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Protecting orphans and vulnerable children in Lesotho: an assessment of the Children's Protection and Welfare Act, 2011

Introduction

This chapter reviews specific aspects of the Children's Protection and Welfare Act 2011 of Lesotho, insofar as they pertain to the situation of orphans and vulnerable children. The chapter commences with a brief outline of the context in which the legislation was adopted, including a brief overview of relevant country data. The substantive aspects of the Act pertaining to orphans and vulnerable children are thereafter discussed. Notably provisions relating to non-discrimination, to health, to registration of orphans and vulnerable children, to protection of surviving children's property and provisions concerning fostering and adoption are featured. Finally an overall assessment of the scheme of the Act in addressing the plight of orphans and vulnerable children is given.

2.The context

Lesotho is a small mountainous country surrounded on all sides by the Republic of South Africa. Then called Basotholand, it was annexed by the British after approaches from the then king (Moshoeshoe) in the 1860s for assistance against the Boers, who went to war against the Basotho in search of land. National elections were held in 1960, and full independence was achieved in 1966; however, the elected head of state, Chief Leabua Jonathan was not popular and when defeated at the polls subsequently, he deposed the king (Moshoeshoe II), and suspended the constitution. Chief Jonathan was deposed in a military coup in 1986 and the king restored to the throne. But ongoing power disputes between the king and the coup leader raged until the king was deposed in favor of his son, King Letsie III. From time to time, political discord has continued to reign, such as in 1998 when the Southern Africa Development Community (SADC) was called in to help restore order in the country. Democracy remains fragile.

Lesotho, however, remains a kingdom, with King Letsie III still the helm, although he does not exercise executive power. Real power lies with the cabinet, headed by a prime minister and a bi-cameral Parliament (a national assembly and a non-elected senate, comprising 22 chiefs and 11 nominated members).

Lesotho ranks among the poorest countries in the world.¹ It has little in the way of natural resources (the exception being water, which led to the building of the Lesotho Highlands Water Project² some years ago for the purposes of exporting water and hydroelectric power to neighbouring South Africa), and the 2 million inhabitants of the country are largely pastoral people. Significant numbers of Basotho work as migrant labourers on the mines of South

¹ Over fifty six per cent (56.6%) of Lesotho population (1,876,633 million people) live below the national poverty datum line, while 43.3% live on one dollar a day.

² www.lhwp.ls (accessed 19 February 2014).

Africa; remittances are key to the national economy, and labour remains Lesotho's major export, with at its peak, 60% of males working in South Africa, primarily in the mining sector. With high levels of migration for economic reasons, it is no surprise that Lesotho is regarded as having the third highest per capita incidence of HIV/Aids in the world, with obvious impact on the numbers of children who are left orphaned or vulnerable due to the impact of the scourge. Poverty and worsening economic outcomes further impact on food security which is tenuous: Nearly 60% of the population lives below the poverty line. A combination of ongoing migration (especially of adult males) and the devastating impact of HIV have shattered the traditional social safety nets which had characterised this largely rural society.³ It must be pointed out that gender inequality is pervasive and culturally sustained.⁴

Having been colonized by the British, previous legislation dealing with aspects of child law bore some of the hallmarks of a previous colonial dispensation. For instance, under the 1952 Adoption of Children Proclamation, a Mosotho child could be adopted only by a non-national - Basotho were legally prohibited from adopting their own clanspeople (although it appears that in recent times Basotho people did participate in adoption).⁵

Recognising the need for modernisation of the law, the Lesotho Law Reform Commission was tasked shortly after the turn of the Millennium with investigating proposals for a children's law that would comply with international treaties such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The first Bill was available in 2004, and an updated version is dated 2009. The legislation was finally signed into law in 2011.⁶ The new law of 2011 replaced the outdated Children's Act of 1980, which was silent on social needs and challenges of the children, rather focusing on children in trouble with the law. Launching the Act in January 2012, the Queen of Lesotho depicted the new Act as a 'special law that greatly differs with any previous law ever enacted', saying that 'it combines numerous laws from the country, regional and international levels while maintaining Basotho cultural values which put children's interest at the forefront'.⁷

³³³ The average life expectancy is currently 48 years, which is indicative of the impact of HIV/Aids (www.dataworldbank.org/country/Lesotho (accessed 22 March 2014).

⁴ Concluding observations of CEDAW to Lesotho's initial and combined 1st, 2nd, 3rd, and 4th country report, Par 34: While noting the various initiatives taken by the State party to prevent and combat HIV/AIDS, including the adoption in 2011 of the National HIV/AIDS Strategic Plan and the National Action Plan on Women, Girls and HIV/AIDS 2011-2016, the CEDAW Committee notes with deep concern that the State party faces a serious epidemic and that women and girls are disproportionately affected by HIV. In this respect, the CEDAW Committee is concerned that women and girls may be particularly susceptible to infection owing to gender-specific norms, and that the persistence of unequal power relations between women and men and the inferior status of women and girls may hamper their ability to negotiate safe sexual practices and increase their vulnerability to infection." (CEDAW/C/LSO/CO/1-4 of 8 November 2011).

⁵ Dr I Kimane presentation on adoption and foster care at the UWC/Miller D Toit Cloete conference on child and family law (2009).

⁶ The lengthy period between the finalisation of the Lesotho Law Reform Commission's work, and the conclusion of the legislative process, explains why there is now a measure of disconnect between the law and the policy objectives contained in the National Strategic Plan for Vulnerable Children, 2012-2017, to which this chapter pays some attention.

⁷ Lesotho has a plural legal culture similar to those of other British colonies in the SADC region. It is a mix of Roman Dutch law, civil law and customary law.

The new Children's Protection and Welfare Act, 2011 purports to be a comprehensive enactment to domesticate international children's rights. It covers both child protection and juvenile justice, as well as parentage, custody and guardianship, maintenance of children, employment of children, and protective measures related to child health. It drew inspiration from amongst others the South African Children's Act 38 of 2005 as well as that of Botswana (2009).⁸ Nevertheless, it contains some unique features not as prominent in the laws of South Africa or Botswana, such as some of those highlighted further in this chapter. As indicated in the chapter title, the focus is on provisions of the Children's statute impacting upon children orphaned or made vulnerable, largely due to HIV/Aids.

3. The HIV/Aids context in Lesotho

The Lesotho National Strategic Plan on Vulnerable Children April 2012 to March 2017, replaced the outgoing National OVC Strategic Plan (2006-2010) that came to an end in December 2010. The key achievements of the 2006 OVC plan included the development of the National OVC Policy (2006), the establishment of the National OVC Coordinating Committee (NOCC) at national level, as well as structures at the district level respectively. A Child Help Line was established in 2008. Through the 2006 OVC plan, the Department of Social Welfare defined the essential services package for OVC that included education, health, food security and nutrition, and protection, care and support. Attempts were made to develop a national OVC database over the lifespan of this initial plan. However, despite efforts to improve strategic information management, the 2012 Plan records that reporting on progress on OVC service provision has been poor. It identified the greatest challenges with the implementation of the 2006 OVC response as a weak policy and legal framework, and inadequate human and financial resources both in government and among civil society organisations.

The 2012 Plan records that while the directed focus on orphanhood status in the 2006- 2010 Plan has had some benefits, it had not been sufficient to provide meaningful support to vulnerable children and that it is now felt to be stigmatising by selecting only orphans.

In the latest Plan 2012-2017, it is said that the response will shift from focusing on orphanhood status to a child's vulnerability, with orphanhood being one of the many possible causes of vulnerability. Also, the Plan notes that a family setup provides the most important social safety net for vulnerable children. In most cases vulnerable children live in vulnerable households, and hence it is important to address the needs of individual vulnerable children in the context of the needs of their families.

A situation analysis of orphans and other vulnerable children conducted in Lesotho in 2011 estimated that vulnerable children in Lesotho are between 10% and 13% (125,000) of all

⁸ Members of the Lesotho Law Reform Commission task teams visited South Africa, and information on legislative developments were also shared by South Africans who provided some technical assistance to Lesotho during the course of the work of the Law Commission.

children (1,072,974) between the ages 0-17 years.⁹ The situation analysis found that there are 363,526 orphans. The analysis indicates that of the total number of orphans, 58.7% (213,248) were paternal orphans, and 17.8% (64,647) were maternal orphans.¹⁰ The total number of double orphans (who have lost both parents) is estimated as 23.6% (85,631). It is this latter group who are now regarded as being targeted by the National Strategic Plan. The increase in the number of orphans and vulnerable children has in particular been fuelled by HIV and AIDS. In 2009, the National HIV and AIDS Estimates noted that there were 180,000 orphans in Lesotho of whom 122,000 were as a result of AIDS. The high adult HIV prevalence rate of HIV/Aids amongst the general population (estimated at 23%) has caused increased mortality among parents, which has in turn resulted in rapidly increasing numbers of orphans and other vulnerable children in the country.¹¹

The Plan clearly identifies the 2011 Child Welfare and Protection Act as a major milestone and complementary tool in the protection of children made vulnerable by HIV/Aids. Amongst the priorities the Plan identifies are strengthening social, legal and judicial protection of vulnerable children and their families, inter alia via implementation of the Act.¹³ Hence the Plan and the Act are, to this extent, inextricably linked.

4. The provisions of the Act

4.1 Guardianship and child rights

The Children's Protection and Welfare Act defines a guardian as 'any person who, in the opinion of the Children's Court having cognisance of any case in relation to the child or in which the child is involved, is for a time being in charge of and/or has control over the child'. This is a far cry from the traditional Roman-Dutch legal definition of a guardian based on biological ties, and is indicative of the uncertain parental status of many children who may

⁹ The 2012-2017 Plan (at p 11) discussed the meaning of vulnerability as follows: 'The [previous] National Policy on Orphans and Vulnerable Children (OVC) has defined an orphan as a "person who is below the age of 18, who has (sic) lost one or both parents due to death". The Children's Protection and Welfare Act (CPWA, 2011) has defined a vulnerable child as " a person who is below the age of 18, who has one or both parents who have deserted or neglected him (her), to the extent that he has no means of survival and as such is exposed to dangers of abuse, exploitation or criminality and is therefore in need of care and protection". The Situation Analysis of OVC in Lesotho (2011) redefined a vulnerable child as "a child whose rights to survival, development, protection and participation are not met" because of certain conditions or circumstances. This means that children become vulnerable when their rights to survival, development, protection and participation in social and economic issues affecting them are not fulfilled. All three definitions above are broad, and inclusive of most children'. It seems that the quantification of 'vulnerability' links to the Situational Analysis which counted orphans but discounted those being adequately cared for by kin, and added other children whose socio- economic circumstances meant that there was no or inadequate means of survival in the family setting.

¹⁰ The National Policy on Orphans and Vulnerable Children (OVC) 2006-2010 defined an orphan as a 'person who is below the age of 18, who has lost one or both parents due to death'. The Children's Protection and Welfare Act, 2011, has defined a vulnerable child as 'a person who is below the age of 18, who has one or both parents who have deserted or neglected him (her), to the extent that he has no means of survival and as such is exposed to dangers of abuse, exploitation or criminality and is therefore in need of care and protection'. Analysis of this definition shows that it is limited to vulnerable children being deserted or neglected and hence does not cover all issues that make children vulnerable or put them on harm's way, according to the 2012 OVC policy. The new Plan clearly seeks to broaden the concept of vulnerability encompassed in the Act.

¹¹ The number of maternal orphans is significant as mothers are traditionally the primary care-takers of children, and this is exacerbated in the context of male migration in Lesotho.

¹² The Lesotho Child Poverty Study (2011) noted that the major underlying drivers of social change in Lesotho are un-employment and HIV and AIDs. The Government of Lesotho has put in place some social protection strategies and programmes that include the Old Age Pension Scheme, the Child Grants Programme, the Public Assistance Scheme, bursaries for secondary schools, free primary education and a school feeding programme.

come to the attention of the Children's Court. The definition accords primacy to the role played by the person factually caring for the child, the traditional response to the death of a parent usually being that another member of the extended family steps in. There is also a definition of a 'member of the family' which accords with African custom, insofar as it refers to 'parent or guardian or member of an extended family who is a household member'.

The short chapter on the 'Principles'¹² at the outset of the Act already contains provisions pertinent to children affected by HIV/Aids. Thus the non- discrimination provision forbids discrimination on a whole list of grounds, which include the child's health status.¹³ This is important given the stigmatisation that frequently occurs in respect of children who themselves are HIV positive. In the following Chapter, titled 'Rights of a child and responsibilities of parents and the State', a unique provision concerns the right of orphaned and vulnerable children to registration.¹⁴ Section 9(1) provides for this, and it is explained in more detail in section 9(2):

'The Department responsible for registration of births and deaths shall maintain and administer a systematic and comprehensive data in relation to all groups of orphaned and vulnerable children'¹⁷

It could be suggested that maintaining a separate registry of orphaned children sets them up for potential discriminatory practices, and downplays the extent to which their life can be 'normalised' through absorption into family and kinship structures, through informal fostering and even through formal adoption. On the other hand, knowledge of their consequent vulnerability could equally assist various organs of state and community structures to ensure that these children do not fall through the cracks (as it were), and contribute to ensuring that appropriate alternative care is in fact provided to all children left without families. Such is indeed a state duty under section 22(i) of the Act (section 22 listing a range of state responsibilities in relation to children with disabilities, the provision of primary education, the protection of children from all forms of maltreatment, etc): section 22(i) requires that the state provide 'special protection for a child deprived of a family environment' and that the state must 'ensure appropriate alternative family care or institutional placement' for such children.

4.2 Protection of property rights

The Children's Protection and Welfare Act is unusual (amongst comparable legislation in the region) insofar as it singles out for dedicated treatment the protection of children's property.

¹³ There are five priorities established in the Plan (the one cited in the text is priority 3). The others are: raising awareness and commitment to vulnerable children's rights and needs through advocacy and social mobilization; strengthening the capacity of families and communities to protect, care for, and support vulnerable children; scaling up availability and access to services by vulnerable children and their families; and systems strengthening.

¹⁴ Containing only three overarching principles, namely the best interests of the child, recognition of children's evolving capacity and non- discrimination.

¹⁵ Article 6.

¹⁶ Although, as noted above, the Plan 2012-2017 describes this registration endeavour as having been less effective than desired. The provision in the Act is indicative of the fact that the Act was developed largely in a previous era when registration was thought to be an appropriate response to identifying vulnerable children.

Property grabbing by relatives and others upon the Aids-related death of a parent or care-giver is a well-known phenomenon, and deprives affected children further of available safety nets, including housing, livestock and land for grazing or crop cultivation. One of the listed children's rights - in section 19 - is the right of the child to the property of his parents, save where the child is born out of wedlock in which case the child has the right to inherit the property of his biological mother (irrespective of the mother's marital status).

Part 5 of the Act deals with the administration of the property of children by the Master of the High Court. The Master of the High Court, the statutory body protecting children's rights to inherit, has been decentralised to all districts to protect orphans' and widows' inheritance rights. The Act provides for a system of community reporting of the death of a parent of minor children to the Master within two months of the death of the parent.¹⁵ Alienation, disposal or sale of the child's (inherited) property is forbidden without the permission of the Master, and contravention of this provision (section 39(1)) is a criminal offence with a tariff of a fine or imprisonment not exceeding 5 months.

The Master has specific duties in relation to safeguarding children's property. Alienation or disposal of property - with permission - may not result in a child being left destitute or homeless; negligent use of property by heirs can result in the concerned person being required (upon application to court) to pay for such negligence. The Master is empowered to pursue a surviving spouse for maintenance towards the upkeep of the children. Employers of deceased persons are required to remit any monies due (pension payouts, for instance) to the Master for him to administer in favour of surviving children and section 43 of the Act provides that no financial institution shall open or operate any account in respect of an orphaned child without the prior consent of the Master of the High Court. Both employers and financial institutions' misconduct in this regard is subject to criminal sanction.

Section 205 of the Act deals with testamentary guardianship, a useful corollary to the provisions on the administration of the inherited property of orphans discussed above. It enables a parent of a child to appoint by will any person to be guardian of a child after the parent's death.¹⁶ The guardian of a child (including one appointed by will him or herself)¹⁷ may in turn appoint by will or deed another individual to take his place as the

¹⁷ Section 9(3) continues that the Bureau of Statistics shall have access to this data.

¹⁸ This is a statutory assimilation of the customary law rule that children born of unmarried mothers do not share in the inheritance of the estate of their fathers. The 2012-2017 National Strategic Plan records that Lesotho has initiated a process where inheritance laws will be reviewed and harmonised. This is because 'the majority of families in Lesotho depend on the Laws of Lerotoli (customary law) in determining inheritance. The cornerstone of the laws of inheritance in Lesotho is Section 11 of the Laws of Lerotoli. The direct effect of this law on vulnerable children is that younger siblings cannot inherit family property, as this is a preserve of the eldest boy child. However, among the elite Basotho an increasing number of families prepare wills to determine how their property should be inherited upon their death. Until recently women had no decision-making role in inheritance issues. However, the Legal Capacity of Married Persons Act 2006 has established a legal framework for equality among men and women and has empowered women to make family decisions, including preparing a family will. A key aspect is articulating the management (handover) of important documents such as birth certificates and title deeds of movable and immovable property' (National Strategic Plan on Vulnerable Children 2012-2017 p14).

¹⁹ National Strategic Plan on Vulnerable Children 2012-2017 p20.

²⁰ The obligation is placed first on any surviving parent, the child's guardian or closest relative: section 38.

²¹ The National Strategic Plan on Vulnerable Children 2012-2017 foresees succession planning becoming an important tool in the fight against vulnerability: 'Succession planning is an important component of mitigating children's and widow's

guardian of the child in the event of his death. A child, member of the family or appointed guardian may approach a children's court for various orders, including appointing a relative to act jointly with the guardian, or refusing to make any order confirming guardianship.¹⁸ The children's court is enjoined not to appoint the guardian, if the guardian is not a relative of the child unless the circumstances are such that it is 'prudent to do so'. This indicates a clear preference that children are placed with relatives. Various further provisions relating to the duties and roles of guardians spell out, inter alia, their duty to protect and safeguard any assets forming part of the child's estate.¹⁹

These provisions seek to mitigate the most detrimental consequences of becoming an orphan, by ensuring as far as possible the preservation of assets of the deceased parent in favour of the child; given the high levels of poverty and food insecurity that prevail generally in Lesotho, this seems to have been a wise step.²⁰

4.3 Health related provisions

In Lesotho, as a result of food insecurity and poor nutrition children's stunting has become a common occurrence with 39% of children under 5 being stunted, of whom 15% were severely stunted.²¹ A survey of 2009 quoted in the National Strategic Plan for Vulnerable Children 2012-2017 further reports 4% of wasting among children of whom 1% are severely wasted. Children that are underweight constitute 13% of children under 5 years, and 4% are severely underweight. Commencing with section 11, health related provisions of the Act include that a child has a right to access (inter alia) medical attention or any other service required for the child's development. Amongst the listed state duties and responsibilities in section 22 (dealing with the responsibilities of the State) are that the State has a duty to formulate policies that will ensure a child's survival and development (section 22(c)) and that there must be special emphasis on the provision of primary and preventive health care, public health education, reduction of infant mortality and measures to ensure that no child is deprived of access to effective health services (section 22(j)).

It is further provided that a child has a right to sexual and reproductive health information and education appropriate to his age.²¹ This right is elaborated in a dedicate chapter of the Act

vulnerability. It can alleviate emotional distress and anxiety, fear of death and loss of inheritance, of being abandoned, abused or separated from other siblings. Succession planning helps parents plan for their children's future, and the children's preparedness of a future without their biological parents. Despite its importance, succession planning is still not a routine or common practice' (p13).

²² See Section 203 which includes under the definition of guardian (for the purposes of this section) a person appointed by a parent in a will.

²³ Section 205(5).

²⁴ See sections 210 and 211 for instance.

²⁵ Training of officials attached to the Master's Office on their fiduciary duties under the Act took place in December 2013.

Orphan's estates that require administration by the Office of the Master of the High Court increased from 161 in 2011 to 200 in 2014/15, and are estimated to comprise 250 by March 2017 (National Strategic Plan for Vulnerable Children 2012-2017, p21).

²⁶ National Strategic Plan for Vulnerable Children, p30.

²⁷ Section 11(6), falling under the chapter headed 'Rights of a child and responsibilities of parents and the state'.

entitled 'Protective measures relating to the health of children'.²² Some of these are clearly inspired by the impact of HIV upon the fulfilment of children's rights in Lesotho.

First, the section which details that children's consent to surgical operations must be effected with the assistance of a parent, guardian or care-giver of the child is an implicit acknowledgement of the difficulties that arise when children require invasive medical treatment and no living parent is available to provide such consent. Hence broadening the list of persons potentially able to provide such consent is a rights-enhancing step.²³

Consent to HIV testing is separately provided for, and children of 12 or older are empowered to provide independent consent to the performance of a HIV test. A parent, guardian or care-giver may furnish consent for younger children below that age, or for children above that age who lack the maturity or mental capacity to understand the benefits, risks and implications of a HIV test. If a child has no parent or guardian and there is no child protection organisation arranging the placement of a child, the consent may be given by the person who is in charge of the hospital where the test is to be performed. This provision equates substantially to the provision of section 130 of the South African Children's Act 38 of 2005, with the subtle distinction that the South African equivalent permits independent consent by a child who is younger than 12, where the child is able to comprehend the consequences of on undergoing an HIV test.²⁴

This right is complemented - to an extent - by the provision contained in section 234: this section requires that a child who is a survivor of sexual abuse and exploitation be provided with emergency legal, medical or health assistance. Although the section does not say this in so many words, it seems that the health assistance may include post exposure prophylaxis (PEPs) (to combat the possibility of HIV/Aids having been transmitted). This is suggested by the wording of the ensuing subsection (2) which provides that no person may refuse to provide reproductive health information to a child who has been a subject of any form of abuse.

That the section is inspired by section 134 of the South African Children's Act 38 of 2005 seems evident: the drafters of the Lesotho Act were fully aware of the South African section which also falls within the short (4 section) Part dealing with the protection of children's health rights in the South African version.²⁵ However, the Lesotho formulation differs markedly

²⁸ Part XXV of the Act.

²⁹ The problem of care-giver consent has arisen in other neighbouring countries such as South Africa where the HIV/Aids pandemic has led to many children being cared for in the extended family. However, in South Africa's Children's Act, the capacity of care-givers to furnish consent is confined to medical treatment and is not extended to (the more invasive) surgical operations. Section 232(4) of the Lesotho Act empowers parents, guardians or caregivers to consent to medical treatment or surgical operations of a child under the age of 12 year, or a child above that age who is of insufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of the treatment or operation. A child of 12 is able to furnish independent consent to medical treatment, provided he or she has sufficient understanding, but needs adult assistance for consent to surgical operations.

³⁰ See J Sloth-Nielsen 'Chapter 7: Protection of Children' in CJ Davel and A Skelton *Compendium on the Children's Act* (2nd revised edition), Juta and O, Cape Town (2013).

³¹ Section 134 of the South Africa law reads as follows: "(1) No person may refuse -

(a) To sell condoms to a child over the age of 12 years; or

(b) to provide a child over the age of 12 year with condoms on request where such condoms are provided or distributed free of charge.

insofar as it is limited to children who are victims of sexual abuse, and insofar as it does not mention access to contraception *eo nomine* at all, referring rather to remedial interventions. This would have been occasioned by the strong traditional and customary attitudes to adolescent sexuality which prevail under Basotho culture.²⁶ The provisions as currently formulated, though not unwelcome, do not comply with the requirements of the Committee on the Right of the Child as spelt out in General Comment no 3 (HIV Aids and the Rights of the Child) and General Comment no 4 (Adolescent Sexual Health and the Rights of the Child). Both require confidential access to reproductive health promoting services to be freely available to sexually active adolescents.

4.4 Fostering and adoption

In the words of the National Strategic Plan on Vulnerable Children 2012-2017, 'in the Basotho culture, legal adoption of children is not a common practice, as children who are vulnerable would normally be placed under the care of a relative in the family. This system has however broken down as more families are unable to provide care and support let alone meet their basic needs due to the socioeconomic impacts of HIV and AIDS, and poverty. A review of the MOHSW Annual Joint Review Report for 2010/2011 fiscal year confirmed the low local adoption rates compared to adoptions outside the country facilitated by international adoption agencies'.²⁷

(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if -

- (c) The United Nations Convention on the Rights of the Child (UNCRC) represents the most significant step towards the advancement of children's rights globally. Article 4 of the UNCRC requires states to take concrete measures to ensure the harmonisation of laws relating to children with the Convention's substantive provisions, including legislative and administrative measures. A similar duty prevails under the regional treaty, the African Charter on the Rights and Welfare of the Child (ACRWC).

Angola is the most recent example of an African country which has enacted a children's statute to bring domestic law in line with international law requirements. The traditional link between children's rights and family law is evident in many UNCRC and ACRWC requirements. These include: the child's right to know and be cared for by both parents who shall bear responsibility for the upbringing and development of the child (UNCRC, art 18(1) and ACRWC, arts 19 and 20); the child's right not to be separated from his or her parents against their will unless so determined by competent authorities (UNCRC, art 9(1); ACRWC, art 19(2)); the right of a child who is separated to maintain personal relations and direct contact with both parents (UNCRC, art 9(2); ACRWC, art 19(3)), and the child's right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, whilst in the care of parents, legal guardians or any other person who has the care of the child (UNCRC, art 19(1); ACRWC, art 16(1)). (a) the child is at least 12 years of age;

(b) proper medical advice is given to the child; and

(c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

(3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality in this respect, subject to section 105."

³² Earlier draft provisions relating to children's access to reproductive health information and provision of reproductive health devices and technologies 'on request by the child and without the consent of the parent or guardian of the child provided that the child is at least twelve years of age, proper medical advice to be given to the child, and a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child' did feature in the Bill (clause 245). The Bill was clearly altered in the Cabinet and Parliamentary process in favour of the much more restrictive version that was eventually passed into law (See African Child Policy Forum 'Harmonisation of law in Eastern and Southern Africa: Lesotho' (2013 update) p 94 (available at www.africanchildforum.org (accessed 26 February 2014)).

³³ By 2011 approximately 1,980 OVC were placed in 34 institutions that were registered with the Department of Social Welfare (as it then was), and in 2010/11, the Department facilitated 50 international and 7 local adoptions (National Strategic Plan for Vulnerable Children 2012-2017, p32).

However, the National Strategic Plan for Vulnerable Children 2012-2017 identifies alternative care to be an important component of the national response to child vulnerability, including as a response to orphanhood as a result of HIV/Aids. Alternative care methods identified in the strategic plan include foster care, adoption, and institutional care. The Plan envisages that communities will be encouraged to foster or adopt vulnerable children as the first choice. Institutional care will be considered as the last option. All of these - foster care, adoption and institutional care - relate to provisions in the 2011 Act, as discussed below.

Lesotho ratified the Hague Inter-country Adoption Convention of 1993 on 24 August 2012, and the Convention entered into force on 1 December of that year.²⁸ This follows the recommendations of a judicial commission of inquiry into adoption appointed in 2004, which was occasioned (inter alia) by reports of two Basotho boys found in Thailand, one of whom who had died in prison, without any indication as to how they had come to be there. There were fears that they had been trafficked, and absent a proper system of adoption and adequate record keeping, such suspicions could not be ruled out. The inquiry, which was headed by Lady Justice Majara, completed its report in 2008. The Commission expanded its work to include foster care, as well as adoption, and produced a detailed report spanning 3 volumes. It was discovered that there was no way of determining how many children were in fact being adopted in Lesotho due to a lack of standardised record keeping at both the Department and the Courts. The Commission did find clear indications that inter-country adoption was being practiced, but details of the adoptive parents and circumstances of the children placed for adoption were seldom clear from the perused records.²⁹

With ratification of the Hague Convention, the Ministry of Social Welfare, which has been quite newly established as an independent ministry, is the designated Central Authority. The suspension on adoption was lifted by 2009, and since then, working agreements with four agencies for the purposes of intercountry adoption have been concluded.³⁰

The Act provides for fosterage and adoption in Part VII. This Part provide a framework for adoption and fosterage, whilst leaving it clear that the detail will be spelt out in standards and guidelines to be developed by the Ministry of Social Welfare (as it now is an independent Ministry).³¹ Eligibility to apply to be an adoptive parent and to serve as a foster parent is,

³⁴ Lesotho also ratified the Hague Abduction Convention of 1980 on that date, and the 1996 Hague Convention on Applicable Law, Recognition, Enforcement and Co-operation in respect of parental responsibilities and measures for the protection of children of 10 October 1996, which entered into force on 1 June 2013. These ratifications, coupled with the finalisation of the 2011 Children's Protection and Welfare Act, constitute the principal reason why the African Child Policy Forum accorded Lesotho a position of 4th on the child friendly states index as regards legal measures to protect children (2013 African Child Wellbeing Report, p31).

³⁵ Due to suspicions of untoward practice in adoption, especially intercountry adoption, all adoptions were suspended in 2007. They have now been resumed.

³⁶ There was also evidence of adoption according to customary or traditional practice (ie without the formal involvement of the courts), but this always occurred between members of the extended family. For a South African case confirming the practice of customary adoption see *M v M* 2010 ZAGPJHC 74.

³⁷ See in general for a discussion of the commission on adoption, Dr I Kimane 'Presentation on adoption and foster care' at the UWC/Miller Du Toit Cloete Conference on Child and Family Law, 2009 (available at www.millerdutoitcloeteinc.co.za/Paper%20-%20Dr%20Kimane)

³⁸ See section 52 of the Act.

however, legislative defined.³² The role of the Ministry in assessing suitability of prospective adoptive and foster parents is spelt out, as is the role of the High Court, the body which must authorise any adoption. The requirement of parental (and, where a child is over the age of 10 years, the child's) consent is detailed as also the effect of an adoption order on parental rights, which severs these and ensures that the adoptive child is for all purposes 'a member of the clan, lineage or other group, and as such will be entitled to all rights to the family rituals in accordance with customary law'.³³

As far as intercountry adoption is concerned, an adoption order involving transborder placement of a child is made for an interim period of no less than two years, subject to supervision of the child by social workers in the country where the adoptive parents reside.³⁴ It can only then be made final, according to the Act.

The Act requires that a child be informed, under the guidance of a social worker, of the fact that he or she is adopted (unless it is not in the best interests of the child to have that fact disclosed to him or her).³⁵ No person other than an adoptive parent may make this disclosure.³⁶ If the child who is to be adopted has siblings, the child is to be informed of any siblings and helped to maintain a link with them, through visits, letters or other forms of communication.³⁷ The importance of a child knowing his or her roots is also evident from article 60(3), which requires, where possible, an adopted child to have access 'to photos, letters or any form of artifacts that might help him to understand his roots better'.

Foster care - by relatives or by persons not related to the child - is rather less well defined in the Act as a whole.³⁸ Although the children's court is empowered to place a child in foster care,³⁹ and the eligibility criteria for foster parents are set out in the same vein as those of adoptive parents, as well as the Act including a provision requiring assessment for suitability by the Ministry,⁴⁰ there is no scheme for the development of a more elaborate foster care system set up by the Act: there are far fewer provisions on foster care than on adoption, for instance, and far fewer than in the foster care chapter of the South African Children's Act 38 of 2005 (seen

³⁹ Sections 51, 54 and (for intercountry adoption) 61.

⁴⁰ Obviously this formulation is aimed more at in-country than inter-country adoption.

⁴¹ In this way the Act gives effect to article 24(f) of the African Charter on the Rights and Welfare of the Child (1990) which requires signatory states to establish machinery to monitor the well-being of children who have been adopted internationally.

⁴² Section 60(1). He or she must also be 'of an understanding age'. It is not clear whether the provisions of this section apply also to intercountry adoption but there is nothing to indicate that they do not. See the text at note 41 below.

⁴³ Section 60(2).

⁴⁴ Section 60(4).

⁴⁵ The definitions clause defines 'family foster care' as placement of a child by the Department of Social Welfare with family members who are not the child's biological parents. 'Foster parent', in turn, is defined as a person not being a parent of a child, who undertakes the responsibility of providing for the care, accommodation and upbringing of the child, with or without financial reward. This latter definition clearly contemplates persons unrelated to the child as well as relatives. The separate definitions of family foster care and foster parent do not appear to play any material role in the provisions of the Act.

⁴⁶ Section 37(1)(e).

⁴⁷ Section 54(1); section 53 provides that the foster parent in whose care a child is placed shall have the same rights in respect of the child's care and guardianship as the parent of the child while the child remains in his care.' It is possibly unusual for foster parents to have legal powers in all respects equatable to those of parents or guardians, but maybe this is a practical solution in a country not well served by social work authorities who can step in to fulfil parental and guardianship roles when required (eg for medical reasons).

together with the package of regulations to the South African Act on this topic). This may well militate against the enhancement of foster care as an alternative care option for children orphaned or made vulnerable by HIV/Aids, and tends to indicate a preference for adoption over foster care as a placement option insofar as adoption receives more elaborate treatment in the law. However, in recent times (2012), the Ministry has developed policy and guidelines on adoption and foster care, which can assist to develop these forms of alternative care further..

Institutional care is also somewhat neglected in the Act. Whilst there are provisions empowering the designation of establishment of places of safety for the care and protection of children, the detail of the conditions, and requirements, not to mention management and functioning of these are left for Ministerial determination, presumably in guidelines and policy.⁴¹ There is no general chapter or Part dealing with residential care establishments outside of this limited provision. Far more attention is accorded, however, to places of detention or custody for children in conflict with the law, which occupy a further 16 substantive sections in this Part (the sections on places of safety are only 3 in number).

Conclusions

The Lesotho Children's Protection and Welfare Act of 2011 was self evidently inspired by the need to put in place effective legal mechanisms for the identification and provision of services to alleviate the plight of orphans and vulnerable children in the country. Several concrete provisions highlighted in this chapter bear testimony to the social phenomenon of HIV/Aids and its impact upon children as a motivating factor for the Act as a whole, and for the inclusion of certain specific provisions.

However, two main concerns are that the Act is light on detail on the specifics of alternative care, including a sound framework for intercountry adoption and its processes, as well as foster care and the regulation of a comprehensive alternative care framework to include private facilities (which may or may not seek designation as a place of safety). The linkages between private child care institutions and inter country adoption have emerged as a source of concern in African countries in recent times, especially where they become 'feeders' for agencies abroad at the expense of alternative care is underscored by the 2009 UN Guidelines for Children in Alternative Care (the adoption of which post dates the drafting (but not the finalisation) of the Lesotho Act).

Second, the Act shies away from comprehensively addressing adolescent sexual health in the HIV context, notably as far as access to contraception and condoms is concerned. This is no fault of the original drafters, it would appear, but provides some evidence of the rather conservative social environment within which the Act was eventually passed into legislation. However, the fact that the Lesotho National Strategic Plan for Vulnerable Children 2012-2017 affirms the centrality of the Act's judicial measures for combatting vulnerability attests to the

⁴⁸ Section 175(1) and (2) of the Act. Compare Chapter 15 of the South African Act (Child and Youth Care Centres) and the detail contained in the accompanying regulations.

enduring value that the provisions have, and the important complementary role that the Act can play in the years to come.

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