ‘n regeringsverplichting, en nie ‘n weldoeningsdaad nie. ‘n Regsgebaseerde benadering is verder belangrik omdat dit veršeker dat beide die strategieë om die negatiewe impak op kinders tot die mimimum te beperk en die uikomste 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 na ‘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

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