

COMMENTARY ON THE IMPACT OF THE CHILDREN'S ACT ON SELECTED ASPECTS OF THE CUSTODY AND CARE OF AFRICAN CHILDREN IN SOUTH AFRICA

JC Bekker*

BA LLB LLD

*Honorary Professor and Part-time Lecturer
Law Faculty, University of Pretoria*

SUMMARY

The Children's Act 38 of 2005 has consolidated and updated the principles relating to care and protection of children. This article does not deal with the multifarious provisions of the Act, but with those that have an impact on African cultural practices and customary law. The author highlights the need for taking issues relating to customary law and culture into account in implementing the Act.

1 INTRODUCTION

The objective of the new Children's Act (the Act) is as set out in the long title, in so far as it is relevant for present purposes –

“To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; ... to make new provision for the adoption of children ...”

The legislature was obliged to develop the law to meet current requirements such as to give effect to the rights of children as embodied in section 28 of our Bill of Rights.¹ Existing legislation does not deal adequately with children's rights in current social and legal circumstances. South Africa has moreover acceded to various international conventions, such as the United Nations Convention on the Rights of the Child² and the African

* The author is indebted to Ms Ronél van Zyl of the SA Law Reform Commission for the insight she gave him in the provisions of the Children's Act.

¹ Embodied in the Constitution of the Republic of South Africa, 1996.

² Entered into force in 1990.

Charter on the Rights and Welfare of the Child.³ The Act accommodates the rights and obligations that flow from these instruments.

However, in legislating on social issues the legislature is invariably confronted with customs and cultural practices.

The object of this article is to highlight and evaluate certain provisions in the Act that are at variance with African customary norms and values. In this regard Sloth-Nielsen and Mezmur⁴ stated that –

“human rights documents continually recognise that culture is an area that must be protected. However, culture should not be relied on as a basis for diminishing protected rights. Where positive, culture should be harnessed for the advancement of children’s rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike the necessary balance between culture and children’s rights is an issue that should continue to engage the minds of scholars ...”

A large number of African children are regulated by customary law rather than by the common or statutory law.

Even though the Act is a *fait accompli*, the comments in this article may lead to a better understanding of the provisions concerned and be of assistance in their implementation and maybe taken into account in further law reform projects.

2 DUAL LEGAL SYSTEM

South Africa has a dual legal system in the sense that the common (Roman-Dutch) law applies to all people, but Africans are also subject to indigenous customary law. In terms of section 211(3) of the Constitution –

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

In practice the dividing line between the application of common and customary law is often obscure. It has given rise to a peculiar version of “conflict of laws”. In the field of family law the conflicts are exacerbated by the fact that the common law has its roots in the Western nuclear family system, whereas many Africans regard themselves as members of what is termed extended families. The family consists of husband, wife and unmarried children and the family home consisting of the family, maybe various wives, patrilocal married sons and other relatives. African children “belong” to this group, whereas in the case of Western concepts the point of departure is that the biological parents are the guardians and custodians of their children.

³ Entered into force in 1999.

⁴ “Surveying the Research Landscape to Promote Children’s Legal Rights in an African Context” 2007 *AHRLJ* 330 335-336.

3 SOCIAL AND CULTURAL CONSIDERATIONS

On the face of it there should be no difference between custody and care of children of different racial groups in South Africa. However, in practice it is not possible to apply universal norms. The African social order in which African children are born and live calls for a different approach. It must be conceded immediately that this social order has changed radically. Many Africans have the same social order as the other population groups. However, according to the latest census three million Africans said they were married by customary law. 28 000 said they had entered into polygynous marriages.⁵

Many contract dual marriages. They enter into a civil marriage and follow it up with a customary marriage ceremony. In a survey involving 100 families in Atteridgeville, a township in Tshwane, Coertze found that a civil marriage in court or in church is invariably followed up the day after, or even a week later, with a customary marriage ceremony and feast, particularly to integrate the bride with her husband's family.⁶

The South African Law Reform Commission pointed out that according to a number of surveys at least 90 percent of African respondents indicated that *lobolo* (bride-wealth) had been paid in respect of their own marriages. More than 80 per cent were against its abolition. Twenty per cent of respondents concluded customary marriages only. Forty per cent were married in terms of both common and customary law.⁷

In a survey conducted in Mamelodi, a township in Tshwane, the researchers found that 80 per cent of African women (a large number of whom were young and educated) were in favour of the *lobolo* institution and did not regard it in any way as infringing on their basic human rights.⁸

A further indication that the indigenous social system still prevails to a large extent, is the fact that there are about 21,3 million people or 3,5 million households which occupy communal land in South Africa. The land generally falls under the jurisdiction of a senior traditional leader (chief).⁹ Those people have also undergone social change, but not to the same extent as people living in cities and towns.

More generally, it is evident that the "new" social order did not lead to a whole-scale abandonment of traditional social values, and cultural perceptions of children in a family.

⁵ Report of the Census Sub-Committee to the South African Statistics Council on Census 2001.

⁶ Coertze "Die Gesinslewe in Atteridgeville" in Eloff and Coertze *Etnografiese Studies in Suidelike Afrika* (1972) 291-334.

⁷ Project 51 Report *Marriages and Customary Unions of Black Persons* (1996) 160-180.

⁸ Vorster *Urbanite's Perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) Centre for Indigenous Law, Unisa, Pretoria.

⁹ Sibanda "The Birth of a New Order and Unitary Land Administration in Communal Areas of South Africa" 2006 *Walter Sisulu University LJ* 4-58. In terms of various provisions of the Communal Land Rights Act 11 of 2004 the land will not *ipso facto* fall under the control of traditional leaders, but will still constitute their areas of jurisdiction.

4 DEFINITION OF A CHILD

This question is closely allied to the aforementioned social considerations, because Africans had, and some still have, firm views and practices about the passage from childhood to adulthood. Chronological age was not a consideration.

In the Act a child is defined as a person under the age of 18 years.¹⁰ This is obviously meant to bring the age in line with section 28(3) of the Constitution in terms of which a child means a person under the age of 18 years. That, then, is the age that has been chosen for the operation of the Act. It must be mentioned though that Africans never viewed childhood in terms of chronological age. On initiation, which went hand in hand with circumcision, a Xhosa boy acquired the status of a man. Puberty again, followed by a ceremony, called *intonjane* by the Xhosa, raised the status of a girl to that of an adult.¹¹

On the other hand Zulu boys do not go through any specific ceremony to mark the transition from boyhood to manhood. They do not undergo circumcision. According to De la Harpe, Leitch and Derwent:¹² "It is rather a gradual evolutionary process, marked by subtle changes indicating that they are growing up."

Initiation ceremonies to introduce boys and girls into adulthood are widespread. Van der Vliet¹³ reports that schools for girls of the scope and size associated with the boys circumcision lodges are found among the Lobedu, Venda, Pedi, South Sotho and Tswana.

Other communities also practise circumcision, almost with religious zeal, and some have coming of age ceremonies for girls. However, the practices are too varied and vague to serve as general criteria for determining adulthood, or in common law parlance, majority status. The definition of a child as a person under the age of 18 years was obviously called for to create uniformity.

The age of majority of any person in terms of the Age of Majority Act¹⁴ was 21. In terms of section 17 of the Act –

"A child, whether male or female, becomes a major upon reaching the age of 18 years."

Be that as it may, the African view of childhood and adulthood will not change as of now. Initiation ceremonies will be performed as heretofore. If, of course, there is a legal conflict the statutory age of majority will prevail,

¹⁰ S 1(1)(g).

¹¹ See Van Tromp *Xhosa Law of Persons: A Treatise on the Legal Principles of Family Law Relations among the Ama Xhosa* (1947) 1-7.

¹² *Zulu* (1998) 72.

¹³ "Growing Up in Traditional Society" in Hammond-Tooke *The Bantu-speaking Peoples of Southern Africa* (1974) 232.

¹⁴ 57 of 192.

such as for determining contractual capacity and the right to marry without parental consent.

5 SOCIAL PARENTAGE

In reflecting upon the custody and care of African children one must have regard to the fact that many children have what may be termed foster parents.

Nhlapo,¹⁵ commenting on Swazi customary law, described this peculiar parenthood as follows:

“All those relationships are characterized by the ‘movement’ of children within or without a kinship to be ‘placed’ temporarily or permanently, with someone other than the biological parent. Sometimes such movement entails a physical change of residence; often it is notional as in the case of a child’s ritual attachment to a godparent or ‘allocation’ to a different branch of the family. These movements are widespread and institutionalised in many societies and the parent-child relationship they create can aptly be described as social parenthood.”

The children retain their original legal status, family name and rights and duties acquired by birth in the father’s home, but in fact they are under the custody and control of the “foster” parents.

Social parentage is widespread. Although migrant labour is supposed to have come to an end on the demise of apartheid, many parents still live away from their children at places of employment. Somebody in the family home undertakes the role of foster parent. Quite sadly peers are often entrusted with the responsibility. Even sadder, the rages of AIDS left innumerable children parentless.¹⁶ Other family members take over the role of parent.

The Act wisely caters for any occurrence of social parentage by defining a “caregiver” as –

“any person other than a parent or guardian, who factually cares for the child and includes (among others) –

- (a) any person who cares for a child with the implied or express consent of a parent or guardian of the child;
- ...; and
- (g) the child at the head of a child-headed household.”

This should facilitate the implementation of measures aimed at alleviating the plight of children in need of care. Problems may arise in that the child caregiver does not have legal capacity. A child caregiver does not have legal capacity, neither at common law nor in terms of the Act.

¹⁵ “Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law” in Eekelaar and Sarcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* (1993) 36.

¹⁶ According to statistical estimates provided by UNICEF 19 per cent of all children in South Africa will have been orphaned by 2010 (*Children on the Brink* 2004 (UNICEF)).

6 ADOPTION

Statutory rules did not exclude or modify the customary law of adoption. In *Kewana v Santam Insurance Company Limited*¹⁷ the court held:

“This legislation therefore introduced a right which did not exist. It filled a vacuum in the common law but there is no basis for holding that it also modified or replaced adoption under customary law which remains enforceable under s 33 of the Constitution [referring to the Republic of Transkei Constitution Act 15 of 1976] while adoption under the Children’s Act is governed by the provisions of the Act. It cannot be said that only adoption under the Children’s Act is recognised in Transkei.”

This *dictum* appeared to be conclusive. However, the Act has introduced some confusion. In terms of section 1(1) an “adopted child” means a child adopted by a person in terms of any law, which would include customary law. Section 212(3) of the Constitution provides that “the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.

Section 28 on the face of it precludes customary law adoptions. It provides that a child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in section 242. Subsection (3) of the latter provides that –

“An adopted child must for all purposes be regarded as the child of the adopted parent and the adoptive parent must for all purposes be regarded as the parent of the adoptive child.”

This would appear to apply to adoptions in terms of the Act only. But as these provisions do not specifically deal with customary law, one may assume that the recognition of customary adoptions as outlined above still stands. This assumption is substantiated by the fact that adoption in terms of a court order as contemplated in section 228 is meant to bring about adoption and to regulate the effect of such an order. To hold otherwise would amount to depriving many African children of a name and status acquired from birth or at any time during childhood. It would be grossly unfair. It would, among others, deprive a child adopted in terms of customary law from a right to claim from the Road Accident Fund or a right to inherit from his or her adoptive parents. It would put them in a legal limbo. That could under no circumstances be in their best interests.

It is suggested that to remove all doubt the Act be amended to recognise adoptions in terms of customary law. Euro-centric lawmakers are inclined to over-regulate. In the case of African law legislatures have adopted reams of paper law and academics compiled re-statements. Nobody has ever succeeded in re-stating or codifying customary law. It is impossible to capture changing cultural practices in legal terminology. Bennett¹⁸ remarked that

¹⁷ 1993 4 SA 771 (Tk). See also *Metso v Padongelukkefonds* 2001 3 SA 1142 (T); and Maithufi “*Metiso v Road Accident Fund Case No 445889 of 2000 (T)*” 2001 *De Jure* 391.

¹⁸ *Customary Law in South Africa* (2004) 6.

“the process of writing inevitably effects a fundamental change to both the form and content of the [customary law] material.”

7 THE ACQUISITION OF PARENTAL RIGHTS AND RESPONSIBILITIES BY UNMARRIED FATHERS

In terms of section 21(1) of the Act –

“The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –

- (a) if at the time of the child’s birth he is living with the mother – in a permanent life-partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother –
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law;
 - (ii) contributes or has attempted to in good faith to contribute to the child’s upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.”

This provision is obviously meant to accommodate an unmarried father who of his own accord is willing to accept parental responsibilities and also wishes to acquire rights in the child. This is laudable, but in practice it would pose several problems:

- (1) The “acquisition” by an outsider may disturb the bond between the child and the family to which it belongs. The maternal grandparents, for instance, do not have to acquire “a child.”
- (2) The requirements of section 21(1)(b)(i), (ii) and (iii) are cumulative. They constitute a strict test. However, the word “acquire” still poses a problem. The dictionary meaning of “acquire” is to gain by and for oneself. In African culture the biological father does not obtain a child for himself by merely following the procedure set out in this section.

Payment of “damages *in terms of customary law*” (emphasis supplied) may be misinterpreted. Acquisition of children by payment of damages as set out by Bekker¹⁹ may be summarised as follows:

- Payment of damages gives the natural father of the child no rights to the child. It belongs to its maternal grandfather.
- The subsequent marriage of its parents, however, legitimates the child and it then belongs to the natural father (and of course the mother).²⁰
- In the Cape Nguni communities the right to claim “ownership” in the child vests in the natural father as soon as he has paid damages. Upon

¹⁹ *Seymour’s Customary Law in Southern Africa* (1989) 230-234.

²⁰ This was accepted by the court in *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

payment of a further beast (which may nowadays sound in money) he is entitled to claim the child.

- Swazi law is similar to that of the Cape Nguni communities.
- Among others the Sotho-Tswana, Tsonga and Zulu, payment of damages gives the natural father no rights in the child. The child belongs to the maternal grandfather.

Each case will therefore have to be judged in the light of the law of the particular community.

It is significant that in terms of the provision under discussion the biological father *acquires* parental responsibilities and rights. It need not be claimed. In customary law parental responsibilities and rights do not follow automatically on payment of damages.

The position is rather as stated by Bennett:²¹

“Customary law has no specific concern with the maintenance of illegitimate children. All children, whatever their origin in or out of wedlock, are absorbed into a family, be it the family of the mother’s husband, of her father or of the child’s natural father, in consequence, the natural father has no duty to support his children unless he acquires full parental rights.”

8 CHILD PARTICIPATION

In terms of article 12 of the UN Convention on the Rights of the Child, 1989, the right to freedom of expression includes the right of a child to express his or her views on judicial and administrative matters affecting such a child. The Act lends substance to this right as follows:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”²²

Africans are not likely to understand this rule. Fathers are responsible for their children and accountable for their behaviour – good or bad. Parental responsibility is a way of life. Anthropologists have described this concept in different ways. Coertze’s²³ account is a fair reflection:

“Among the Bafokeng it is not customary for a child under the age of twelve, whether a boy or girl, to appear in court, even when the charge relates to an offence committed by him, or when compensation is claimed on his behalf. A child under twelve may be called before the *lesika* (family) court, but if the case arising from his [misdeeds] goes before a public court, the young offender will not be present ... The sentence relates to the father’s offence, namely his refusal to accept responsibility for his child and to carry out his parental duty by punishing him.

²¹ 316.

²² S 10.

²³ Coertze *Bafokeng Family Law and Law of Succession* (1987) 212-213.

However, once a boy has reached the age of about 15, he will be ordered to appear in court with his father. If compensation is awarded to a complainant, it will be paid by the father.”

Thus, hearing a child in isolation from his parents may distort the parent-child relationship. Parents may opt out of their parental obligations. This may be avoided if courts and officials interpret the phrase “participate in an appropriate” way in a manner that accommodates parents’ thought patterns.

9 PARENTING PLANS

In terms of section 33(1) of the Act –

“The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.”

This provision may best be initiated by a bland statement: custody awards on divorce are in many cases not complied with.²⁴ The terms are every so often breached or the non-custodian parents are not given access at all. Sanctions for non-performance are inadequate. In the case of African children the situation is exacerbated by sheer poverty and African views about where children belong.

On account of poverty neither parent may have suitable accommodation, nor adequate means to care for the child.

Africans, moreover, have an ingrained belief that children “belong” rather than being under the guardianship or in the custody of either parent, especially of the mother.

In customary law parlance the word “custody” is hardly, if ever, used. The emphasis is on deciding to which family a child belongs or is affiliated. In *Madyibi v Nguva*²⁵ the rules of affiliation were stated as follows:

“By nature the progeny of a woman accrue to her father’s group and are members of his group and tribe for religious and political purposes ... These rights and duties are transferred by Native law to another group only on contraction (sic) of a valid customary union whereby the woman’s group receives ‘lobolo’ from the other group and transfers the natural right to the woman’s productive power and her progeny to the group providing ‘lobolo’.”

Although this means that the biological parents do not necessarily have custody of their children, affiliation always affords care and security. Even if both biological parents should pass away, the child will not be an orphan in the Western sense of the word.

Against this view of a child’s membership of a family, the award of custody to the mother is not understood. It is not as if she is regarded as unfit to care for the child. On the contrary, young children will as a matter of course be

²⁴ This matter is discussed by Bekker and Van Zyl “Custody of African Children on Divorce” 2002 *Obiter* 116-131.

²⁵ 4 NAC 40. The report does not carry a date.

left in their mother's care. But an award of custody is interpreted as breaking the child's link with the family, and father for that matter, to which it belongs.

The equality of the spouses in the current human rights dispensation is non-negotiable. Mothers must have equal rights of guardianship and access to children on divorce. However, Mbiti²⁶ says an individual does not and cannot exist alone except corporately, children belong to the corporate body of kinsmen. They do not belong to the mother.

Custody as presently understood is changed entirely. In terms of section 1(2) of the Act –

“In addition to the meaning assigned to the terms ‘custody’ and ‘access’ in any law, and the common law, the terms ‘custody’ and ‘access’ in any law must be construed to also mean ‘care’ and ‘contact’ as defined in this Act.

There are elaborate definitions of ‘care’ and ‘contact’ that need not to be repeated here.

These terms convey to a larger extent African views, more so than custody only, as presently understood.”

10 THE ROLE OF TRADITIONAL LEADERS

The Act envisages a role for traditional authorities in the care of children. In terms of section 71(1) –

“The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.”

It has been submitted that traditional authorities are organs of state as defined in section 239 of the Constitution.²⁷ If that submission is correct, traditional leaders could play a significant role in implementing the Act.

In addition also section 8(2) enjoys –

“all organs of state in any sphere of government ... [to] respect, protect and promote the rights of children contained in [this] Act.”

Although traditional authorities are not mentioned, they could support the establishment of drop-in centres in terms of section 213. The establishment would in many cases be dependent on support from the traditional authority of the area. They should also be the eyes and ears of welfare agencies in identifying child-headed households.

The positive side of the proposed involvement is that there are no less than 773 senior traditional leaders (chiefs) in the communal areas.²⁸ They are in contact with members of their communities particularly through ward

²⁶ *African Religions and Philosophy* (1969) 108.

²⁷ Bekker “Traditional Authorities as Organs of State” 2004 *Speculum Juris* 121-124.

²⁸ Department of Provincial and Local Government *The Role of Traditional Leaders in Democratic Government: A Consolidated Set of Policy Instruments* (undated) 22.

heads (headmen). It is estimated that there are about 12 000 courts of ward heads in communal areas.²⁹

11 CONCLUSION

The dichotomy between universal norms and culture pervades the whole of Africa. As explained by Sloth-Nielsen and Mezmur.³⁰

“some importance in the African context is the extent to which legal reforms deal with customary law and issues relating to custom and culture. In Namibia, for instance, debates are still raging about law reform concerning the issue of guardianship and contact of unmarried fathers with their extramarital children, which have been strongly influenced by cultural considerations, especially the perceptions of men.”

The author’s perception of the Act is that it has not really taken account of “customary law and issues relating to custom and culture”. It may make implementation of certain provisions somewhat difficult. On the other hand there are provisions, such as the new approach to custody and access, that would be more acceptable than one of the parents having custody.

The Act also brings about legal certainty in many spheres. However, it defines situations and events in such great detail that it might hamper parent-child relationships. Africans have a pragmatic approach to care and custody of children. The detailed definitions and prescriptions, if literally applied, might make some provisions mere “paper law” – law that is out of touch with African norms and values. Maithufi³¹ emphasises this problem by saying –

“Reforming or adapting customary family law is a daunting task that can take many years to accomplish. The reformer must ideally have knowledge of African culture and traditions, and at least a working knowledge of the language used in that area. African customary family law principles are, in most instances, contained in idiomatic expressions that may not be easily understandable to the non-speaker of an African language. Without these basic tools, the reform product might result in paper law. It has also to be noted that it is not always advisable to take the reform product of one country and apply it to another without taking into account traditional or cultural variations.”

²⁹ Fn 41 in Chapter 9 “Court of Traditional Authorities” in Bekker, Rautenbach and Goolam *Introduction to legal Pluralism in South African* (2006) 143.

³⁰ 2007 *AHRLJ* 335-336.

³¹ “Adapting or Reforming Customary Family Law in a Democratic Constitutional Dispensation. The South African Experience” in Hinz (ed) *The Shade of New Leaves: Governance in Traditional Authority* (2006) 248.