

The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments

Ann Skelton*

Advocate of the High Court of South Africa; Director of the Centre for Child Law, University of Pretoria, South Africa

Summary

This article charts the development of a child law jurisprudence that is emerging in Eastern and Southern Africa. The article records how judgments are beginning to make reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and even to less prominent instruments such as the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993) and the Hague Convention on Civil Aspects of International Child Abduction. Attention is paid to certain textual differences between the UN Convention and the African Children's Charter, and the extent to which these discrepancies have played a role in the development of a child law jurisprudence that might be described as uniquely African. The article considers judgments in the region that have expressly dealt with the 'best interests' principle. Examples from Botswana, South Africa and Kenya are described. The second area discussed is the imprisonment of children's primary care givers, in relation to which article 30 of the African Children's Charter, dealing with the children of imprisoned mothers, is highlighted. Other examples arise in relation to differences in the wording of the UN Convention and the African Children's Charter regarding inter-country adoption, which is the third area of case law discussed. High-profile cases relating to adoption applications brought by Madonna before the Malawian courts are amongst those examined.

* BA LLB (KwaZulu-Natal), LLD (Pretoria); ann.skelton@up.ac.za

The article concludes that there is evidence of the beginnings of a specifically African jurisprudence in child law. It is noted, however, that more can be done to promote children's legal rights in the region through the ratification by more African countries of the Hague Conventions, and also through courts in the Eastern and Southern African region taking note of each other's jurisprudence.

1 Introduction

A child law jurisprudence is gradually beginning to emerge in Eastern and Southern Africa. An awareness of children's rights has grown on the continent with the advent of the United Nations (UN) Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). This article aims to demonstrate that the jurisprudence in the region has been influenced by these international and regional instruments and other relevant conventions. The article begins with a brief examination of the relevant instruments, and then moves on to explore various judgments from the courts which have utilised these instruments in their judgments. It is argued that a fledgling jurisprudence that reflects a specifically African angle to children's rights (which is at the same time congruent with international standards) is gradually emerging, and can be further developed.

2 Overview of international instruments relating to children

CRC is the most widely ratified convention in the world, and it has been ratified by all African countries other than Somalia. After CRC was adopted by the UN General Assembly in 1989, a view was expressed by some child rights advocates in African countries that CRC did not adequately address certain issues that had specific relevance to Africa.¹ These issues included the situation of children living under apartheid (which no longer exists on the statute books), the disadvantages facing female children, as well as harmful practices such as female genital mutilation. Also of concern were the lack of attention given to socio-economic conditions, the African conception of communitarian responsibilities and duties, the use of child soldiers, the position of children in prison and the imprisonment of mothers. Finally, there was concern about the lack of a broader understanding of the role of family — including extended family — in the upbringing of children and in matters of adoption and fostering. In response, the African Chil-

¹ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 214.

dren's Charter was developed, driven initially by civil society. A draft was handed to the Organisation of African Unity, and the Heads of State and Government adopted it at the 26th ordinary session in Addis Ababa, Ethiopia, in 1990.² It entered into force in 1999, when it had received the required number of 15 ratifications by AU states. Now, a decade later, the African Children's Charter has received a total of 45 ratifications, with only eight African countries that have yet to ratify the treaty.³

Other important international instruments relevant to children's rights have been given much less attention by African states than CRC and the African Children's Charter. The Hague Conference on Private International Law has concluded two very important conventions that encourage co-operation between states in relation to the rights of children. The first of these is the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993).⁴ Given the fact that adoption featured as one of the issues that the African children's rights movement identified as being inadequately dealt with in CRC, it is strange that the Hague Convention on inter-country adoption has met with little interest on the continent. Only nine countries in Africa have ratified the Convention.⁵ This is paradoxical, because with African countries being 'sending countries' in the context of inter-country adoption, it is very important that mechanisms be set up to avoid poor practices and even baby-selling or trafficking.⁶ Perhaps the lack of enthusiasm for the Convention stems from a tendency by some African countries to view inter-country adoption with suspicion, seeing that it is an appropriation of its most

² A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 33.

³ The full list of countries that have ratified (updated 12 February 2009) is available at the African Union website <http://www.africa-union.org/root/au/Documents/Treaties/List> (accessed 15 September 2009). The eight countries that have not ratified are Central African Republic, Djibouti, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, São Tomé and Príncipe, Sudan, Swaziland and Tunisia. Of these, the DRC and São Tomé and Príncipe have neither signed nor ratified, whilst the majority of the other countries signed more than ten years ago. For further information regarding the progress being made by the African Committee, see J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336; Lloyd (n 2 above).

⁴ The Convention was unanimously approved at the 17th session of the Hague Conference of Private International Law.

⁵ Burkina Faso, Burundi, Guinea, Kenya, Madagascar, Mali, Mauritius, Seychelles and South Africa (whilst there are 79 contracting states worldwide); http://www.hcch.net/index_en.php?act=conventions.status (accessed 16 September 2009).

⁶ V Root 'Angelina and Madonna, why all the fuss? An exploration of the rights of the child and inter-country adoptions within African nations' (2007) 8 *Chicago Journal of International Law* 323.

treasured resources — children — by people from wealthy nations.⁷ Nevertheless, it is clear that Hague Convention aims to regulate inter-country adoption, not to facilitate it. The Convention thus is part of the solution to the fears that some may harbour.

The other relevant Hague Convention is the Hague Convention on the Civil Aspects of International Child Abduction.⁸ This Convention covers situations where one party, usually a parent, abducts or illegally retains a child in another country. The Convention provides a general rule of preemptory return to the country in which the child was prior to the abduction or illegal retention. Again, it is not entirely clear why this instrument has been ratified by only five African countries,⁹ though the reluctance in developing countries across the world to ratify it suggests that there is anxiety about being able to appoint an effective central authority and to comply with all its requirements, including the costs involved in the assessment of children, legal applications and the preemptory return of children.¹⁰ Another reason might be that international child abduction has previously been seen as a middle-class issue, a feature of the Western world with its high divorce rate. However, more children are being moved across borders in Africa, as parents have become more mobile, or where parents have children with partners from other countries.¹¹ As these Conventions only operate where both countries involved are contracting parties, it is important, particularly for neighbouring countries, to be in a position to co-operate. It is disappointing that so few countries in Africa have ratified the Convention.

⁷ For some of the debates about this issues, see generally J Esq 'The good, the bad and the ugly? A new way of looking at the intercountry adoption debate' (2007) 13 *UC Davis Journal of international Law and Policy* 17; M Liu 'International adoptions: An overview' (1994) 8 *Temple International and Comparative Law Journal* 187; Root (n 6 above).

⁸ This Convention was adopted at the 14th session of the Hague Conference of Private International Law on 24 October 1980.

⁹ Burkina Faso, Mauritius, Seychelles, South Africa and Zimbabwe; http://www.hcch.net/index_en.php?act=conventions.status (accessed 16 September 2009).

¹⁰ W Duncan 'Regional developments and the Hague Children's Conventions' in J Sloth-Nielsen & Z du Toit (eds) *Trials and tribulations, trends and triumphs* (2008) 58-59 points out that the challenges facing the conventions in the developing world relate to the need for an easy-to-contact central authority, rapid procedures (including appeal procedures), specialised family courts, etc. Countries in the developing world may thus be wary of becoming contracting states because of the financial and administrative burdens that this occasions, which are difficult to manage without fully-fledged systems.

¹¹ See, eg, the Kenyan cases of *Brouwen v Attorney-General* [2007] 1 EA 37 (HCK) and *B v Attorney General* [2004] 1 KLR 431. These cases involve civil abduction of children, but as Kenya has not ratified the Hague Convention on the Civil Aspects of International Child Abduction, it did not apply, and the court had to use principles of common law to reach its finding. The court's judgments would not, however, carry any weight in Belgium (to which two of the children were abducted), whereas the Hague Convention allows for the recognition of orders from the other Hague Convention country.

The ratification of children's rights instruments, in particular CRC and the African Children's Charter, has certainly had positive effects on the African continent. Thirty-four constitutions in African countries mention children's rights.¹² Many African countries have drafted new child laws in recent years, notably Uganda, Ghana, Kenya, Rwanda, Nigeria and South Africa, and there are bills pending in Mozambique, Namibia, Malawi and Lesotho.¹³ Law reform in the children's rights field thus appears to be well underway in the region, though progress remains uneven. The drafting of child-friendly laws and constitutions is only part of the endeavour that must be undertaken to ensure a protective legal environment. Laws (both old and new) must be interpreted against the backdrop of constitutional protections as well as against international instruments. The law can thus incrementally develop through the setting of precedents.

The article now turns to a consideration of whether, and to what extent, developments in jurisprudence reveal the influence of relevant regional and international legal instruments. Attention will be paid to certain textual differences between CRC and the African Children's Charter, and the extent to which these discrepancies in wording have played a role in the development of the jurisprudence.

3 Best interests

The 'best interests of the child' is a universal standard which had its origins in family law, but which has now spread to all other areas of the law to be a guiding principle in decisions to be made about children. CRC refers to best interests as being 'a primary consideration' in matters concerning the child. The African Children's Charter uses a subtly different wording: 'the primary consideration'. The difference amounts to only one small word, but it creates a significant difference in how to give weight to the principle. Whilst 'a primary consideration' leaves best interests competing equally with other rights on the same footing, 'the primary consideration' suggests that children's best interests must be given a heavier weighting where there are competing rights. South Africa's Constitution, in section 28(2), refers to a child's best interests as being 'of paramount importance' in every matter concerning the child. The South African Constitutional Court, whilst giving careful and deliberate consideration to children's best interests, has made it clear that the paramountcy principle is not an absolute trump *vis-à-vis* other

¹² J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in the African context' in A Alen *et al* (eds) *The UN Children's Rights Convention: Theory meets practice* (2007); J Sloth-Nielsen 'Domestication of children's rights in national legal systems in African context: Progress and prospects' in Sloth-Nielsen (n 2 above) 53.

¹³ African Child Policy Forum *Realising their rights: Harmonisation of law for children in Eastern and Southern Africa* (2007).

rights. The child's best interests rights can be limited (as long as such limitation is reasonable and justifiable) where there is a need to weigh those rights against others.¹⁴

International and regional instruments have been used in support of the best interests principle in a number of judgments from courts in African countries. By way of example, in the case of *Motlogelwa v Khan*,¹⁵ handed down by the High Court of Lobatse, Botswana, the Court made reference to these instruments in relation to a case where custody was in dispute, and the best interests of the child was considered to be the paramount principle, even in the context of customary law. Molokomme J had the following to say:¹⁶

In his well-researched heads of argument, counsel also refers the court to the provisions of various international and regional instruments which adopt the principle of the best interests of the child, such as the 1989 UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Although these instruments have not been specifically incorporated into the Botswana domestic law, this country is a state party to the UNCRC and therefore its provisions have strong persuasive value on the decisions of this court.

In the case of *Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)*,¹⁷ one of the issues that the South African Constitutional Court had to decide was whether the customary law rules that gave rise to differential entitlements of children born within a marriage and those born extra-maritally constituted unfair discrimination on the grounds of birth.

Writing for the majority of the Court, Langa CJ said as follows:¹⁸

In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered.¹⁹ South Africa is

¹⁴ *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC) para 20; *Sonderup v Tondelli & Another* 2001 1 SA 1171 (CC) paras 33 & 35; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 1 SA 406 (CC) paras 54-55; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) paras 12-27.

¹⁵ 2006 2 BLR147 HC.

¹⁶ At 150. The South African High Court has made a similar decision in the case of *Hlope v Mahlalela* 1998 1 SA 449 (T) in which it was decided that the best interests of the child was the main criterion to be utilised in disputes relating to the custody of children, and that this would override any rule of customary law. The Court referred to the best interests principle in the South African Constitution, but did not make direct reference to international law. On the issue of best interests and its application in customary law, see I Maithufi 'The best interests of the child and African customary law' in Davel (n 1 above) 146.

¹⁷ 2005 1 SA 580 (CC).

¹⁸ n 17 above, para 55.

¹⁹ Sec 39(1) of the Constitution in relevant part provides: 'When interpreting the Bill of Rights, a court, tribunal or forum — ... (b) must consider international law.'

a party to a number of international multilateral agreements²⁰ designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their 'physical and mental immaturity' need 'special safeguards and care'.²¹ Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.²²

The Court went on to examine the relevant provisions of the African Children's Charter, noting that²³

Article 3 of the African Charter on the Rights and Welfare of the Child provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, ... birth or other status'.

The Court found that unfair discrimination on the ground of 'birth' should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. The differentiation was thus found to be unfair discrimination. The wording of article 3 appears to have played a significant role in the Court's decision.²⁴

Differentiation between children of married or unmarried parents also came under the spotlight in the case of *RM and Another v Attorney-General*.²⁵ This application was clearly brought as a test case before the High Court in Nairobi in the name of the child, assisted by a children's rights organisation, CRADLE. It concerned the rights of RM, who was a child born out of wedlock. At stake here was not a recognition of the child's rights under customary law, but under section 24(3) of the Children's Act (2001). It was argued by the applicant that by treating children of married and unmarried parents differently, section 24(3) abrogated

²⁰ South Africa became a party to CRC on 16 July 1995; ICCPR on 10 March 1999; the African [Banjul] Charter on 9 July 1996; and the African Children's Charter on 7 January 2000.

²¹ See Preamble to the Convention which cites the Declaration of the Rights of the Child which was adopted by the General Assembly in 1959.

²² Art 2 of CRC. Also see art 24 of ICCPR; art 18(3) of the African Charter; arts 3 & 26(3) of the African Children's Charter.

²³ *Bhe* (n 17 above) para 55.

²⁴ The judgment has come in for some criticism, most of which aligns itself with the dissenting judgment by Justice Ngcobo. He was of the view that the Court should not have declared the law unconstitutional and found that the answer to resolving the conflict between customary law and the Bill of Rights lies in 'flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case' (para 236). A full discussion of these issues is beyond the scope of this article.

²⁵ The full name of the judgment is *RM (Suing thro' next friend) JK Cradle (The Children Fund) Millie and Gao v the Attorney-General Nairobi* (Nairobi Law Courts) High Court Civil Case 1351 of 2002 (unreported). It is available in Centre for Child Law and Policy Research and Children's Legal Action Network *The law on children: A case digest* (2007).

the child's right to protection from discrimination which is reflected in Kenya's Constitution, in articles 2 and 3 of CRC and articles 2 and 3 of the African Children's Charter. Relying heavily on a General Comment of the UN Human Rights Committee, the Court decided that the section of the Children's Act in question did not offend the principle of equality and non-discrimination. It is worth noting that the Kenyan Constitution does not include 'birth' as one of the grounds of discrimination (although CRC and the African Children's Charter both include it). The Court declared itself to be constrained by a concern that the Children's Act had brought about improvements in this area of the law, and that to strike down the section would be, in the words of the Court, 'a great tragedy'. It is apparent from these comments that Kenyan constitutional law does not have an equivalent mechanism to that found in the South African Constitution that allows for measures that ameliorate the possible negative effects of an immediate declaration of constitutional invalidity, such as a suspension of such a declaration to allow the legislature time to remedy the defect.²⁶ The case of *RM* showed great promise, and it is evident that the child rights advocates involved in the case were fully aware of the application of the international and regional instruments to the case. However, one is left with the feeling that the Court side-stepped the issue, adroitly using other international sources to support their decision. Thus the case cannot be cited as a good example of the child rights instruments developing positive jurisprudence, despite the best intentions of the litigators.

Thus far reference has been made to CRC and the African Children's Charter jointly, as though they contain very similar protections. It is true that there is much commonality in the provisions, and that in some instances the differences in wording are superficial. However, there are certain aspects where there are substantive differences between CRC and the African Children's Charter.²⁷ There have been two recent cases in the South African Constitutional Court where specific provisions of the African Children's Charter were cited which are different from CRC, and which appear to indicate the possible emergence of a jurisprudence of children's rights which is linked specifically to the African Children's Charter, which I will describe as a 'fledgling African child law jurisprudence'.

4 Children of imprisoned mothers

The first of these two cases was *S v M (Centre for Child Law as Amicus Curiae)*.²⁸ The central question in this case was: What are the duties of

²⁶ See eg sec 172(1)(b)(ii) of the Constitution of South Africa Act 108 of 1996.

²⁷ For a full discussion of the differences between the two instruments and on the way in which the African Children's Charter provides improved normative standards, see B Mezmur 'The African Children's Charter v the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 1.

²⁸ 2008 3 SA 232 (CC) (*S v M*).

a sentencing court when the person being sentenced is the primary caregiver of minor children, keeping in mind the constitutional protection of the best interests of the child? The appellant in the case was M,²⁹ the mother of three minor children. She was the sole caregiver of the children, and was also the main provider of financial support for their care. She had raised a bond on a modest home in which the family lived on the income she derived from two small businesses. She was convicted in various counts of fraud and theft and was sentenced initially by the Regional Court to four years' imprisonment.³⁰ On appeal, the High Court set aside her sentence and replaced it with a sentence that would require her to serve approximately six months in prison before the Commissioner of Correctional Services could consider releasing her on correctional supervision.

The *amicus curiae* submitted that the sentencing court should take cognisance of the rights of the children when sentencing a primary caregiver, and provided support from international and regional instruments in this regard. The submissions pointed out that one of the features of the African Children's Charter that distinguishes it from CRC is the fact that it contains a separate and distinct article on 'children of imprisoned mothers', namely article 30, which has no counterpart in CRC.

Article 30 reads thus:

Children of imprisoned mothers

State parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be the first consideration when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for the holding of such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

The judgment makes reference to international and regional law and, in particular, to article 30 of the African Children's Charter. In the final analysis, the Court pronounced as follows:³¹

[F]ocused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all

²⁹ The Constitutional Court issued an order on the day of hearing that the citation of the case name should include only the initial of the applicant's surname in order to protect the identity of her children.

³⁰ *S v M* (n 28 above) para 3.

³¹ *S v M* (n 28 above) para 33.

the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts.

The result of the judgment in *S v M* is that in each case the sentencing court must give specific attention to the impact the sentence will have on the child or children of a primary care giver. This does not mean that a primary care giver will never, henceforth, be given a custodial sentence. The judgment explains quite clearly that the choice of the sentencing option least damaging to the interests of the children is made 'within the legitimate range of choices in the circumstances available to the court'.³² In other words, if a non-custodial option is clearly appropriate, the court must set such a sentence, bearing in mind the interests of the children. If there is a range of appropriate sentences under consideration, the likely negative impact of imprisonment on the children of the primary care giver will generally tip the balance in favour of a community-based sentence.

It is significant, in jurisprudential terms, that the Court took note of article 30 of the African Children's Charter, especially as there is no similar article in CRC. The issue of children of imprisoned mothers, we will recall, was one of the issues which the African states that lobbied for a uniquely African children's rights charter felt was missing from CRC. It is thus interesting to see that jurisprudence has already developed relating to this article of the African Children's Charter, giving further weight to the idea of an 'African child rights jurisprudence'.

5 Inter-country adoption

Another recent case in which the African Children's Charter was shown to differ in a small but significant way from CRC was in the case of *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* (AD case).³³ This was a matter concerning inter-country adoption. Inter-country adoption came into being in South Africa in 2000, as a result of a ruling of the Constitutional Court, in the matter of *Minister of Welfare and Population Development v Fitzpatrick and Others*.³⁴ Prior to that case, inter-country adoption was not possible due to a clause in the Child Care Act³⁵ that prohibited foreign persons from adopting South African children. In the *Fitzpatrick* case, the impugned section was struck down with immediate effect. The decision was based on the central premise of the best interests of the child. The Court determined that the children's courts' powers to hear domestic adoption matters were wide enough

³² As above.

³³ 2008 3 SA 183 (CC).

³⁴ 2000 3 SA 422 (CC).

³⁵ Sec 18(4)(f) of the Child Care Act 74 of 1983.

to allow them to deal with inter-country adoptions, and that CRC provided sufficient guidance in this respect. At that time, South Africa had not yet ratified the Hague Convention on Inter-Country Adoptions. Perhaps the Court was overly sanguine about how well the children's courts would cope with inter-country adoption in the absence of a comprehensive legal framework, because the *AD* case showed that there were still many difficulties on the ground with regard to inter-country adoption, several years later.³⁶

In the *AD* case, an American couple who wanted to adopt an abandoned South African child (referred to by the Court as 'Baby R') approached the High Court for a sole custody and guardianship order, with a view to taking her out of the country and adopting her in America. This was an unusual route for inter-country adoption in South Africa, where there is a children's court at magistrate's court level which hears all domestic adoption matters and has been dealing with inter-country adoptions since the year 2000.³⁷ The Constitutional Court, hearing an appeal from the Supreme Court of Appeal³⁸ (where the Court had divided three to two, with four written judgments) had to decide whether the process of applying for a sole custody and guardianship order in the High Court was an acceptable approach, or whether the children's court was the correct forum, where an adoption could be concluded. The majority in the Supreme Court of Appeal had upheld the order of the High Court, in which the couple had been advised that the correct forum to conclude the inter-country adoption was the children's court. A pivotal issue in the matter was the principle of subsidiarity, meaning that inter-country adoption should always be subsidiary to domestic solutions.

The subsidiarity principle is enshrined in article 21(b) of CRC, which provides that 'inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.

Article 24 of the African Children's Charter includes the principle of subsidiarity, which is similar to CRC, but stronger, because it describes inter-country adoption as 'a last resort'. This is linked to the reality that African countries, being 'sending countries' in the context of inter-

³⁶ AS Louw 'Intercountry adoption in South Africa: Have the fears become fact?' (2006) 3 *De Jure* 503.

³⁷ Inter-country adoptions became lawful in South Africa in 2000 when the Constitutional Court struck down a section of the Child Care Act 74 of 1983 which prevented foreigners from adopting South African children (*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC)). The Court found that this law was too restrictive to allow for children's best interests to be realised, and the impugned section was declared invalid with immediate effect. The Court indicated at that time that the Children's Court would deal with such adoptions.

³⁸ *De Gree & Another v Webb & Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA).

country adoption, have to pay special attention to the protection of their children. If children are seen as a communal blessing in African society, then it makes sense that the law should try as far as possible to ensure that children are cared for in families and communities within their countries of origin.

The Constitutional Court considered this aspect very carefully, but decided as follows:³⁹

Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.

Whilst recognising the importance of the international law principles relating to inter-country adoption, the Court decided in the end that the best interests of the child principle was paramount. The Court found that it was in the child's best interests to be adopted by the appellants, the court made an order that the adoption be heard in the children's court within one month, and Baby R was duly adopted. The issue of subsidiarity was thus not seen as a bar to inter-country adoption, but as an important principle to be weighed (together with other principles such as the best interests of the child) by the Court making the decision about adoption.

The fact that subsidiarity features so heavily in the majority of the Supreme Court of Appeal, and that it was paid a significant amount of attention in the Constitutional Court judgment, indicates that these courts understood the vigilance that needs to be exercised when making decisions about adoption in 'sending countries'. However, whilst the African Children's Charter renders inter-country adoption a 'last resort' (demonstrating a very high commitment to the subsidiarity principle), the Constitutional Court balked at making a decision that rested on that principle. The best interests of the child principle carried the day, and this is seen as a universal principle, although, as mentioned earlier, the African Children's Charter also views best interests as *the* (rather than *a*) primary consideration.

There are striking similarities between the South African Constitutional Court's reasoning in the *AD* case, and the High Court of Malawi's judgment in the case of *In Re: Adoption of Children Act (Cap.26:01); In re: David Banda*.⁴⁰ Inter-country adoption has given rise to a number

³⁹ *AD* case (n 33 above) para 55.

⁴⁰ Adoption Cause 2 of 2006 (2008) *MWCH* 3 28 May 2008.

of cases in the Eastern and Southern African region,⁴¹ but none quite as profound, and certainly none as internationally well known, as the case of David Banda. The Malawi Human Rights Commission and the Malawi Human Rights Consultative Committee applied and were granted leave to be joined as *amici curiae*. Both filed written submissions, and the Malawi Human Rights Commission also presented oral submissions. In addition to the involvement of *amici curiae*, in the *David Banda* case, as in the *AD* case, the best interests of the child were protected by a guardian *ad litem*, who filed reports.

Madonna and Guy Richie presented a petition to the High Court in Lilongwe to adopt David Banda. The Court was satisfied that informed consent had been given, and that the Richies were suitable adoptive parents. The difficulty that the Court faced was that the laws of Malawi did not allow for adoption in the case where the adoptive parents lived in another country, due to a provision in section 3(5) of the Children's Act (Cap 26:01) that '[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi or in any respect of any infant who is not so resident'.

The Court examined the wider context within which the law fell to be interpreted. Noting section 211 of the Malawian Constitution, Justice Nyirenda observed that Malawi had ratified CRC, and was also a party to the African Children's Charter, and that therefore these Conventions are binding on Malawi by choice. Even if the Conventions were not part of the law, opined the honourable judge, at very least the Court would have a duty to 'interpret and apply our statutory law, so far as the spirit of the statute could allow, so it is in conformity and not in conflict with our established obligations under these Conventions'.⁴²

The Court examined article 21 of CRC and article 24 of the African Children's Charter in some detail, noting that the Children's Charter used stronger language, namely that inter-country adoption should be a measure of last resort. The Court then tackled the issue of 'residence' through the lens of the international, regional and constitutional law framework. The Court grappled with whether the 'residence' requirement was an end in itself, or a means to an end, and posed the question: Is residence so paramount that all else collapses without it? Why was residence so important? Examining this question took up much of the Court's time and encompassed what Justice Nyirenda described as 'resounding thoughts'. The first was 'to realise that children are an important asset to any civilised society'. The second was that society

⁴¹ *In the Matter of the Adoption of EC (Infant) Nairobi* (Nairobi Law Courts), High Court Adoption Cause 46 of 2006; *In the Matter of Adoption of BAO (Infant) Nairobi* (Nairobi Law Courts), High Court Adoption Cause 141 of 2003, *In the Matter of AC (A Child), Nairobi* (Nairobi Law Courts) High Court Adoption Cause 25 of 2006. The case is unreported. It is available in Centre for Child Law and Policy Research and Children's Legal Action Network (n 25 above).

⁴² The court cited *Mwakanwanga v Rep* 1968-1970 5 MLR 14 and *Gondwe v Attorney-General* 1996 MLR 492 in support of this statement.

has an obligation to bring up its own children and that ‘the best place for the child to experience love and affection and naturally realise its full potential is the biological family unit’. A third resounding thought was that where it is not possible for children to grow up under the love and care of their natural parents, then an option is to allow for adoption, and the fourth, that the state administration must be satisfied as to the suitability of adoptive parents.

The Court found that the residence requirement was a means to an end, aimed at protecting children. The Court noted that the national policy of Malawi stresses that the best interests of the child is paramount in all matters concerning the child. Furthermore, the Malawian Constitution, which emphasises the development of children, and the international and regional instruments, brought the Court to the conclusion that any cases in the past that had seen residence as an end in itself ‘could never survive in our constitutional order’. The *David Banda* judgment found that the principle of the best interests of the child was more weighty than the requirement of residence, in much the same way that the *AD* judgment found that the principle of subsidiarity was itself subsidiary to the best interests of the child. However, both courts still paid heed to the imperatives set by international instruments. The *David Banda* Court stated that ‘[t]he underlying consideration is that inter-country adoption should indeed be a last resort when all other options of the placement of a child have failed’.

The *AD* Court did not go so far as to say that inter-country adoption is a measure of last resort, but did recognise the importance of comity of states and the need for protection of children. Justice Sachs, writing for a unanimous Court, said as follows:⁴³

[T]his Court had to bear in mind that inter-country adoption has a strong public as well as a private dimension. Both the sending and the receiving states have an obligation to establish appropriate regulatory machinery to minimise the possibilities of abuse. It is not simply the risk of trafficking in children for nefarious purposes, or developing a trade in babies, that needs to be guarded against. The dignity of the sending country can be affected if it appears that it is failing to find appropriate resources to look after its children. Courts need at all times to be sensitive to these matters.

There is an important post-script to the *AD* case. The adoption of Baby R fell through once the child was already in America, and she has been adopted by another family there. Had this been an adoption governed by the Hague Convention,⁴⁴ Baby R could have been returned in terms of its provisions, because where an adoption collapses within 140 days after consent being given, the central authority may organise the

⁴³ See n 33 above para 59. On the issue of comity between states, see further J Sloth-Nielsen & B Mezmur ‘(Illicit) transfer by De Gree’ (2007) 2 *Law, Democracy and Development* 81 100.

⁴⁴ South Africa has ratified the Hague Convention on Intercountry Adoption but it has not been brought into operation as yet. This is expected to happen during 2009, when the long-awaited Children’s Act 38 of 2005 is expected to come into operation.

return of the child.⁴⁵ Of course, it is impossible for courts to gaze into a crystal ball and predict the future, but this story provides all the more reason for the ratification of the Hague Convention on Inter-country Adoption by countries in Africa.

In early 2009, Madonna Ciccone (using her maiden name after her divorce from Richie), returned to Malawi to adopt a second child. The matter was heard by Chombo J in the High Court of Malawi in the Lilongwe District on 3 April 2009.⁴⁶ The child at the heart of this petition for adoption was a three year-old girl who the Court refers to as 'CJ'. The 14 year-old mother of CJ had died shortly after giving birth. Relevant reports about the circumstances of CJ and the suitability of Madonna to adopt had been placed before the Court, and counselling of the extended family members to ensure that they understood the implications of adoption had been undertaken. The Court considered section 3(5) of the Adoption of Children Act which provides that an adoption order shall not be made in favour of any applicant who is not resident in Malawi. The judge examined in detail the meaning of the word 'resident', and after briefly making reference to the decision of the *David Banda* Court with regard to that term, she went on to compare the definition of resident by the superior courts in Papua New Guinea and Fiji. Chombo J recorded that the petitioner 'jetted into the country during the weekend just days prior to the hearing of this application' and she further took note that the last time the petitioner had been in Malawi was for the final adoption order of her son, David Banda. The Court concluded that Madonna was not resident, and that her petition must fail.

In examining why this rule exists in the law of Malawi, the judge opined that it was a safeguard 'to protect Malawian children from "trafficking of children by some unscrupulous individuals"'. The judgment makes reference to article 3(1) of CRC and article 4(1) of the African Children's Charter, which refer to the best interests of the child being the paramount consideration. The judge failed to mention the subtle difference in the wording included in these two articles, which has been discussed earlier in this article. She then went on to set out in full article 24 of the African Children's Charter, and she added her own emphasis by underlining certain words. Notably the words 'may as the last resort', which are the words that appear only in the African Children's Charter and not in CRC, are underlined, as well as the words 'if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be care for in the child's country of origin'. In a controversial move, the Court determined that care in an orphanage conforms with the clause "in any suitable manner", and that there is

⁴⁵ Sec 261(6) of the Children's Act 38 of 2005, not in operation at the time of writing.

⁴⁶ *In Re: Adoption of Children Act CAP. 26:01; In Re: CJ (A Female Infant) of c/o Mr Peter Baneti, Moba (Adoption case 1 of 2009)* [2009] MWHC 3 (3 April 2009) <http://www.saflii.org/mw/cases/MWHC/2009/3.html> (accessed 14 September 2009).

thus an alternative to inter-country adoption. This decision is controversial from a child rights perspective because it is widely accepted that suitable alternatives to inter-country adoption would include foster care or adoption in the country of adoption, and it is rarely thought to be appropriate to keep a child in residential out-of-home care where there is an option available of placement in a family.⁴⁷

The High Court judgment in the *CJ* case is puzzling, because it flies in the face of the precedent set in the *David Banda* case, in which the Court found that residence was a means to an end, and that rigid adherence to the residence requirement was not in the best interest of children.

An appeal against the High Court decision in the *CJ* case was lodged urgently and was heard by the Malawi Supreme Court of Appeal.⁴⁸ A local human rights organisation called the Eye of the Child, as well as the Malawi Human Rights Commission, sought and were granted the opportunity to join the proceedings and be heard as *amici curiae*. The Appeal Court found that the Court had not been bound to follow the judgment of Nyirenda J (as he then was) if she did not agree with it, particularly as she found precedents from other jurisdictions that differed from that judgment. The judgment examines the extent to which international law is binding, and finds that the Malawian courts will look at the Constitution and the domestic laws of Malawi and determine whether they are consistent or in harmony with international law, and the courts will, as far as possible, avoid a clash between the two. Where such a clash is unavoidable it is the Constitution and laws of Malawi that will prevail, and the court provided as its reasoning for this that international agreements are, by their nature, 'products of compromise arising out of hard bargaining by high contracting parties'.

The Supreme Court found that there was no clash or disharmony between international law and the adoption law of Malawi. Returning to the issue of 'residence', the Supreme Court referred to additional judgments that define this term, and concluded that 'residence' simply means that a person must not have arrived in a country by chance (such as when one's aircraft runs out of fuel), but rather by design. The Court concluded that Madonna was in Malawi by design because she had come there specifically for the purpose of this application for adoption. With respect, this interpretation is unduly strained, and the Supreme Court's judgment lacks the wealth of reasoning or logic that underpins the judgment of Nyirenda J (as he then was) in the *David Banda* judgment. He simply found that residence was not an end in

⁴⁷ See W Duncan 'The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993: Some issues of special relevance to sending countries' in ED Jaffe (ed) *Intercountry adoptions: Laws and perspectives of 'sending' countries* (1995) 222-223.

⁴⁸ In Re: The Adoption of Children Act CAP 26:01; In RE CJ A Female Infant of C/o PO Box 30871, Chichiri, Blantyre 3 (Msca Adoption Appeal 28 of 2009) [2009] MWSC 1 (12 June 2009) <http://www.saflli.org/mw/cases/MWSC/2009/1.html> (accessed 14 September 2009).

itself, and that to interpret it thus would be to infringe the best interests of the child and would be contrary to the Constitution.

Following its concocted interpretation of 'residence', the Supreme Court's judgment went on to say the following: 'We do not think that under the Act inter-country adoption is a last resort alternative.' The Court also made it clear that in its view CJ would be better taken care of by being adopted by a foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents. This aspect of the Supreme Court's judgment sets the record straight regarding the general principle that foster care and adoption in the country of origin, but not residential care in an institution, are suitable alternative options to inter-country adoption. Whilst the tone of the Supreme Court's judgment is very reserved and apparently reluctant to criticise the judgment of the court *a quo*, the Court did find that the judge erred in considering the intention of the legislature and taking account of a bill which had not yet been passed.

In particular, the judge is taken to task for basing her decision on the risk that 'some unscrupulous individuals' might use the precedent of court orders allowing adoption to facilitate child trafficking. The Supreme Court said that these 'imaginary unscrupulous individuals' were not before the Court, and that the Court erred in trying to protect some 'imaginary children'. This part of the Supreme Court's judgment misfires. It is necessary for the courts to be vigilant about incorrect practices in inter-country adoption. Whilst Chombo J may have made her point somewhat inelegantly, and perhaps did place too much emphasis on her concerns about trafficking, such concerns are not entirely misplaced. The prevention of trafficking is, in fact, expressly mentioned in the Preamble to the Hague Convention on Inter-Country Adoptions, and the risk of trafficking is one of the motivating factors for the strict regulation in inter-country adoption. It is thus important for the rights of *all* children to be protected. The importance of preventing avenues for incorrect inter-country adoption practice should accordingly not be underestimated. Chombo J's instinct, in this regard, was generally on target. Her error lay more in the fact that she did not sufficiently consider the best interests of the individual child in the case before her, the infant CJ. Her interests would not have best been served by staying in an orphanage rather than being placed in a family.

Evaluating the inter-country adoption jurisprudence from the perspective of international instruments reveals that the courts certainly have paid detailed attention to specific provisions in the instruments. The outcomes of these cases do, however, present an impediment to the theory I am trying to advance, that the emerging child law jurisprudence in the Eastern and Southern African region has a uniquely African character, in that it arises from clauses in the African Children's Charter which are either unique or are different from similar provisions in CRC. In inter-country adoption, the key difference between article 21 of CRC and article 24 of the African Children's Charter is the notion

that inter-country adoption is a 'measure of last resort'. Whilst both instruments reflect the principle of subsidiarity, the last resort clause in article 4 of the African Children's Charter is emphatic. As we have seen, however, the judges in the *AD*, *David Banda* and *CJ* judgments have not bought into the idea that inter-country adoption is a last resort. The only exception was Chombo J, but she was firmly overturned on this point, as the Supreme Court found that the law of Malawi does not view inter-country adoption as a last resort. All three judgments favour the best interests of the child principle over strict adherence to the subsidiarity principle, and this makes the judgments international in nature, rather than having a particularly African slant. Nevertheless, a careful reading of the judgments does leave the reader with a strong sense that these are cases about inter-country adoption written from a 'sending country' perspective, with the concomitant concerns about our children, our national assets, being taken to live in other countries, far away from their families and cultures and languages. The predominance of best interests is also not only the preserve of the international community. It is, after all, *the* primary consideration in all matters concerning the child, according to the African Children's Charter.

6 Conclusion

There are several other judgments from the region that make reference to CRC and the African Children's Charter,⁴⁹ including a number of cases concerning the treatment of children in the criminal justice system.⁵⁰ To discuss them all in detail is beyond the scope of this article.

The judgments described in this article demonstrate the fact that international and regional child protection instruments have played an important role in the development of child rights jurisprudence in some countries in the Eastern and Southern African region, and that there is evidence of the beginnings of a specifically African jurisprudence. There is much more that can be done to promote a child law jurisprudence on the continent. The fact that so few countries have ratified the Hague Conventions (both the one on adoption and the one on abduction) is a matter of concern. Eight African states have not even ratified the African Children's Charter.⁵¹

⁴⁹ *AF v HA and HI* Meru High Court Civil Appeal 72 of 2004; *Diana Ndele Wambua v Dr Paul Wambua* 2004 eKLR; <http://www.kenyalaw.org> (accessed 15 September 2009).

⁵⁰ *Republic v Matano Katana* 2004 e KLR; *Mkunzo & Another v Republic* (2008) 1 KLR (G&F); *Republic v SAO*, Nairobi Criminal Case 236 of 2003; *S v Williams & Others* 1995 7 BCLR 861 (CC); *S v B* 2006 1 SACR 311 SCA; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 3 SA 515 (SCA); *S v N* 2008 3 SA (SCA).

⁵¹ See n 3 above.

Another issue that comes to the fore when reading these judgments is that the courts in Eastern and Southern African countries dealing with child law issues rarely look at each other's judgments. American, Canadian, British and even Indian case law is cited, but there is a dearth of references to other African divisions. Given the jurisprudential discourse that has begun in the area of children's rights on the African continent, an opportunity for African countries to learn from each other is clearly evident.