

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK FOR ADOPTION UNDER AFRICAN
CUSTOMARY LAW**

A Dissertation Submitted in Fulfilment of the Requirements for the Degree of Master of

Laws (LLM) by Dissertation



**UNIVERSITY *of the*
WESTERN CAPE
Titilayo Joan Akande**

Student Number: 4061094

Supervisor: Associate Professor Anthony C. Diala

DECLARATION

I, **Titilayo Joan Akande**, declare that the thesis titled '**Comparative Analysis of the Legal Framework for Adoption under African Customary Law**' is my original work and that all sources I have used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College or other institution of learning for any academic or other awards.



Titilayo Joan Akande



This dissertation has been submitted for examination with my approval as Supervisor.

A.C.D

[Professor Anthony C Diala]

28 February, 2022

DEDICATION

I dedicate this work to all the children adopted under customary law in the countries under review. Many of these children are abused, marginalised, and denied rights that are available to biological children and children adopted under statutory law. It is my hope that the suggestions in this work will alleviate your predicament and make your prospects brighter. Hopefully, the result of this study will create an awareness of the gaps in the administration of adoptions under customary law and instigate law reform aimed at redressing this loophole. Concurrently, this dissertation is dedicated to my elder brother, Dr Olusola Olanrewaju, who continues to be of great support to my extended family.



ACKNOWLEDGEMENTS

I would like to thank God for his strength, and grace that sustained me throughout the period of writing this thesis. Additionally, I thank God for bringing me in contact with various people who made this outcome a reality.

I would like to thank my supervisor, Professor Anthony Diala for his kindness and patience throughout the writing process. I remain indebted to him for inspiring me to write on this theme. No amount of words will be able to convey my sincere gratitude to him.

My special thanks go to my husband, Dr. Robert Akande for encouraging me to pursue a Master's Degree in law. I would like to thank my sons, Gabriel Robert-Akande and Michael Robert- Akande for their patience, which allowed me to focus on my studies and sacrifice the time I would have solely spent with them. Once again, I would like to thank my husband for standing in this role.

I am indebted to my dear brother, Dr. Oye Olanrewaju for his assistance in making this dream a reality.

Finally, I would like to thank my colleagues, Talumba Kateketa and Albert Puja for their assistance when I needed guidance.

The period of writing was tedious and I am grateful for all who made the burden lighter.

ABSTRACT

While there is a comprehensive legal framework for the adoption of children under statutory law in Nigeria, South Africa, and Botswana, there is far less clarity on customary law adoption. This study explored how the legal framework of these countries provide for customary law adoption. It also examined the extent to which the rights of adopted children are protected, as mandated by international and regional human rights instruments. The study reveals that the legislative framework on adoption in the sampled states does not formally accommodate customary law adoption. Many children in these countries live in rural communities practicing customary law, with the majority of them being born in families that struggle with poverty and gender inequality. The violation of fundamental human rights of children adopted under customary law in some Nigerian communities is treated with contempt. In South Africa, customary law adoption is unregulated, unmonitored and unrecognised by statutory law, thereby engendering a risk of abuse and exploitation of vulnerable children. Similarly, Botswana lacks written rules and techniques for customary law adoption. The study calls for the statutory recognition of customary law adoption, evaluation of how the court ensure that the best interests of the child are promoted, and clear delineation between formal adoption and forms of informal kinship care.

Keywords: African customary law adoption, comparative law, best interests of the child.

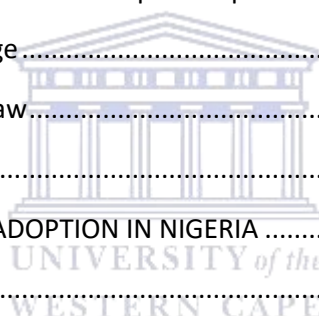
ABBREVIATIONS AND ACRONYMS

ACRWC	African Convention on the Rights and Welfare of the Child
CRA	Child Rights Act
DSD	Department of Social Development
GDP	Gross Domestic Product
HCIA	Hague Convention on International Adoption
HRC	Human Rights Commission
NGO	Non-Governmental Organisation
PRR	Parental Rights and Responsibilities
SALC	South African Law Commission
SALRC	South African Law Review Commission
UNCRC	United Nation Convention on the Rights of the Child
UNICEF	United Nations Children' Educational Fund
USA	United States of America

Table of Contents

DEDICATION	iii
ACKNOWLEDGEMENTS	iv
ABSTRACT	v
ABBREVIATIONS AND ACRONYMS	vi
CHAPTER ONE: INTRODUCTION	1
1.1. Research background	1
1.2. Research problem	2
1.3. Research question (s)	3
1.4. Objectives of the study	3
1.5. Scope of study and literature review	4
1.5.1. Nigeria	4
1.5.2. South Africa	5
1.5.3. Botswana	8
1.6. Research methodology	10
1.7. Justification of research	11
1.8. Chapter breakdown	11
CHAPTER TWO: HISTORY OF ADOPTION LAWS IN NIGERIA, SOUTH AFRICA AND BOTSWANA	14
2.1. Introduction	14
2.2. Definition of adoption	14
2.3. Reasons for adoption	16
2.4. History of adoption laws in Nigeria	17
2.4.1. Laws and procedures under the Child Rights Act 2003	18
2.4.2. The objective of the Act	19
2.4.3. Provisions of the Act	20
2.4.3.1. Establishment of adoption services	Error! Bookmark not defined.
2.4.3.2. Persons who may be adopted	21
2.4.3.3. Persons who may adopt	Error! Bookmark not defined.
2.4.3.4. Consents required for adoption	22
2.4.3.5. Conditions preceding the making of adoption order	23
2.4.3.6. Prohibition of certain payments for adoption	24

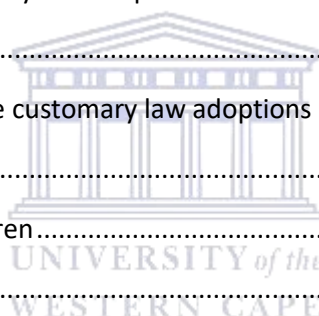
2.4.3.7. Establishment of the adopted children register	24
2.5. History of Adoption Laws in South Africa	25
2.5.1. Adoption of Children Act 25 of 1923	25
2.5.2. Children’s Act 31 of 1937	27
2.5.3. Children’s Act 33 of 1960	27
2.5.4. Childcare Act 74 of 1983	28
2.5.5. Children’s Act 38 of 2005	28
2.6. Roman Law	29
2.7. History of Adoption Laws in Botswana	30
2.7.1. Qualifications for adoption	33
2.7.2. Adoption orders	34
2.7.3. Effect of adoption	34
2.7.4. No consideration in connection with adoption is permissible	35
2.7.5. Effect of adoption on marriage	35
2.7.6. Act not to affect customary law	35
2.8. Conclusion	35
CHAPTER THREE: CUSTOMARY LAW ADOPTION IN NIGERIA	38
3.1. Introduction	38
3.2. Basis of adoption under customary law in Nigeria	38
3.3. Purpose of customary law adoption	40
3.4. Types of customary law adoptions	41
3.4.1. Formal customary law adoption	41
3.4.2. Informal customary law adoption	42
3.4.3. Quasi – adoption	43
3.5. Northern Nigeria’s perception of adoption	44
3.6. Procedures for a valid customary law adoption	47
3.7. The rights of the Nigerian child	48
3.7.1. The rights of the adopted child in succession	49
3.8. Challenges to the rights of the child adopted under customary law	51
3.9. Conclusion	52



CHAPTER FOUR: CUSTOMARY LAW ADOPTION IN SOUTH AFRICA	54
4.1. Introduction	54
4.2. Customary law in South Africa	54
4.3. Development of adoption in customary law in South Africa	56
4.3.1. Restrictions on adoption	58
4.4. Effect of statutory provisions on customary law adoption.....	60
4.5. The validity of customary law adoption.....	60
4.6. Regulation of adoption of children under customary in South Africa	64
4.6.1. Provisions of the Children’s Act 38 of 2005	65
4.6.2. Draft Child Care and Protection Policy.....	68
4.7. Case law recognition of customary law adoptions in South Africa.....	70
4.7.1. <i>Kewana v Santam Insurance Co Ltd</i>	71
4.7.2. <i>Metiso v Padongelukfonds</i>	72
4.7.3. <i>Thibela v Minister van Wet en Orde</i>	72
4.7.4. <i>Motsepe v Khoza</i>	73
4.7.5. <i>Zibi v Zibi</i>	73
4.7.6. <i>Maswanganye v Baloyi</i>	73
4.8. Conclusion.....	74
CHAPTER FIVE: CUSTOMARY LAW ADOPTION IN BOTSWANA	77
5.1. Introduction	77
5.2. Historical development of adoption laws in Botswana	77
5.3. Customary law in Botswana.....	78
5.4. The Botswana courts.....	80
5.4.1. Historical overview of the courts in Botswana	80
5.4.2. Customary courts	81
5.4.3. Customary law and its application in Botswana courts	82
5.5. Definition of a child	84
5.5.1. Adoption of children under customary law in Botswana	84
5.6. Different types of customary law adoptions in Botswana.....	87
5.6.1. Temporary adoption	88

5.6.2. Permanent adoption	89
5.6.2.1. Permanent adoption of a weaned child.....	90
5.6.2.2. Permanent adoption by a friend	92
5.6.2.3. Permanent adoption by a natural father	92
5.6.2.4. Permanent adoption by a step father.....	93
5.7. Customary child adoption in relation to international instruments.....	95
5.8. Analysing laws against child abuse in Botswana.....	96
5.8.1. The role of non-governmental organisations in campaigning for the rights of children.....	97
5.9. Conclusion	98
CHAPTER SIX: CUSTOMARY LAW ADOPTION VERSUS OTHER FORMS OF CHILDCARE	100
6.1. Introduction	100
6.2. Foster care.....	101
6.2.1. Foster Care under the Child Rights Act 2003	102
6.2.2. Foster care and guardianship in Botswana.....	104
6.2.3. Legal implications of foster care.....	105
6.3. Foster care in customary law	105
6.3.1. Lack of recognition and regulation of customary foster care in South Africa	106
6.4. Guardianship	107
6.4.1. Guardianship in Nigeria under the Child Rights Act.....	107
6.5. Guardianship in customary law.....	108
6.6.1. Distinction between customary adoption and other forms of child care.....	111
6.7. Comparisons of children raised in foster care placement and other institutions	112
6.8. Foster care and inter-country adoptions	113
6.9. Problems associated with inter- country adoptions.....	115
6.10. Regulating foster care in treaties.....	116
6.11. Best interest of the child in forms of childcare	116
6.12. Conclusion.....	118
CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS	121
7.1. Introduction	121
7.2. Summary of chapters	122

7.2.1. Chapter one.....	122
7.2.2. Chapter two	122
7.2.3. Chapter three	123
7.2.4. Chapter four	124
7.2.5. Chapter five	125
7.2.6. Chapter six.....	126
7.3. Policy Recommendations.....	127
7.3.1. Nigeria	128
7.3.1.1. Enforcement of equality rights in Nigeria	128
7.3.2. South Africa	128
7.3.2.1. Recognition of customary law adoptions by South African courts	128
7.3.2.2. Monitoring and screening prospective adoptive parents in South Africa	129
7.3.2.3. Specific provision for customary law adoption in NCCPP	129
7.3.3. Botswana.....	129
7.3.3.1. Stronger structure to validate customary law adoptions in Botswana	129
7.3.3.2. Standard definition of a child.....	130
7.3.3.3. Promoting the rights of children.....	130
7.3.4. Foster care and guardianship.....	130
7.4. Closing remarks and further research	131
BIBLIOGRAPHY	132
APPENDIX.....	144



CHAPTER ONE: INTRODUCTION

1.1. Research background

While there is a comprehensive legal framework for the adoption of children under statutory law in Nigeria, South Africa and Botswana, there is less clarity on adoptions under customary law in these countries. In Nigeria, South Africa, and Botswana, the majority of the people live under customary laws, especially in rural communities.¹ Botswana has a population of over 2.3 million people, and at least 40% are children below the age of 18 years, with the majority of them living in rural areas.² Many of the children living in customary law communities in these three countries are deeply entrenched in poverty and gender inequality. Consequently, they are susceptible to violation of their rights.³ This research compares the legal framework of adoption under African customary law in the three countries. It focuses on how this framework depicts indigenous African values and the principle of the best interest of the child. Customary law is defined as an amalgam of customs or habitual practices accepted by members of a particular community, influencing the law as a result of long-established usage.⁴ A customary law adoption is a cultural practice in which a child is raised by a person who is not the child's biological parent, according to the customary law of the family's community.⁵ This kind of adoption secures the rights of children to alternative care while their parents are absent, deceased or unable to take care of them.⁶ In Southern Africa, adoption has been the foundation of support for many children who

¹ See Nigerian Institute of Advanced Legal Studies(ed.) *Restatement of Customary Law of Nigeria* (2013) Preface. See Maithufi I 'The Best Interests of the Child and African Customary Law' in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 137. See also Molokomme A *Children of the Fence: The Maintenance of Extra-Marital Children Under Law and Practice in Botswana* (1991) 40 (hereafter *Children on the Fence*).

² Nsereko DDN *Constitutional Law in Botswana* (2002) xxi; Tabengwa M, Khan A & partners 'Law reform – the emerging protection of children in Botswana?' in Sloth-Nielsen J & du Toit Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 83 (hereafter Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations*).

³ Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa: A study commissioned by Save the Children Sweden Southern Africa Regional Office* (2011) 8 (hereafter Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa*)

⁴ Ehiribe I 'The Validity of Customary Law Arbitration in Nigeria' (1996) 18 *COMP. L. Y.B. INT'L BUS.* (1996) 131.

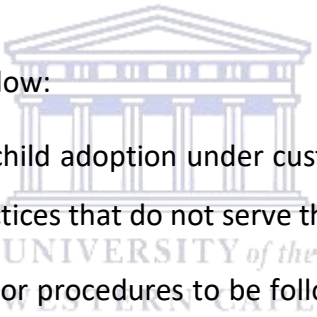
⁵ Payne N 'Customary Adoption What is the Law in Your Province?' 2019 available at <https://nelliganlaw.ca/blog/customary-adoption-law-province/> (accessed 28 October 2020).

⁶ Martin P & Mbambo B 'An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa' (2011) 43.

have been deprived of their natural parents' care as a result of their demise of HIV and AIDS.⁷ A common element in customary law adoptions is for the birth parents to maintain a role in the child's life.⁸ A distinguishing characteristic of statutory adoption is a permanent severance of the rights, duties and legal relationship between the adopted child and the natural parents.⁹ Conversely, these rights, duties, and legal relationships are kept intact in customary law adoption.¹⁰ In South Africa, customary law adoption usually takes place between families that are related to each other biologically but it may also take place between non-relatives.¹¹ The validity of an act of adoption in terms of African customary law largely depends on the agreement between families.¹² The aim of these agreements is to indicate that the adopted child has been formally relocated from one family to another.

1.2. Research problem

The research problem is outlined below:

- 
- (a) There is no legal framework on child adoption under customary law in Nigeria, South Africa and Botswana, which promotes practices that do not serve the best interests of the child;
 - (b) There are no written rules, laws or procedures to be followed pertaining to the adoption of children under customary law in these three countries;
 - (c) There are discrepancies and gaps between the statutory form of adoption and that of customary law in these three countries;
 - (d) Traditional institutions hardly keep records of customary law adoption, which makes it impossible to know what courts consider important for forthcoming cases; and

⁷ Martin P & Mbambo B (2011) 42.

⁸ Payne N 'Customary Adoption- What is the Law in Your Province?' 2019.

⁹ Osondu AC *Modern Nigerian Family Law & Practice* (2012) 258.

¹⁰ Osondu AC (2012) 258.

¹¹ Maithufi 2001 De Jure 391, 394.

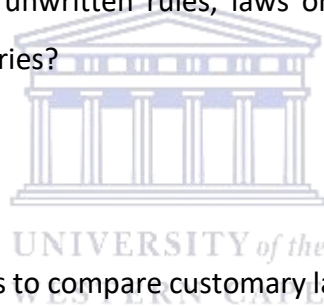
¹² Maithufi 2001 De Jure 391-392. See also SALC Project 110 24.

(e) In customary law adoption, children are regarded as communal resources and their best interests are deputized for those of the community to which they belong.

1.3. Research question (s)

The main question this study seeks to research is: In what ways does the legal framework of Nigeria, South Africa and Botswana provide for child adoption under African customary law? In the endeavour to research this question, the following sub-questions will be examined, vis:

- a) What factors promote or inhibit the development of a legal framework for child adoption under African customary law in these three countries?
- b) How does customary law adoption impact on children's rights in these countries?
- c) What are the consequences of unwritten rules, laws or child adoption procedures under customary law in these three countries?



1.4. Objectives of the study

- a) The main objective of this study is to compare customary law adoption in Nigeria, South Africa and Botswana and deduce similarities, differences and what legal framework is in place to govern such adoption.
- b) To understand why very little information is available on customary law adoption.
- c) To establish how these countries, recognise customary adoption.
- d) To understand if the best interest of the child as enjoined in many instruments are promoted in customary law adoption in these three countries.
- e) To examine if the children adopted under customary law are in any way marginalized compared to those adopted according to statutory law.

1.5. Scope of study and literature review

The aim of this study is to investigate whether there is a legal framework for children adopted under customary law and the extent to which the rights of adopted children are protected as enjoined by the various instruments. To achieve this aim, an analysis of the legal framework of South Africa, Nigeria, and Botswana will be made next.

1.5.1. Nigeria

There are two basic forms of adoption in Nigeria: Customary law and statutory law adoptions.¹³ There is no Islamic law of adoption in Nigeria, as adoption is prohibited in this religion.¹⁴ This is reinforced by the fact that it is unjust to assign the paternity of a child to anyone other than the biological father.¹⁵ In pre-colonial Nigeria, customary adoption was a system that was used primarily to help cushion the effect of economic challenges amongst family members. The communal and rural setting of customary child adoption have largely disappeared as a result of socio-economic changes brought about by colonial rule. This has also affected the acceptance of customary law adoption. Nigeria's federal system of government and its Constitution give legislative power to the state and not the federal government to regulate issues relating to children.¹⁶ The effect of this is that the Children's Rights Act of 2003, passed at the federal level must also be passed specifically at the state level before it can be operative in each state.¹⁷ The Act provides for the adoption of children in Nigeria, but does not accommodate customary law

¹³ Ogwezzy O 'Legal perceptive of Child Adoption under Nigerian Law' (2018) *Nigerian Law Journal* 57.

¹⁴ Ladan MT 'The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 Northern States' (2007) 58. Paper presented at the Interactive forum for Sokoto State House of Assembly Legislators, Sokoto, Nigeria 2007(hereafter The Child Rights Act 2003).

¹⁵ Ladan MT The Child Rights Act 2003 (2007) 58.

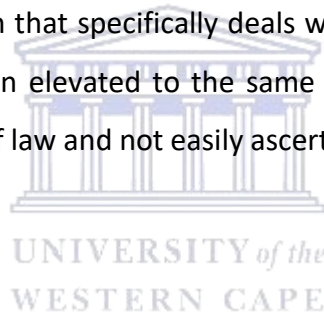
¹⁶ Section 17(3) (f) of the 1999 Constitution of the Federal Republic of Nigeria, as amended (hereafter the Constitution).

¹⁷ Owasanoye B 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 *Family Law Quarterly* 406. See also S.17(3)(f) of the Constitution.

adoption.¹⁸ Some authors have alluded that customary law adoption existed in Nigeria.¹⁹ Other authors have discredited such claims by suggesting that what the earlier authors referred to as customary law adoption is merely forms of guardianship or foster care.²⁰ This study will among others, investigate through case law and statutory law whether customary law adoption exists.

1.5.2. South Africa

Customary law is a basic element of South African Law.²¹ It is mostly applicable to the majority of the black population.²² It was first recognised as a basic element of the South African legal system at the time when the interim constitution was operational.²³ Customary Law is now firmly recognised and established in the Constitution of Republic of South Africa.²⁴ Section 211(3) of the Constitution states “the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.²⁵” The effect of this is that customary law has been elevated to the same level as Common Law.²⁶ However, customary law is not a fixed body of law and not easily ascertainable.²⁷ Customary law is seen as



¹⁸ Owasanoye B (2005) 406.

¹⁹ Nwogugu EI Family Law in Nigeria (1990) 322-329. See Obi SNC. Modern Family Law in Southern Nigeria (1966)344-346; Okojie CG Ishan Native Laws and Customs (1960) 90; Forde D Yako Studies (1964) 72-73; Partridge C “Native Law and Custom in Egbaland” (1911) 10 J.A.S. 422.

²⁰ Uzodike EN ‘Law and Procedure for Adoption in Nigeria’ (1991) 1 Nig. J. Contemp. Law 6.

²¹ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 478.

²² Maithufi I ‘The Best Interests of the Child and African Customary Law’ in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 137. Black is defined as relating or belonging to people with black or dark brown skin, especially people who live in Africa or whose family originally came from Africa. See Cambridge Advanced Learner’s Dictionary 3 ed (2008) 138 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 20 May 2022)

²³ Act 200 of 1993.

²⁴ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) at 926.

Bennett TW ‘The conflict of laws’ in Bekker JC, Rautenbach C & Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 17.

²⁵ The Constitution of the Republic of South Africa, 1996.

²⁶ Bennett TW ‘The conflict of laws’ in Bekker JC, Rautenbach C & Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 17.

²⁷ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 479.

a right to culture.²⁸ It derives its legitimacy from tradition and social practices that the community concerned accepts as obligatory.²⁹

In South Africa, the customary law adoption ceremony practiced by people belonging to the Xhosa tribe suggests to the world that the adoptive parents have formally accepted parental responsibility for the child.³⁰ The adopted child is thereafter accepted and regarded by society as a child of the adoptive parents.³¹ Customary law adoption is widely practiced by people belonging to the aforementioned tribe in the Eastern and Western Cape Provinces of the Republic of South Africa.³² In informal adoption, no ceremonies are celebrated but the process occurs when a person takes a child of a relative into his home and treats him/her as their own child.³³ This is a common feature of the African societies which is as a result of the extended family system.³⁴

Bennet says that customary adoption is not an established system of customary law.³⁵ There is ample evidence to show that customary adoption exists in South Africa. In *Maneli v Maneli*, the high Court recognised customary law adoption for the purpose of creating an obligation on the adoptive parents.³⁶ The obligation was to support the adopted child as required by the Children's Act 38 of 2005 and the Maintenance Act 99 of 1998. Although *Maneli v Maneli* set precedence for customary law adoption, it was based mainly on policy and not the recognition of customary adoption per se³⁷. In *Metiso v Padongelukfonds*, Judge Bertelsmann held that customary adoption was valid, even though it did not comply with the formalities.³⁸

²⁸ Bennett TW 'The conflict of laws' in Bekker JC, Rautenbach C & Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 18.

²⁹ Bennett TW *Customary Law in South Africa* (2004) 128.

³⁰ *Maneli v Maneli* [2010] ZAGPJHC 22.

³¹ *Maneli v Maneli* [2010] ZAGPJHC 22.

³² *Maneli v Maneli* [2010] ZAGPJHC 22.

³³ Osondu AC (2012) 257.

³⁴ Osondu AC (2012) 257.

³⁵ Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) 107 (hereafter *Human Rights*).

³⁶ [2010] ZAGPJHC 22.

³⁷ The policy, as stated in Children's Act 38 of 2005 and the Maintenance Act 99 of 1998 places a demand on a parent to support the child.

³⁸ 2001 (3) SA 1142 (T) at 1150.

Similarly, in *Kewana v Santam Insurance Co Ltd*, the Court held that a child that is adopted according to customary law is entitled to compensation for loss of support. The loss of support resulted from the negligent killing of the child's adoptive parent.³⁹ It was also held in this case that the previous Act, (the Children's Act 33 of 1960), which regulated adoption before the Child Care Act did not modify or replace adoption under customary law. These are some of the cases that show that customary adoption exists in South Africa. From the cases referred to above, it would seem that customary law adoption is only recognised by the South African courts on an ad hoc basis. There is no general recognition of customary law adoption by statutory law. Although these two systems of adoption have the same consequences, they are not recognised in the same manner. The regulation of customary law adoption in South Africa leaves much to be desired. In a study commissioned by Save the Children Sweden Southern Africa Regional Office, findings showed that in customary law adoption, there are no preliminary investigations, inquiries, monitoring by officials of Social Services.⁴⁰ There are no court inquiries or approved transfer of parental rights and responsibilities in respect of adopted children. In addition, there is no official monitoring of the well-being of the child once placed in the extended family household. The study showed that unlike statutory adoptions, customary law adoptions are neither subject to judicial reviews nor legislative regulation. Furthermore, there is no formal screening, selection and monitoring of customary adoptive parents and this creates an opportunity for the exploitation and abuse of children who are already susceptible. There was a presentation at a workshop hosted by the HRC and UNICEF on equity and child rights in South Africa.⁴¹ This presentation showed that there are unconfirmed allegations of exploitation of customary law adoption by opportunists. The goal of these opportunists is to have access to the support grants that children living in poverty are entitled to.

³⁹ 1993 (4) SA 771 (TkA).

⁴⁰ Martin P & Mbambo B (2011) 43.

⁴¹ Mbambo B (2011) presentation at a workshop hosted by the HRC and UNICEF in South Africa, Midrand on Equity and Child Rights in South Africa, March 2011.

1.5.3. Botswana

Customary law was the only law that regulated the communities that made up Botswana until it became an independent Nation in 1966.⁴² After independence, the common law was introduced, which resulted in a new law that applied to all individuals living within that Nation.⁴³ Customary law is not codified in Botswana but the term “customary law” is defined by statute as regulation consisting of rules of law which by custom are applicable to any particular tribe or tribal community. These however, are rules which are consistent with the provisions of any enactment and not contrary to morality, humanity or natural justice.⁴⁴ Botswana has a heterogeneous system which comprises of at least 30 ethnic groups and most of the population consists of indigenous Africans.⁴⁵ In Botswana’s statutory law and customary law co-exist.⁴⁶ Botswana also recognises both customary and statutory adoptions.⁴⁷ The two types of customary law adoption in Botswana are temporary and permanent adoption. However, a few concerns need to be highlighted in customary law adoption in Botswana. It is worth mentioning that some authors have observed that adoption is not a very familiar subject in Botswana. To this effect, very little information is available on this subject for research purposes.⁴⁸ There are also no written procedures to be followed in customary law adoption. In *Marman v Marman*, the court held that an agreement between two families was enough to satisfy a customary law adoption.⁴⁹ There is an apprehension that an encroachment in the life of a child could be affected by a mere

⁴² Tabengwa M, Khan A & partners ‘Law reform – the emerging protection of children in Botswana?’ in Sloth-Nielsen J & du Toit Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 84 (hereafter Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations*).

⁴³ Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84. The term ‘common law’ is made up of the Roman-Dutch law which was introduced in 1891 and statute law. See Molokomme A *Children of the Fence* (1991) 29. There will be more discussion on this in chapter five.

⁴⁴ Seepapitso IV K ‘Does customary law have a future in Botswana?’ in Brothers S, Hermans J & Nteta D (eds) *Botswana in the 21st Century: Proceedings of a symposium* (1994) 343 (hereafter *Botswana in the 21st Century*). See also S 4(1) of the Common Law and Customary Law Act 1969.

⁴⁵ Nsereko DDN *Constitutional Law in Botswana* (2002) xxi.

⁴⁶ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

⁴⁷ Quansah EK *Introduction to Family Law in Botswana* 4 ed (2006) 138 (hereafter *Family Law in Botswana*).

⁴⁸ Ferreira S *Interracial and Intercultural Adoption* 377.

⁴⁹ 2003 (1) BLR 97 (HC) 98.

agreement. Records of proceedings in customary courts are rarely kept.⁵⁰ It is therefore almost impossible to know the locus classicus to rely on in subsequent cases of customary law adoption. In *Kewana v Santam Insurance Co Ltd*, the court in deciding whether there was a customary adoption or not, had to call in an expert to explain the procedures in such adoptions.⁵¹

A study found that customary law adoption is not preceded by preliminary social services monitoring or investigations as there were no court inquiries or approved transfer of parental rights and responsibilities in respect of the child.⁵² There is also no official monitoring of the well-being of the child once placed in the adoptive family setting.⁵³ Contrary to the obligation placed on states to ensure that placements in alternative care are judicially reviewed, customary law adoptions are not subject to judicial or legislative regulations.⁵⁴ It was held in a South African case of *Zibi v Zibi* that the customary system of adoption did not have to comply with the requirements of the Child Care Act to be valid.⁵⁵

In Botswana, there are a few concerns about customary law adoption such as lack of written rules or procedures to be followed.⁵⁶ It was held in *Metiso v Padongelukfonds* mere agreement between two families was enough to culminate in a customary adoption.⁵⁷ In addition, records of proceedings in customary courts are rarely kept.⁵⁸ It is therefore almost impossible to know the locus classicus to rely on in subsequent cases of customary law adoptions. In *Marman v Marman*, the court had to call in an expert to explain the procedures in such adoptions in order to determine whether there was a customary adoption.⁵⁹

⁵⁰ Sigweni S *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and compliance with Regional and International Human Rights standards* (unpublished LLM thesis, University of Cape Town, 2008) 28 (hereafter *Adoption Laws and Procedures of Botswana*).

⁵¹ *Marman v Marman* 2003 (1) BLR 97 (HC) 98.

⁵² Martin P & Mbambo B (2011) 43.

⁵³ Martin P & Mbambo B (2011) 42.

⁵⁴ UNCRC, Article 9(1); ACRWC, Article 19(1); UNCRC Article 25.

⁵⁵ *Zibi v Zibi* 1952 (2) NAC 167 (S) at 170. See also Maithufi 2001 De Jure 390, 394.

⁵⁶ *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1150.

⁵⁷ *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1150.

⁵⁸ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 28.

⁵⁹ 2003 (1) BLR 97 (HC) 98.

A common element in the system of customary law adoption in the three countries is the absence of a legal framework that governs customary law adoptions.

1.6. Research methodology

This study used a desk-based research method. This comprised of literature review and content analysis of judicial decisions in South Africa, Nigeria and Botswana. It consequently examined how customary law adoptions are recognised. In the legal sphere, doctrinal research focusses on case-law, statutes and other legal sources, rather than the development of theory.⁶⁰ This study developed, assessed and interpreted the principles that underlie customary law adoption in Nigeria, Botswana and South Africa. The principles were developed through an examination of the views of academics, practitioners, policy makers and other role players in adoption under African customary law. This type of research is relevant in the law field where principles and rules are developed through a process of rigorous analysis. These developed doctrines are regarded as a substitute for theory.⁶¹

As a hermeneutic-related discipline, doctrinal research is suitable for the study of interpretive texts such as legislation and case law.⁶² Legislative sources for determining the rights and privileges of children in the aforementioned countries include the 1999 Constitution of the Federal Republic of Nigeria, and the 1996 Constitution of the Republic of South Africa. Others are the 1966 Constitution of Botswana, the Nigerian Child Rights Act 2003 and South African Children Act No 38 of 2005.⁶³ Court decisions from these three countries were used to analyse judicial attitudes and patterns. In addition, textbooks, articles on customary law, and literature on children's rights were employed. The researcher analysed the contents and reviewed articles, especially those that are relevant to this study.

⁶⁰ Hutchinson TC & Duncan N 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) *Deakin Law Review* 83–119.

⁶¹ Coetsee et al 'A doctrinal research perspective of master's degree students in accounting' 2018 *South African Journal of Higher Education* 71-89.

⁶² Van Hoeke M 'Legal doctrine: Which method(s) for what kind of discipline?' in Van Hoeke M (ed) *Methodologies of legal research: What kind of method for what kind of discipline?* (2011) 1–18.

⁶³ Coetsee et al (2018) 71-89.

This study also involved examination of data from empirical work done by organisations that work hand in hand with Children such as United Nations Children 'Fund (UNICEF) Nigeria, Save the Children South Africa. A study commissioned by Save the Children Sweden Southern African Regional Office to explore the interplay between African customary law and practices and children's protection rights in South Africa is worth mentioning. Furthermore, an exploration and examination of data from human rights organisations and bodies working on customary law like the Nigerian Institute of Advanced Legal Studies was done.

1.7. Justification of research

Customary law is the legal system that is mostly applicable to the majority of the black population in Africa.⁶⁴ Many of the children living in customary law communities in these countries are helpless as a result of poverty and gender inequality.⁶⁵ Customary law adoption has been the foundation of support for these helpless children over the years. In spite of the many years of the practice of customary law adoption, there is no legal framework that is operational in these countries to regulate it. Hopefully, the result of this study will create an awareness of the gaps in the administration of customary law adoption and instigate a law reform aimed at redressing this loophole. This is crucial as children are naturally vulnerable and prone to be abused by opportunists who would take advantage of their helplessness. The answers from this study will hopefully contribute to knowledge base as it is the first major examination of the subject of legal framework for customary law adoptions in these three countries.

1.8. Chapter breakdown

Chapter 1: Introduction

⁶⁴ Maithufi I 'The Best Interests of the Child and African Customary Law' in Davel CJ (ed) Introduction to Child Law in South Africa (2000) 137.

⁶⁵ Martin P & Mbambo B (2011) 8.

This chapter introduced the study and highlighted the research problem, as well as the scope of the study. It also explained the research methodology that was employed.

Chapter 2: History of adoption laws

This chapter gave a working definition of adoption. It investigated as well as analysed the history of adoption laws in Nigeria, South Africa and Botswana with a special focus on how the laws evolved and were received in these three countries. It also considered a brief history of adoption in Roman law.

Chapter 3: Customary law adoptions in Nigeria

The origin and purpose of customary law adoption in Nigeria was investigated in this chapter. A distinction between formal and informal adoption as well as the procedures for valid customary law adoption was discussed. The challenges to the rights of the child adopted under customary law were highlighted.

Chapter 4: Customary law adoptions in South Africa

This chapter examined the forms in which customary law adoptions are recognised in South Africa and how the validity of such adoptions is determined. It investigated how customary law adoptions are regulated and the lapses inherent therein. There was an in-depth analysis of case law recognition of customary law adoptions in South Africa.

Chapter 5: Customary law adoptions in Botswana

This chapter examined how Botswana's legal framework provides for the adoption of children under customary law and the strengths and weaknesses inherent in it. The different types of customary law adoption were discussed. It also examined why customary law adoption is a very unfamiliar subject in Botswana with the result that very little information is available for research purposes.

Chapter 6: Customary law adoptions versus other forms of childcare

This chapter distinguished between customary law adoptions and other forms of childcare such as foster care and guardianship. Similarities and dissimilarities between the different forms were

highlighted. The aim was to harness the benefits in the other forms of childcare and recommend that such benefits imbibed in customary law adoption. This chapter also explored how the best interest of the child in human rights instruments feature in forms of childcare.

Chapter 7: Conclusion and recommendation

This chapter illustrated a summary of the study's findings. Recommendations on a legal framework for customary law adoption were made to policy makers.



CHAPTER TWO: HISTORY OF ADOPTION LAWS IN NIGERIA, SOUTH AFRICA AND BOTSWANA

2.1. Introduction

This gave a working definition of adoption. It investigated and analysed the history of adoption laws in Nigeria, South Africa and Botswana with a special focus on how the adoption law evolved and were received in these three countries. It also considered a brief history of adoption under the Roman law.

2.2. Definition of adoption

Adoption has been defined as a legal process whereby a person obtains a parenting role over another, usually a child, from that person's biological parents or the state, and thereby permanently assumes all the rights and responsibilities of a parent.¹ It creates a legal relationship since it involves a person taking over the rights and responsibilities of the natural parent of a child.² Usually, an authoritative body of the state makes an order that transfers a child from one family to another, and confers on the adoptive parent all rights, interests, responsibilities, duties, and obligations of a natural parent.³ Adoption permanently changes the status of the adopted child to that of the legitimate child of the adoptive parents notwithstanding the fact that the adopted child may have been born out of wedlock.⁴

The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child mandates that adoption should be authorised only by competent state authorities in accordance with applicable laws and procedures.⁵ Sigweni suggests that the

¹ Singh D 'Adoption of children born out of wedlock' (1996) 29 De Jure 305.

² See *Robb v Mealey's Executor* (1899) 16 SC 133–136.

³ Sigweni S *Adoption laws and procedures of Botswana* (unpublished LLM thesis, University of Cape Town (2008) 10 (hereafter *Adoption laws and procedures of Botswana*).

⁴ Sigweni S *Adoption laws and procedures of Botswana* (unpublished LLM thesis, University of Cape Town, 2008) 10.

⁵ See Article 21 of the United Nations Convention on the Rights of the Child (hereafter "the Convention"). The Convention was adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990. See also Article 24 of the African Charter on the Rights and Welfare of the Child (hereafter "the Charter").

legal relationship instituted by adoption does not necessarily depend on a natural relationship.⁶ The definition of adoption is different under customary law. Customary law adoption is defined as an unofficial placement where relatives and friends take up children to nurture and bring them up as their own.⁷ In Africa, children are considered to belong to the community as a whole and not to a child's parents alone.⁸ Customary law adoption is a contract between the families of the adoptive child and the adoptive parents.⁹ In customary law adoption, it is crucial for the parents of the adopted child and the adoptive family to reach an agreement.¹⁰ This agreement need not be approved by the state in order for it to be validly recognised in a customary law community. This is because validity of a customary law adoption depends to a large extent on the agreement between the relatives of the child and the adoptive parents.¹¹ This agreement should be communicated to the relevant traditional ruler¹². The wishes of the mother of the child may not be taken into account.¹³ The adoptive child essentially becomes that of the adoptive parents once the adoption process has been finalised.¹⁴ Statutory law adoption and customary law adoption is thus different.¹⁵ Nevertheless, both of them have similar legal consequences.¹⁶

There are two kinds of customary law adoption in Botswana, temporary and permanent adoption. In temporary adoption, a child is sent to live with relatives or friends to enhance the closeness between the two families.¹⁷ The biological parents remain the guardian of the child as the status of child vis a vis the biological parents remain the same.¹⁸ In this kind of arrangement, the child can return to the biological parents at any moment as the relations between them are

⁶ Sigweni S *Adoption laws and procedures of Botswana* (unpublished LLM thesis, University of Cape Town, 2008) 10.

⁷ Onyango P & Bali S *Regional Practice: The African Situation in Doek J el al* (eds) *Children on the Move: How to Implement Their Right to Family Life* (1996)142(hereafter *Regional Practice*).

⁸ Onyango P & Bali S *Regional Practice* (1996)142.

⁹ Maithufi I (2001) *De Jure* 391.

¹⁰ Maithufi I (2001) *De Jure* 391-392; SALC Project 110 24.

¹¹ Maithufi I (2001) *De Jure* 391-392.

¹² Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 236.

¹³ *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1147.

¹⁴ Maithufi I (2001) *De Jure* 392.

¹⁵ Bennett *Customary Law in SA* 319. See footnotes 3, 5 and 7 of page 15.

¹⁶ Maithufi 2001 *De Jure* 391, 394. Maithufi explained that customary adoption is a process that has the same legal consequences as common law adoption (see "4.3. Development of adoption in customary law in South Africa"). See also my argument in "5.6.2 Permanent adoption" and "3.4.1 Formal customary law adoption".

¹⁷ Schapera I *A Handbook of Tswana Law and Custom* (1970) 173(hereafter *Tswana Law and Custom*).

¹⁸ Schapera I *Tswana Law and Custom* (1970)173-174.

never broken.¹⁹ In permanent customary law adoption, the focus is to assist members of the family or friends who do not have a child of their own or where such families or friends have children of same sex.²⁰

The United Nation Convention on the Rights of the Child recognises adoption as one of the forms of alternative care for children temporarily or permanently deprived of their family environment, as well as children who are not able to remain in their environment.²¹ Adoption touches upon the adopted child's status as it affects his or her legal rights, welfare, and obligations.²²

2.3. Reasons for adoption

The reasons why people opt for adoption are diverse and vary from person to person. A man who has no heir to inherit his property after he is deceased may adopt a son while he is alive to perpetuate his family name and sustain his line of descent.²³ This is similar to the Roman- law concept of *adoptio*, the main purpose of which is to sustain the adopter's bloodline.²⁴ Another reason is to strengthen the adoptive family with more children and to safeguard the interest of the child where the natural parents cannot afford to care for him or her.²⁵ Other circumstances that will require the adoption of a child are the desire to replace a dead child, acquire a companion for an only child, stabilize a marriage, legitimize a child born out of wedlock, and

¹⁹ Roberts S *Tswana Family Law* (1972) 22- 23, 64, 101.

²⁰ Schapera I *Tswana Law and Custom* (1970) 174. More will be said about customary law adoptions in Botswana in chapter 5 of this thesis.

²¹ Art 20(1) & (2) of the "Convention" Some of the other alternative child-care facilities include foster placement, kafalah of Islamic law (both recognise by Art. 20(3) of the Convention), guardianship and foster care will be discussed in "6 Customary law adoptions versus other forms of child care".

²² Nwogugu EI *Family Law in Nigeria* (1990) 312.

²³ Bennett Customary Law in SA 319; SALC Project 110 25; Bennett TW *Human Rights* (1995) 107; Maithufi 2001 De Jure 392.

²⁴ Details of this type of adoption are explained in details in this chapter under "ROMAN LAW".

²⁵ SALC Project 110 25.

rescue a child who is in an irreversible state of abandonment.²⁶ In terms of customary law, both males and females may adopt a child.²⁷ Boys and girls may be adopted.²⁸

2.4. History of adoption laws in Nigeria

The first attempt to provide a statute on adoption was a private member's bill presented to the then Eastern House of Assembly in April 1958.²⁹ The Bill was withdrawn as it was not well received in the House.³⁰ Until 1965, there was no statutory legislation regulating adoption in any part of the country, thereby resulting in difficulties for couples who genuinely wanted to adopt children. When couples took children into their homes with the intention of legally adopting them, it was not recognised as legal adoption. It was viewed as a form of fostering or guardianship.³¹ To this effect, the natural parents of these children could at any time demand the return of their children from foster parents. This however, does not imply that a close relationship or bond has not been established between the child and the foster parents.³² This is similar to what happens in permanent customary law adoption in Botswana. There are two types of customary law adoptions in force ; temporary and permanent law adoption.³³ When a child is adopted by a relative under permanent customary law adoption in Botswana, there is invariably a great atmosphere of uncertainty as the adoptive parents may never know when the adoptive child will be taken away from them by the natural parents.³⁴

The first statutory legislation on adoption in Nigeria is the Adoption Law of 1965, which was enacted by the defunct Eastern region of Nigeria and known as the Eastern Nigerian

²⁶ Chukwu L *Adoption of children in Nigeria under the Child's Rights Act 2003*. Adoption of Bill (2012) 7

²⁷ SALC Project 110 27; Maithufi 2001 De Jure 392.

²⁸ Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 236.

²⁹ Kigbu SK 'Child Adoption: Nature and Procedure under Nigerian Law' available at <http://hdl.handle.net/10485/384> (accessed 25 January 2021) hereafter Kigbu SK Child Adoption.

³⁰ Kigbu SK Child Adoption.

³¹ Tajudeen OI Adoption Practice in Nigeria (2013) 19 *Journal of Law, Policy and Globalisation* 8.

³² Tajudeen OI Adoption Practice in Nigeria (2013) 19 *Journal of Law, Policy and Globalisation* 8.

³³ Schapera I *Tswana Law and Custom* (1970) 173.

³⁴ More will be said about this in chapter 5 "Customary law adoptions in Botswana."

Adoption Law of 1965.³⁵ It was followed by an Adoption Edict promulgated for Lagos state in 1968.³⁶ Thereafter, other states followed their own laws with a considerable resemblance. Today, all the states that make up southern Nigeria have adoption statutes.³⁷ It is however, evidenced that none of the states that make up the Northern part of Nigeria has any legislation on adoption.³⁸ The Northern states are predominantly governed by Islamic law and Islam prohibits adoption.³⁹ This is as a result of a belief in Islam that it is unjust to assign paternity of a child to anyone other than the biological father.⁴⁰ Incidentally, the largest number of adoptable children are found in the Northern states lurking around in streets and begging for alms and being exposed to crime.⁴¹ Some authors are of the view that there are adoption processes happening in the Northern Nigeria, although they are not backed up by adoption enactments.⁴² This was the state of the law on adoption in Nigeria prior to the enactment of the Child Rights Act of 2003.

2.4.1. *Laws and procedures under the Child Rights Act of 2003*

The Child Rights Act of 2003 sets out the rights and responsibilities of every child in Nigeria.⁴³ It provides for justice administration, care and supervision of a child amongst other things.⁴⁴ Before the enactment of the Act, adoption was and is still regulated by laws made by some states of the federation. The Act makes its provisions supersede those of any other enactments on adoption and any other matter pertaining to children .Where the latter is inconsistent with any provisions of the Act, they shall be void to that extent.⁴⁵ Although the Act is assumed to have come into

³⁵ This Law came into force on 20th May 1965 and has now been assumed by all the States that were later carved out of Eastern Region namely: Abia, Akwa-Ibom, Anambra, Cross-River, Ebonyi, Enugu and Rivers and Bayelsa State.

³⁶ This has transformed into the Adoption Law, Cap. A5 Laws of Lagos State 2003.

³⁷ Chukwu L Adoption of children in Nigeria under the Child's Rights Act 2003 (2012) 6.

³⁸ Chukwu L (2012) 6.

³⁹ Ladan MT *The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 Northern States*. Paper presented at the Interactive forum for Sokoto State House of Assembly Legislators, Sokoto, Nigeria (2007) 58.

⁴⁰ Ladan MT (2007) 58. See Scope of study and literature review, chapter 1.

⁴¹ Chukwu LO Adoption of children in Nigeria under the Child's Rights Act 2003. Adoption of Bill (2012) 7.

⁴² Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 8.

⁴³ The Child Rights Act No 26 of 2003 with a commencement date of 31st July, 2003.

⁴⁴ Part XX of the Child Rights Act 2003 (Hereafter referred to as "the Act").

⁴⁵ S 274 of the Act.

effect since 2003, the adoption laws enacted by the States are still in existence. This is as a result of the fact that adoption as well as the rights and welfare of children are within the province of the states under the constitution of the Federal Republic of Nigeria.⁴⁶ The National Assembly has no constitutional power to impose the Act on the states. The Act is enforceable only in the territory of the Federal capital, Abuja for which the National Assembly has powers to make laws.

2.4.2. The objective of the Act

The objective of the Act is to come up with comprehensive and uniform legislation on the rights and welfare of children as well as an efficient system of child justice administration that meet international standards.⁴⁷ The Act makes it mandatory for the states as well as the federal governments to establish and maintain adoption services and facilities.⁴⁸ It also sets up a uniform institutional framework for adoption throughout the country, which will harmonize the procedure and criteria of eligibility for adoption. As a means of checking child trafficking, the Act prohibits inter-country adoption as well as the giving and receiving of any payment or reward as a consideration to facilitate adoption.⁴⁹ It also provides for inter-state adoption within the country and recognises foreign adoption.⁵⁰ Only 25 out of the 36 states of Nigeria have adopted the Act. The remaining 11 states, in the northern part of Nigeria object to the provisions of the Act because they aver a conflict with religious and cultural norms. They have asserted the reasons for their objections. Among many reasons, the Act prohibits: child marriages; marriages to members of an adoptive family; and defines a child as anyone below the age of 18 years.⁵¹ The Act disallows child marriages as a reaction to a prevailing practice where younger girls are given

⁴⁶ Item 61, part 1 of the schedule to the Constitution of the Federal Republic of Nigeria 1999.

⁴⁷ Chukwu LO Adoption of children in Nigeria under the Child's Rights Act 2003. Adoption of Bill (2012) 2.

⁴⁸ S.125(c) of Child Rights Act 2003.

⁴⁹ S 133(d) of the Child Rights Act 2003.

⁵⁰ S 145(1) of the Child Rights Act 2003.

⁵¹ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' The Conversation 24 November 2019 available at <https://theconversation.com> (accessed 8 February 2021). The states that have objected to signing the Child Rights Act 2003 are Bauchi, Yobe, Kano, Sokoto, Adamawa, Borno, Zamfara, Gombe, Katsina, Kebbi, and Jigawa, 'Updated: 11 states in northern Nigeria yet to pass child rights law-UNICEF Official' Premium Times 11 May 2019 available at <https://www.premiumtimesng.com>.(accessed 8 February).

to older men. This is particularly prevalent in the Northern part of Nigerian and it wields power in favour of older men.⁵²

There is a relationship between child marriage and health risks. The World Health Organisation has noted that adolescent pregnancy is one of the major contributors to maternal and child mortality.⁵³ The 2008 Nigerian Demographic and Health Survey estimates that 48% of girls in northern Nigeria were married off at the age of 15. In addition, it estimates that 78% of them were married off before they were 18 years old which put the median age for child marriage in north-western region at 15.2.⁵⁴ The most recent survey released in October 2019 did not include this data.⁵⁵ The concept of adoption is generally not recognised under Islamic law.⁵⁶ However, Kafalah draws a distinction between biological children and non- biological children and asserts that the latter maintain blood relations with their biological family, and can be married to the members of the adoptive family.⁵⁷ The political leaders in northern Nigeria consider the provisions of the Child Rights Act 2003 contradictory to a practice validated by religion.⁵⁸



2.4.3. Provisions of the Act

The Act acknowledges primary consideration for the best interest and the welfare of the child in adoption proceedings and in any action concerning the child.⁵⁹

⁵² Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁵³ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁵⁴ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁵⁵ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁵⁶ Ladan MT (2007) 58.

⁵⁷ Chapter 33:4-6 of the Qur'an sees as valid a marriage between an adoptive parent and an adopted child as there is no blood relation between them. See also Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁵⁸ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

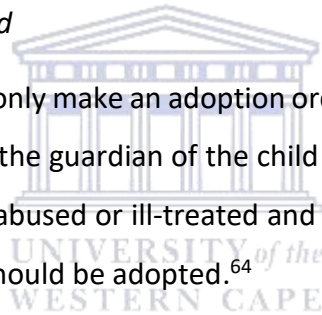
⁵⁹ S 126(3)(a) Child Rights Act 2003.

2.4.3.1 Establishment of adoption services

The Act provides that each state and the federal government shall establish and maintain a service designed to meet the needs of every adopted child; parents and guardians of such child as well as the adoptive parents.⁶⁰ Temporary boarding and lodging arrangements are facilities that ought to be provided when assessing a child, prospective adopters and counselling for persons with problems relating to adoption.⁶¹ The above provisions of the Act are yet to be implemented and there are no similar provisions in the former legislation preceding the Act for establishment and maintenance of adoption services and facilities.⁶² The above scenario depicts a loophole of illicit acts of child trafficking and unauthorised adoption that exploit children in maternity centres and orphanages.⁶³

2.4.3.2 Persons who may be adopted

The Act provides that the court will only make an adoption order in respect of a child, in instances when: there is no surviving parent; the guardian of the child consents to the adoption; the child is abandoned, neglected, tirelessly abused or ill-treated and there are persuasive reasons in the interest of the child why the child should be adopted.⁶⁴



⁶⁰ S.125(1) Child Rights Act 2003.

⁶¹ S.125(2) Child Rights Act 2003.

⁶² Chukwu L (2012) 8.

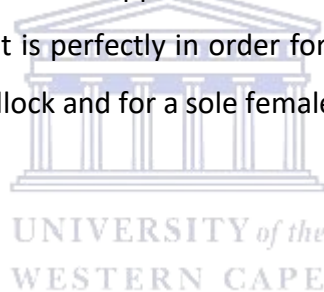
⁶³ Larry Chukwu reports that the Proprietress of one Good Shepherd Orphanage was on a tip-off, arrested, detained and tried alongside four other accused persons on a sixteen-count charge including child trafficking and abduction at the High Court of Lagos State. Similarly, the police arrested a woman in Lagos, Nigeria, who was accompanying 52 children. Some of these children were as young as 12 months old. The children were discovered in a container on a truck that normally transported fish to market. The woman in question said she brought the children from the Northern part of Nigeria to hire them out as domestic servants. The woman was operating out of Good Shepherd Orphanage in Lagos, where ten girls and a dozen babies (six of the ten girls were pregnant and held against their will, having been enticed with offers of money), see Newspaper Article: 'Woman arrested in Nigerian child slavery probe,' Irish Examiner 8 March 2005 available at <https://www.irishexaminer.com> (accessed 24 February 2021) See Chukwu L Adoption of children in Nigeria under the Child Rights Act 2003 (2012) 8.

⁶⁴ S.128 Child Rights Act 2003.

2.4.3.3 Persons who may adopt

The persons who may adopt include a married couple where each of them has attained the age of twenty-five years, and there is an order permitting them to conjointly adopt a child.⁶⁵ A married person may adopt if he has acquired permission of his spouse, as required under section 132 of the Act.⁶⁶ A single person may also adopt if he has attained the age of thirty-five years, provided that the child to be adopted is of the same sex as the person adopting.⁶⁷ In all cases specified above, the adopter(s) shall be persons found to be suitable to adopt the child in question by the appropriate investigating officers.⁶⁸

A single person is not allowed to adopt a child of the opposite sex.⁶⁹ There is however a discriminatory prohibition under the previous state legislation that allows a sole female applicant to adopt a male child.⁷⁰ Some authors believe that the imbalance in the proviso to section 129(c) of the Act should be amended to allow sole applicants to adopt their biological children who are of opposite sex. They believe that it is perfectly in order for a sole male applicant to adopt his biological daughter born out of wedlock and for a sole female applicant to adopt her illegitimate biological son.⁷¹



2.4.3.4 Consents required for adoption

Under the Act, three types of consents are required before an adoption order can be made and each depends on the facts of the case. The first is the consent of the parents of the child or, where

⁶⁵ Section 129(a) of the Child Rights Act 2003.

⁶⁶ Section 129(b) of the Child Rights Act 2003.

⁶⁷ Section 129(c) of the Child Rights Act 2003.

⁶⁸ Section 129(d) of the Child Rights Act 2003.

⁶⁹ S Section 129(c) of the Child Rights Act 2003.

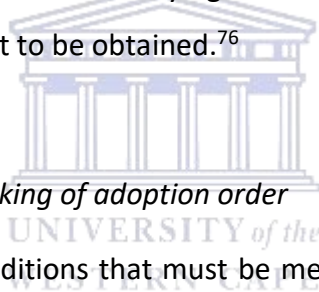
⁷⁰ S.3(2) Adoption Laws of Lagos State; S.4(2) Adoption Laws of Eastern States.

⁷¹ Larry Chukwu notes that in some systems of customary law in Nigeria, a daughter born out of wedlock can become the accepted father by a process known as legitimation by acknowledge of paternity. 'In *Alake v Pratt* (1955) 15 WACA 20, the trial judge, Foster Sutton, P held that the appellants in that case who were children of the deceased born out of wedlock to their father, were entitled to share in the estate of their father together with the respondents who were issues of a marriage contracted in accordance with the Marriage Ordinance' available at <http://www.judry.legal> (accessed 27 May 2021).

there is no surviving parent, the guardian of the child.⁷² This becomes necessary only where such a parent or guardian is known and can be traced. No such consent is, however, required where the child to be adopted is abandoned, neglected, or persistently abused or ill-treated, and there are compelling reasons in the interest of the child for her to be adopted.⁷³

The second type of consent required is when a married person is the sole applicant. In this case, the consent of the spouse is required under section 132(1) and also section 129(b) of this Act.⁷⁴

The third type of consent is where a person other than a parent or relative of a child has a right or obligation in respect of the child under an order of the court or an agreement or under customary law. The court may first obtain the consent of that person before an adoption order is made.⁷⁵ The child development officer will assist the court in determining where the person who is not a parent or relative of the child has any right or obligation over the child and whether the consent of the person ought first to be obtained.⁷⁶



2.4.3.5 Conditions preceding the making of adoption order

Section 133 of the Act lists the conditions that must be met before an adoption order can be made. It provides that every consent required under section 132 of this Act must have been obtained.⁷⁷ It further states that every person who has given his consent must understand the nature and effect of the adoption order sought for and the adoption service must provide adequate counselling for the parties involved in the adoption.⁷⁸ The adoption order if made shall

⁷² S.128 Child Rights Act 2003.

⁷³ S.128 Child Rights Act 2003.

⁷⁴ S.132(1) of the Act states that where a married person is the sole applicant for an adoption order, the court may, if it thinks fit, refuse to make the order if the consent of the spouse of the applicant to the making of the order is not first obtained. S.129(b) provides that a married person may adopt if he has obtained consent of his spouse, as required under section 132 of the Act.

⁷⁵ S.132(2) of Child Rights Act 2003.

⁷⁶ S.132(3) of Child Rights Act 2003.

⁷⁷ S.133(a) It is absurd that S.128(a) that makes provision for the consent of the parent or guardian of the child is not included in the list of required consents.

⁷⁸ S.133(b).

be for the welfare and best interest of the child. In line with the foregoing, consideration must be given to the child's wishes having regard to the age and understanding of the child.⁷⁹ Furthermore, the applicant must not give, receive, or agree to receive any reward to facilitate the adoption process except as ordered by the court.⁸⁰

2.4.3.6 Prohibition of certain payments for adoption

Giving or receiving of any payment or reward to facilitate adoption of a child is prohibited.⁸¹ Contravention of section 143(1) of the Child's Right Act 2003 is an offence and punishable with a fine of thirty thousand naira or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.⁸² If any payment or reward is made in contravention of Section 143(1) of the Act, an adoption order may be allowed to continue at the discretion of the court having regard to the best interest of the child.⁸³



2.4.3.7 Establishment of the adopted children register

The Act provides for the Chief Registrar to establish and maintain a register to be called the "Adopted Children Register" in which only entries as directed by an adoption order shall be made therein.⁸⁴ In addition, it states that the adoption order shall contain a directory to the Chief Registrar and the National Population Commission to make entries in the Adopted children's register in the form specified in the Fifth Schedule to this Act.⁸⁵

These entries shall include date of entry, name and sex of the adopted child, name, surname, address and occupation of the adopter(s), date of birth of the child. In addition the

⁷⁹ S.133(c).

⁸⁰ S.133(d).

⁸¹ S.143(1) Child Rights Act 2003.

⁸² S.143(2) Child Rights Act 2003.

⁸³ S.143(3) Child Rights Act 2003.

⁸⁴ S.142(1) Child Rights Act 2003.

⁸⁵ S.142(2). The National Population Commission keeps the register of births and deaths. The National Population Commission is hereafter referred to as "the Commission".

entries shall include the date of adoption order and description of the court that made it and signature of the officer who attests the entry.⁸⁶ The court shall cause a copy of every adoption order to be communicated to the Chief Registrar and the Commission and on the on receipt of the order shall comply with the directions contained therein.⁸⁷ A certified copy of an entry in the Adopted Children Register purporting to be stamped or sealed by the Chief Registrar's office shall be proof of the adoption therein and where the entry includes the date of the birth of the child to whom it relates, it shall be proof of the date without any further evidence `

In *Olaiya v. Olaiya*, the Supreme Court of Nigeria held that where a child is said to have been adopted under the law, the clear and undisputable evidence of such adoption is from the adoption of children's register.⁸⁸

When an adoption order is revoked, the court shall communicate such revocation to the Chief Registrar who shall cancel the entry in the register relating to the adopted child as well as the marking with the word adopted or re-adopted relating to the child in the Register of Births to be cancelled.⁸⁹



2.5 History of Adoption Laws in South Africa

2.5.1 Adoption of Children Act 25 of 1923

The first statute in South Africa to administer adoption of children was the Adoption of Children Act⁹⁰. This Statute legalized adoption for the first time in South Africa.⁹¹ Prior to the promulgation of this Act, people ventured into adoption by way of private arrangement, by contract and through testamentary provision.⁹² These various approaches had no legal basis. Ferreira notes

⁸⁶ S.142(1) Child Rights Act 2003.

⁸⁷ S.142(5) Child Rights Act 2003.

⁸⁸ (2002) 8 NWLR (Pt. 782) 652.

⁸⁹ S.142(10).

⁹⁰ Act 25 of 1923 (Proc no 244 in GG of 30 November 1923).

⁹¹ S 8(1) of the Adoption Act provided that the adopted child would for all purposes be deemed in law to be the child of the adoptive parent as if "born in lawful wedlock" of the adoptive parent.

⁹² See *Edwards v Fleming* 1909 TH 232; *Rex v Du Plessis* 1922 TPD 191; *Fibinger v Botha* (1905-1910) 11 HCG 97 and *Robb v Mealey's Executor* (1899) 16 SC 133 136.

that the Adoption of Children Bill 25 of 1923 was read in the House of Assembly of the Union of South Africa on 30 January 1923 by a Mr R Feetham who was a member of the House of Assembly.⁹³ There was a second reading on the Adoption of Children Bill from Mr Feetham on 15 March 1923 where he gave a long presentation.⁹⁴ He said there was a need to formalize adoption in South Africa as there was an increase in the number of informal adoptions that took place. He added that the agreement between the natural parents and the adoptive parents were not accepted as binding by the courts as the rights of the natural parents in relation to their children are unchanged. He said further that many of the prospective adoptive parents shied away from adoption as they had no legal rights over the children as the position of adoptive parents over the children was not secured.⁹⁵ In conclusion, he argued that this situation deprived many children in need of adoption from being adopted by prospective adoptive parents who have the resources to give such children a good home as well as a good life. The Bill was passed on 12 June 1923 and the Adoption of the Children Act was assented to by the Governor-General on behalf of His Majesty the King on 21 June 1923.⁹⁶ The Act was publicized in a Government Gazette and came into force on 1 January 1924.⁹⁷ The main objective of the Adoption of Children Act was to provide a procedure that will make it mandatory that the legal ties between a natural parent/guardian and a child are cut off and replaced by one between an adopted child and the adoptive parents.⁹⁸ It is important that a magistrate confirms every adoption of a child before it

⁹³ Ferreira informs that this was reported in the Cape Times on 31 January 1923, and reproduced in the “Debates of the House of Assembly of the Union of South Africa as reported in the Cape Times 20th November, 1915 – 25th June, 1923” at 31. See Ferreira *S Interracial and Intercultural Adoption: A South African Legal Perspective* (unpublished doctoral thesis, University of South Africa, 2009) 24-25 (hereafter *Interracial and Intercultural Adoption LLD dissertation*, 2009).

⁹⁴ On 15 March 1923, as reported in the Cape Times on 16 March 1923 and reproduced in the “Debates of the House of Assembly of the Union of South Africa as reported in the Cape Times 20th November, 1915 – 25th June, 1923” at 159. See *Interracial and Intercultural Adoption* (unpublished LLD dissertation, 2009) 25.

⁹⁵ This was the exact situation in Nigeria until the first Adoption Laws of the States were enacted in 1965. (See note 23). This is also visible in permanent Customary Law Adoption in Botswana where the position of the adoptive parents is never secured as the natural parents of the adoptive child can make a demand for their children at any time. The adoptive parents never know where they stand in respect of the adoptive children.

⁹⁶ This was announced by the Minister of Justice, Senator, the Hon NJ de Wet KC. See Ferreira *S* (unpublished LLD dissertation, 2009) 25.

⁹⁷ GG 1330 of 30 June 1923, GN 1074.

⁹⁸ Joubert DJ ‘Interracial Adoptions: Can we learn from the Americans?’ (1993) 110 *SALJ* 726.

is legally binding.⁹⁹ The magistrate must ensure that the adoption will promote the welfare of the adopted child.¹⁰⁰

2.5.2 *Children's Act 31 of 1937*

The Adoption of Children's Act 25 of 1923 was replaced by the Children's Act 31 of 1937 and came into operation on 18 May 1937. Chapter VII addressed the adoption of children. An adoption was implemented by an order of children's court of the district in which the adopted child resided.¹⁰¹ The court must be satisfied amongst others that the applicant(s) are fit to be assigned the custody of the child.¹⁰² The adoption must serve the interests and be conducive to the welfare of the child.¹⁰³

2.5.3 *Children's Act 33 of 1960*

The Children's Act of 1937 was set aside by the Children's Act of 1960. The latter Act came into force on 14 April 1960.¹⁰⁴ It defined a child as any person, including an infant who was under the age of eighteen years.¹⁰⁵ Ferreira notes that this Act was wide in its scope as it provided for issues relating to protection and welfare of certain children, adoption of children and establishment of the children's court.¹⁰⁶ Chapter VII of this Act handled adoption of children.

⁹⁹ S.1 of the Act states that a child is a boy or girl who was under the age of sixteen years. S.4(1)(d) states that if the child was over the age of ten years, he or she had to consent to the adoption.

¹⁰⁰ S 4(1)(c) of the Act.

¹⁰¹ S 69 (1) Adoption of Children's Act of 1937.

¹⁰² S 69(2)(b) Adoption of Children's Act of 1937.

¹⁰³ S 69(2)(c) Adoption of Children's Act of 1937.

¹⁰⁴ The Act was assented to on 7 April 1960.

¹⁰⁵ S 1 of the Children's Act 1960. It defined an infant as "a person under the age of seven years".

¹⁰⁶ Ferreira S (unpublished LLD dissertation, 2009) 28.

2.5.4 *Childcare Act 74 of 1983*

The Childcare Act 74 of 1983 had an overall objective of regulating adoption.¹⁰⁷ It was the channel that administered adoption in South Africa after the Children's Act of 1960. Chapter 4 (sections 17–27) provided among others for the qualification for adoption of children.¹⁰⁸ The circumstances in which consent to adoption may be dispensed with were highlighted.¹⁰⁹ The Act also enumerated the effect of adoption.¹¹⁰ This Act prohibited consideration in respect of adoption.¹¹¹ An order of adoption may be rescinded.¹¹² The Childcare Act made no reference to customary law adoption except to define 'marriage' as any marriage which is recognised in terms of South African law or customary law.¹¹³

2.5.5 *Children's Act 38 of 2005*

The Children's Act of 2005 was assented to on 8 June 2006 and gazetted on 19 June 2006.¹¹⁴ The Act aimed to make new provision for adoption of children. Chapter 4 of the Childcare Act of 1983 which provided for adoption had 11 sections.¹¹⁵ Chapter 15 of the Children's Act 2005 on the other hand managed adoption with a total of 26 sections regulating the subject.¹¹⁶ Chapter 16 of the Children's Act 2005 dealt with intercountry adoptions with a further 20 sections.¹¹⁷ The Children's Act 2005 is more detailed and far-reaching regarding adoption than the previous Acts. In the same vein as the preceding enactments, customary law is not provided for in the Children's Act. The only time customary law is referred to regarding adoption is in section 236, which provides that consent is not required. It states that a biological father who was not married to

¹⁰⁷ Assented to on 15 June 1983 with a date of commencement of 1 February 1987.

¹⁰⁸ S.17 Child Care Act 1983.

¹⁰⁹ S.19 Child Care Act 1983.

¹¹⁰ S.20 Child Care Act 1983.

¹¹¹ S.24 Child Care Act 1983.

¹¹² S.21 Child Care Act 1983.

¹¹³ S.1 Child Care Act 1983.

¹¹⁴ The English text was signed by the President on this day and the Act was gazetted in GG 28944 on 19 June 2006. This Act will be referred to as the Children's Act of 2005.

¹¹⁵ Sections 17- 27 of the Child Care Act 1983 (S.27 was later repealed by S.10 of Act 96 of 1996).

¹¹⁶ Sections 228- 253 of the Children's Act 2005.

¹¹⁷ Sections 254- 273 of the Children's Act 2005.

the child's mother at the time of the child's conception or at any other time can become eligible to give his consent to an adoption order by paying damages in terms of customary law.¹¹⁸

2.6 Roman Law

Bennett wrote that adoption was always part of Roman law. There was dynastic adoption, which aimed to take care of family and parental interests as it was essential to prominent Roman families that they have heirs to perpetuate their names. This type of adoption made a way for persons without natural heirs to obtain one. Ferreira notes that the purpose of adoption at this time was mainly to meet the demands of the adoptive parents and family.¹¹⁹ During the Justinian era, philanthropic adoption gained prominence since it took cognizance of children that were adopted and their interest was taken into consideration.¹²⁰ There are two ways that adoption takes place under the Roman law:

There was the *adrogatio* and the *adoptio*. There was a difference between these two in both form and function. In *Adrogatio*, a completely independent person was adopted.¹²¹ There was a thorough investigation to determine whether *adrogatio* was in the interest of the child or not. It was important to do this as the entire estate of the child would fall under the power of the adoptive parent.¹²² The relationship between the *adrogatus* (adopted person) and his original family was abrogated.¹²³ The *adrogatus* and his family were left in the power of the adopter. At the onset, women and children below the age of puberty were not allowed to be adopted in this manner.¹²⁴ This meant that a father had no power to adopt his illegitimate daughter.¹²⁵ Women

¹¹⁸ S.236(4)(c) Children's Act 2005.

¹¹⁹ Ferreira S (unpublished LLD dissertation, 2009) 15. See also Van Zyl DH *History and Principles of Roman Private Law* (1983) 92.

¹²⁰ Blom-Cooper LJ 'Whither the law of adoption' 1956 *Modern Law Review* 202.

¹²¹ Ferreira S (unpublished LLD dissertation, 2009) 15. See also Van Zyl DH *History and Principles of Roman Private Law* (1983) 92.

¹²² Van Zyl DH (1983) 93.

¹²³ Van Zyl DH (1983) 92.

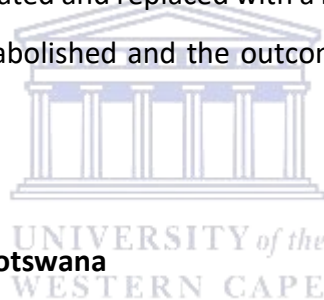
¹²⁴ Schulz F *Classical Roman Law* (1951) 146-147.

¹²⁵ Schulz F (1951) 147.

also had no power to adopt their own children because they had no patria potestas (power of a father) over their children.¹²⁶

Ferreira reports that Adoptio was a later type of adoption than adrogatio. It was connected to the principles of the twelve tables and the old civil law.¹²⁷ It was used for adopting dependent persons. There are two parts to this process of adoption. There was the initial sale which was identified as mancipatio. A father sold his son three times to a proposed adoptive father or a third person (a confidant). The third sale ended the patria potestas (power of a father).¹²⁸ Later the adoptive father claimed the son from the original father in an act of adoption.¹²⁹ The adoptee was handed down totally from the potestas (power) of the original father into that of the adoptive father.¹³⁰ The adoptee had no more relationship or dealings with his initial family except he was adopted by a family member.¹³¹

This type of adoption was abrogated and replaced with a more humane procedure during the reign of Justinian. The sales were abolished and the outcomes of adoption were substantially amended.¹³²



2.7 History of Adoption Laws in Botswana

Botswana is made of more than 30 ethnic groups with the majority of the people being indigenous Africans.¹³³ The vast majority being Africans live and settle their disputes typically in accordance with customary law.¹³⁴ Prior to 1885, the structure in place in Botswana was that its people lived as independent units.¹³⁵ In 1885, following a British invasion, Botswana was declared

¹²⁶ Schulz F (1951) 144.

¹²⁷ Van Zyl DH (1983) 94.

¹²⁸ Van Zyl DH (1983) 94.

¹²⁹ Poste E Gai *Institutiones* (1904) 1.134.

¹³⁰ Poste E Gai *Institutiones* (1904) 1.107.

¹³¹ Thomas JAC *Textbook of Roman Law* (1976) 441.

¹³² Ferreira S *Interracial and Intercultural Adoption* ((unpublished LLD dissertation, 2009) 16.

¹³³ Nsereko DDN *Constitutional Law in Botswana* (2002) xxi.

¹³⁴ Molokomme A *Children of the Fence* (1991) 40.

¹³⁵ Nsereko DDN *Constitutional Law in Botswana* (2002) xv. Botswana was until its independence on 30 September 1966 known as Bechuanaland.

a British protectorate and the High Commissioner of South Africa was given the power to regulate the Protectorate which resulted in the Roman-Dutch law being introduced into Bechuanaland.¹³⁶ This law is still in place today although Botswana became an independent state on 30 September 1966.¹³⁷ Common law applies to all persons while customary law differs from community to community.¹³⁸

According to Molokomme and Mokobi, the relationship between customary law and statute is most often uncertain.¹³⁹ There is however a clear distinction with regard to adoption as it can take place in terms of statute or customary law.¹⁴⁰ Common law adoption became a part of Botswana law when the Adoption of Children proclamation was introduced to the colony in 1952.¹⁴¹ Sigweni notes that the idea of adoption was not totally new when the Adoption of Children Proclamation introduced common law adoption in Botswana.¹⁴² Tswana customary law was unwritten and developed through the customs of the Tswana people. Adoption under that law was an informal arrangement where relatives and friends can take up children and bring them up as their own.¹⁴³ Customary adoption was not a lasting arrangement, as an adopted child could return at any time to the natural parents.¹⁴⁴

The Proclamation excluded Africans from taking part in common law adoption, as it expressly stated that it was not to be interpreted as forestalling Africans from adopting African

¹³⁶ Nsereko DDN *Constitutional Law in Botswana* (2002) xv-xvi. See also Himsworth CMG 'The Botswana Customary Law Act 1969' (1972) 16(1) *Journal of African Law* 4.

¹³⁷ Nsereko DDN *Constitutional Law in Botswana* (2002) xix.

¹³⁸ Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84 Common law is also referred to as statute law/state law. To avoid ambiguity, I will refer to common law as "statute law" in the remainder of this chapter.

¹³⁹ Molokomme A & Mokobi K 'Custody and guardianship of children in Botswana' in Ncube W (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 186 (hereafter Molokomme A & Mokobi K in Ncube *Children's Rights in Eastern and Southern Africa*).

¹⁴⁰ Quansah EK *Family Law in Botswana* (2006) 138. S 16 of the Adoption of Children Act 1952 states that nothing in the Act shall be construed to prevent the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law. In other words, customary adoption will only be possible where both the child and the prospective adoptive parent are subject to customary law.

¹⁴¹ Proclamation No. 63 of 1952 Bechuanaland Protectorate.

¹⁴² Sigweni S LLM ((unpublished LLM thesis, 2008) 11. See also Joubert DJ (1993) 110 *SALJ* 726.

¹⁴³ Sigweni S (unpublished LLM thesis, 2008) 12.

¹⁴⁴ Sigweni S (unpublished LLM thesis, 2008) 12.

children in line with Tswana law and custom.¹⁴⁵ This is contained in section 16 of the Adoption of Children Act which states as follows:

This Proclamation shall not apply to Africans, and nothing in this Proclamation contained shall be construed as preventing or affecting the adoption of an African child by an African or Africans in accordance with Tswana law and custom.¹⁴⁶

Britain continued to allow the indigenous law of the Tswana people after the colonization of Botswana as this law was permitted to exist side by side with the colonial law, provided that indigenous law did not diminish British sovereignty over the Tswana Protectorate.¹⁴⁷ In 1964, the part of the Proclamation excluding Africans from engaging in common law adoption was abolished and a provision that permitted Africans to adopt children under the proclamation was implemented.¹⁴⁸ After the independence of Botswana, the Tswana native law continued to exist side by side with common law as long as they were not inconsistent with morality, humanity, and natural justice, which were adjudged by British standards.¹⁴⁹ Despite its insufficient provisions, the 1952 Proclamation continues to be the one and only enactment that supervises common law adoption in Botswana.¹⁵⁰ The Children's Act of 2009 was subsequently enacted to address temporary care such as foster care. This latter Act does not address adoption of children in Botswana.¹⁵¹

Ferreira notes that South African law was integrated into Botswana with little moderation.¹⁵² The result is that the Adoption of Children's Act of 1952 (Botswana) is very similar to the Children's Act of 1937. However, the Children's Act of 1937 has been updated by the

¹⁴⁵ Sigweni S (unpublished LLM thesis, 2008) 12. See also section 16, Adoption of Children Proclamation No.63 of 1952.

¹⁴⁶ Ferreira notes that customary law was until 1968 referred to as "Tswana law and custom". See Himsworth CMG 'The Botswana Customary Law Act, 1969' (1972) 16(1) *Journal of African Law* 14.

¹⁴⁷ Nsereko DDN *Constitutional Law in Botswana* (2002) 202. In *Marman v Marman and others* [2003] 1 BLR the court had to resort to calling an expert in customary law to explain the procedures in such adoption.

¹⁴⁸ General Law (Removal of Discrimination) Revision Law No. 28 of 1964 Bechuanaland Protectorate.

¹⁴⁹ Nsereko DDN (2002)199.

¹⁵⁰ With a commencement date of 12th December, 1952.

¹⁵¹ The Children's Act 2009 had a commencement date of 19 June 2009.

¹⁵² S Ferreira *Interracial and Intercultural Adoption* (unpublished LLD dissertation, 2009) 377.

Children's Act of 1960 and subsequently with Childcare Act 74 of 1983 and thereafter with the Children's Act 38 of 2005. The Adoption of Children's Act of 1952 is yet to be updated.¹⁵³

2.7.1 Qualifications for adoption

Persons who are qualified to adopt under the Adoption of Children's Act include husband and wife jointly, a widower, widow or unmarried or divorced person.¹⁵⁴ A married person whose spouse is, at the time of the adoption mentally disordered or defective, and has been in this state for a continuous period of not less than seven years as well as a married person who is separated from his or her spouse by judicial decree also qualify to adopt.¹⁵⁵ The Act also provides that no person under the age of 25 years separately or jointly with his or her spouse shall adopt any child and no person shall separately or jointly with his or her spouse adopt a child of the age of 16 years or more unless he/she or both adoptive parents are at least 25 years older than that child.¹⁵⁶ There is a proviso to the effect that a widower or widow or unmarried or divorced person is excused from the above provision if the said child is their natural child which has previously been adopted by any person under this Act.¹⁵⁷ A husband and his wife jointly are allowed to adopt a natural child of one of the spouses in contravention of the above provision, if the husband is at least 15 years older than such a child of his wife or if the wife is at least 10 years older than such a child of her husband.¹⁵⁸ A person shall not adopt: except jointly with his or her spouse; a child not less than 25 years younger than the said person; unless the child is of the same sex as that person; or that person is a widower or widow or unmarried ; or divorced person and is a natural parent of the child.¹⁵⁹

¹⁵³ The various Children Acts in South Africa were discussed in this chapter under "HISTORY OF ADOPTION LAWS IN SOUTH AFRICA".

¹⁵⁴ S.3(1) (a) & (b) of the Adoption Act [Cap 28:01] of 1952.

¹⁵⁵ S.3(1)(c) & (d) of the Adoption Act Cap 28 of 1952.

¹⁵⁶ S.3(2) of the Adoption Act Cap 28 of 1952.

¹⁵⁷ S.3(2)(i) of the Adoption Act Cap 28 of 1952.

¹⁵⁸ S.3(2)(ii) of the Adoption Act Cap 28 of 1952.

¹⁵⁹ S.3(3) of the Adoption Act Cap 28 of 1952.

2.7.2 Adoption orders

The Adoption of Children Act aligns with the requirement of the UN Convention on the Rights of the Child and the African Charter on the Rights and welfare of the Child by providing that adoption of a child shall be effected by the order of the court of the district in which the adopted child resides, on the application of the adoptive parent(s).¹⁶⁰ The court prior to granting the said order must be satisfied that the applicant(s) are qualified to adopt the child; are of good reputation and possess adequate means to maintain and educate the child.¹⁶¹ The court must ensure that the adoption will serve the interests of the child.¹⁶² It is pivotal that the relevant consent to the adoption is obtained.¹⁶³

2.7.3 Effect of adoption

The Act provides that an adoption order shall confer the surname of the adoptive parent on the adopted child.¹⁶⁴ Subject to section 14, an adopted child shall for all purposes be deemed to be the legitimate child of the adoptive parent, provided that an adopted child shall not become entitled to any property devolving on any child of his adoptive parent if the instrument was executed prior to the date of the order of adoption unless the instrument clearly conveys that intention.¹⁶⁵ An adopted child shall not inherit any property *ab intestato* from any relative of his adoptive parent.¹⁶⁶ An order of adoption shall terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them *ab intestate*.¹⁶⁷

¹⁶⁰ S.4(1) of the Adoption Act Cap 28 of 1952.

¹⁶¹ S.4(2)(a) & (b) of the Adoption Act Cap 28 of 1952.

¹⁶² S.4(2)(c) of the Adoption Act Cap 28 of 1952.

¹⁶³ S.4(2)(d) of the Adoption Act Cap 28 of 1952.

¹⁶⁴ S.6(1) of the Adoption Act Cap 28 of 1952.

¹⁶⁵ S.6(2)(i) of the Adoption Act Cap 28 of 1952.

¹⁶⁶ S.6(2)(ii) of the Adoption Act Cap 28 of 1952.

¹⁶⁷ S.6(3) of the Adoption Act Cap 28 of 1952.

2.7.4 *No consideration in connection with adoption is permissible*

No consideration in connection with adoption is permissible except with the consent of the court which made the order or to which an application was made. Any parent or guardian, who gives or undertakes to give any consideration in respect of the adoption of that child, shall be guilty of an offence.¹⁶⁸

2.7.5 *Effect of adoption on marriage*

The adoption of a person shall not prohibit or permit a marriage between persons, who would not have been prohibited or permitted if the adoption had not taken place: Provided that no marriage shall be contracted between an adopted person who is under the age of 21 years and his adoptive parent.¹⁶⁹

2.7.6 *Act not to affect customary law*

The Act shall not prevent or affect the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law.¹⁷⁰ Till date, the customary courts continue to discharge customary law adoption in line with customary law, while common law courts regulated common law adoption in accordance with the Adoption of Children Proclamation which is now known as the Adoption of Children Act.¹⁷¹

2.8 Conclusion

The objective of this study is to compare customary law adoptions in Nigeria, South Africa and Botswana and observe whether there are similarities and differences and what legal framework

¹⁶⁸ S.12 of the Adoption Act Cap 28 of 1952.

¹⁶⁹ S.14(a) of the Adoption Act Cap 28 of 1952.

¹⁷⁰ S.16 of the Adoption Act Cap 28 of 1952.

¹⁷¹ [Cap 28:01], Laws of Botswana. See Sigweni S LLM (2008) 13.

is in place to govern such adoptions.¹⁷² The various instruments to regulate adoption in Nigeria, South Africa and Botswana have evolved and changed over time, with the exception of Botswana which has managed adoption through the Adoption of Children Proclamation since 1952. However, there is still a wide gap regarding the provisions for customary law adoption.

Nigeria had from the onset, adopted state legislation and the earliest was enacted in 1965.¹⁷³ Currently, there is the Child Rights Act of 2003.¹⁷⁴ Reference is only made to customary law in section 132(2) of the Child Rights Act 2003 where it is stated that where a person other than a parent or relative of a child has a right or obligation in respect of the child under an order of the court or an agreement or under customary law. The court may first obtain the consent of that person before an adoption order is made.¹⁷⁵ In South Africa, the first enactment on adoption was the Adoption of Children Act 25 of 1923. Since then, there have been four other enactments.¹⁷⁶ In all the five enactments, there is no provision for customary law adoption. The only time customary law is alluded to in terms of adoption is in section 236, which illuminates when consent is not required. It provides that a biological father who was not married to the child's mother at the time of the child's conception or at any other time can become eligible to give his consent to an adoption order. This can be done by paying damages in terms of customary law.¹⁷⁷ Botswana's only enactment on adoption till date is Proclamation No. 63 of 1952 in the old Bechuanaland Protectorate. The only reference that is made to customary law is in section 16.¹⁷⁸ There are no provisions to govern customary law adoption in all of these countries.

Having analysed the legislative frameworks on adoption in these countries, it is evident that they do not formally accommodate customary law adoption. Chapters three, four and five

¹⁷² See objective of study, chapter one.

¹⁷³ This Law came into force on 20th May 1965 and has now been assumed by all the States that were later carved out of Eastern Region namely: Abia, Akwa-Ibom, Anambra, Cross-River, Ebonyi, Enugu and Rivers and Bayelsa State.

¹⁷⁴ The Child Rights Acts No 26 of 2003 with a commencement date of 31st July, 2003.

¹⁷⁵ S.132(2) of Child Rights Act 2003.

¹⁷⁶ See "History of adoption laws in South Africa" in this chapter.

¹⁷⁷ S.236(4)(c) Children's Act 2005.

¹⁷⁸ S.16 of the Adoption Act Cap 28 of 1952 provides that Act should not be interpreted as preventing adoption of an African child by an African or Africans in accordance with Tswana law and custom.

of this study will analyse customary law adoption in Nigeria, South Africa and Botswana respectively.



CHAPTER THREE: CUSTOMARY LAW ADOPTION IN NIGERIA

3.1. Introduction

This chapter investigated the origin and purpose of customary law adoption in Nigeria, with emphasis on the Ekpeyi tribe of Cross River State. A distinction between a formal and informal customary law adoption was made. The chapter further discussed the procedures for a valid customary law adoption and highlighted the challenges of acquiring protection of the rights of children adopted under customary law.

3.2. Basis of adoption under customary law in Nigeria

Childcare, protection and parental responsibility in Africa is different from what is prevalent in most parts of the world. This is because members of the extended family embrace the responsibility to care for children of other members of the family who are not in a position to take care of their own children.¹ In Nigeria as well as in other African countries, childcare is viewed as a communal responsibility and not as the sole duty of the child's biological parents.² It is the responsibility of the community to train, correct, and give guidance and support to young children as the continuity of the human race was dependant on the survival and the development of the child.³ It is on this premise that there is a well-known adage in Africa that a child does not belong to his/her biological parents but to the whole community from which that child originates. To this effect, a child is not only raised by his/her biological parents but by the entire community.⁴

Sigweni notes that in the African context, adoption was seen as a means of serving the interest of the society and not that of the child or her family.⁵ It was a way of reinforcing the bond

¹ Onyango P & Bali S Regional Practice (1996) 142.

² Onyango P & Bali S Regional Practice (1996) 142.

³ Onyango P & Bali S (1996) 142.

⁴ Onyango P & Bali S (1996) 142.

⁵ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 15.

in the family and the community.⁶ In some cases, adoption was employed to serve the interest of the adoptive parents as it was used to equip childless couples with children.⁷

There are contrasting views on whether customary law adoption does exist in Nigeria. Onuoha argues that adoption of children is rare and known mostly in English Law.⁸ TW Bennett says that adoption is not an established practice of customary law.⁹ Ferreira in response to Bennet's assertion remarked that there is evidence that the possibility of adoption of a child does exist in customary law.¹⁰

Chukwu remarked that adoption is not a customary law concept as what some authors identified as customary law adoption was guardianship, fostering or some other forms of indigenous concepts of child care.¹¹ He argued that none of those authors had identified a relationship under customary law, where there is an irreversible severance of the parent-child relationship between a child and the biological parents.¹² This is what distinguishes adoption from any other child care practice because any practice that does not create this outcome is not adoption in the legal sense of the word.¹³ Chukwu avers that it is a well-known principle in many customary law communities in Nigeria that a child who is not a slave, will go back to his/her biological family when such a child grows up, regardless of how long he/she resided with and is nurtured by a parent(s).¹⁴ He said this system is not unconnected with the traditional social stigmatisation of a person who is not the child of his or her acknowledged parent(s). Chukwu believes that this social stigmatisation has to a great extent contributed to the unpopularity of

⁶ Sigweni S *Adoption Laws and Procedures of Botswana* LLM (2008) 15.

⁷ Schapera I *Tswana Law and Custom* (1970) 174. See also Onuoha RA 'Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue' (2008) 10 *ICNL* 79(hereafter *Discriminatory Property Inheritance Under Customary Law in Nigeria*).

⁸ Onuoha RA 'Discriminatory Property Inheritance Under Customary Law in Nigeria' (2008) 10 *ICNL* 79.

⁹ Bennett TW *Human Rights* (1995)107.

¹⁰ Ferreira S (unpublished LLD dissertation, 2009) 21.

¹¹ Chukwu L *Adoption of children in Nigeria under the Child Rights Act 2003* (2012) 4.available at <https://docplayer.net/31952432-Adoption-of-children-in-nigeria-under-the-child-s-rights-act-2003-larry-o-c-chukwu-esq.html> (accessed 7 March 2021).

¹² Chukwu L *Adoption of children in Nigeria under the Child Rights Act 2003* (2012) 5.

¹³ Chukwu L (2012) 5.

¹⁴ Chukwu L *Adoption of children in Nigeria under the Child Rights Act 2003* (2012) 5.

adoption in Nigeria and concludes that adoption is not a customary law concept but has its source in statutory law.¹⁵

Moore and Himonga similarly note that the practice of moving children from one family to another is common among people that live according to customary law.¹⁶ When a family is unable to take care of a child, other relatives of the child will come to rescue and care for that child.¹⁷ They, like Bennet argue that, adoption does not take place in customary law and any attempt to compare other customary care arrangements with adoption should be opposed.¹⁸ Moore and Himonga argued further that the idea of controlling child care arrangement will work against the premise that every child belongs to the larger family and not just the parents as the interference from the state will take away from the families the freedom of handling their own affairs.¹⁹ Customary law adoption is practiced in parts of Iboland, Yako tribe of Plateau State, Okrika of Rivers State, Ishan of Edo State, Egbas of Yorubaland amongst others.²⁰

3.3. Purpose of customary law adoption

Adoption takes place where a couple could not have children of their blood or where they have children but out of sympathy takes in a child who has lost his or her parents.²¹ The purpose of customary law adoption is therefore to give a home to an orphan, an abandoned or a homeless child.²² It is also to give hope to an adoptive parent and to prevent a family from going into extinction.²³ It is on this premise that the customary court of appeal in giving its judgement in

¹⁵ Chukwu L Adoption of children in Nigeria under the Child Rights Act 2003 (2012) 5.

¹⁶ Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 63.

¹⁷ Moore E & Himonga C (2018) 63.

¹⁸ Moore E & Himonga C (2018) 63. See also Bennett TW *Customary Law in South Africa* (2004) 323.

¹⁹ Moore E & Himonga C (2018) 63.

²⁰ Ogwezzy O 'Legal Perspective of Child Adoption under the Nigerian Law' (2018) 59.

²¹ Onuoha RA 'Discriminatory Property Inheritance Under Customary Law in Nigeria' (2008) 79.

²² Dike SC & Chigbo C 'Customary Child Adoption: Ekpeye Tribe Perspective in Relation to Human Rights Challenges' (2019) 12 *The Journal of Jurisprudence* 112 (hereafter Dike SC & Chigbo C Customary Child Adoption).

²³ Dike SC & Chigbo C *Customary Child Adoption* (2019) 112.

favour of the respondent, (customary law child adoption) asked this soul-searching question in *Uyi v Uyi*:²⁴

If I may ask, where do the appellants expect the respondent to go now? To his biological father's family which the appellants family denied him? To wake up after 53 years of a man's life with a move to chase him out of the only family which he had known and being a part of, would in my view, to say the least unconscionable.

3.4. Types of customary law adoptions

3.4.1. Formal customary law adoption

In Nigeria, adoption is either formal or informal and this depends on the custom of the parties concerned.²⁵ Formal is defined as an adjective that means a public or an official procedure.²⁶ Formal customary law adoption is initiated by a ceremony involving the families of both the prospective adopter and the adoptive child.²⁷ This ceremony is an important aspect of the adoption process as the aim is to formally transfer the rights and duties of the natural parents of the adoptive child to the prospective adopter.²⁸ The adopter then publicly declares his intention to regard the child in question as his own and the ceremony is thereafter sealed with a shared meal among the families.²⁹ However, it must be noted that the system of public declaration of intention regarding a child and sealing up the ceremony with sharing of food is not the case in every community. This is prevalent in south eastern Nigeria.

²⁴ Unreported case customary court of appeal Rivers State (22 February 2016). This was an appeal from customary court, Oyigba. This was the first time the customary court gave pronouncement on the existence of customary child adoption in Ekpeye tribe in same in customary court Oyigba, (7th March 2012). The appeal was dismissed in favour of the adopted child who was the respondent. See also Dike SC & Chigbo C Customary Child Adoption (2019) 112.

²⁵ Osondu AC *Modern Nigerian Family Law & Practice* (2012)257.

²⁶ Cambridge Advanced Learner's Dictionary 3 ed (2008) 562 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 15 June 2021).

²⁷ Osondu AC *Modern Nigerian Family Law & Practice* (2012)257.

²⁸ Osondu AC (2012)257.

²⁹ Osondu AC (2012)257.

3.4.2. Informal customary law adoption

The word informal is defined as an adjective that is used to describe situations that are not formal or official and suitable when a person is with friends and family but not for official occasions.³⁰ In informal adoptions, there are no ceremonies involved. It happens when a person takes the child, in most cases, of a relative into his home and treats same as his own child.³¹ This is a common feature of the African societies and is a consequence of the extended family system.³² In *Akinwande vs Dogbo*, a man took his deceased sister's child into his home. The child lived with him for a long time and he was responsible for maintenance as well as the upbringing of the child. Thompson, J. held that this was an adoption under customary law.³³ These are some of the deficiencies that are inherent in customary law adoption and these flaws are as a result of the absence of a legal framework and laid down procedure to be followed. Some authors contend that the above scenario of maintenance and upbringing of a child is capable of several interpretations. It could be interpreted as adoption or guardianship.³⁴

Customary law adoption and guardianship often overlap.³⁵ The distinguishing characteristic is the length of time and the financial obligations involved, as customary law adoption has a longer duration while guardianship has a shorter time frame.³⁶ The extended duration of relationships invariably results in greater financial commitment.³⁷ However, this line of demarcation is often criticized. It is rightly argued that in the absence of a specified time frame and specifics of financial investment, determining which of the two categories the demarcation falls into becomes difficult.³⁸

³⁰ Cambridge Advanced Learner's Dictionary 3 ed (2008) 740 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 15 June 2021).

³¹ Osondu AC (2012) 257.

³² Osondu AC (2012) 258.

³³ Unreported case no AB/26/68 (14 July 1969) See also Nwogugu EI *Family Law in Nigeria* 3 ed (2014) 344.

³⁴ Ogwezy O 'Legal Perspective of Child Adoption under the Nigerian Law' (2018) 59.

³⁵ Okaisabor N 'Adoption, Guardianship and Fostering: Practice and Procedure – Customary Law Perspective' a presentation at the National Workshop for Area/Sharia/Customary Court Judges organized by the National Judicial Institute, Abuja 18th – 22nd March 2019 at 14(hereafter NU Okaisabor Adoption, Guardianship and Fostering).

³⁶ Okaisabor N *Adoption, Guardianship and Fostering* 15.

³⁷ Okaisabor N *Adoption, Guardianship and Fostering* 15.

³⁸ Okaisabor N *Adoption, Guardianship and Fostering* 15.

Informal adoption is also visible in cases where a widow or divorcee remarries and with the consent of the new spouse brings into her new home, children born in the previous marriage.³⁹ The step father informally adopts such a child who takes on the former's surname and this is often the case where the child has no relationship with the patrilineal family.⁴⁰

3.4.3. Quasi – adoption

Quasi is defined as a prefix used to show that something is apparent, but not completely what is described.⁴¹ Okaisabor reports that in the Yoruba custom, there is a quasi- adoption culture identified as omo iyawo.⁴² In this custom, the bride brings into her new home non-biological children who are brought up as biological children of the new home and regarded as the senior siblings of the biological children.⁴³ This responsibility of the newly wed to bring up the omo iyawo is usually with the consent of the natural parents of the latter and the omo iyawos are often raised to adulthood. Usually, when the adoptive children are getting married, the biological children of the home go along with them to their matrimonial homes.⁴⁴ The adoptive parents take on the financial responsibilities associated with the marriage ceremony and ensure that the omo iyawos are provided with all necessities of starting a new home. This depends on the financial capability of the adoptive parents.⁴⁵ The Omo iyawo will often acquire the skills of their adoptive parents like tailoring, mechanics, welding and petit trading. This is however, not compulsory as the adoptive children may decide to enhance their academic pursuits so that they may be eligible for white collar jobs.⁴⁶ This practice was very common among the Yoruba and the relationship is for a life time but its popularity has waned. This is as result of the dwindling global

³⁹ Okaisabor N (2019)14.

⁴⁰ Okaisabor N (2019)14.

⁴¹ Cambridge Advanced Learner's Dictionary 3 ed (2008) 1163 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 17 June 2021).

⁴² Okaisabor N *Adoption, Guardianship and Fostering* (2019) 14. The literal meaning of omo iyawo is the bride's child.

⁴³ Okaisabor N *Adoption, Guardianship and Fostering* (2019) 14.

⁴⁴ Okaisabor N *Adoption, Guardianship and Fostering* (2019) 14.

⁴⁵ Okaisabor N (2019) 15.

⁴⁶ Okaisabor N (2019) 15.

economy and the financial obligations it places on adoptive parents.⁴⁷ Modern families desire to bring up their biological children in line with modern cultures and educational system. As a result, such families can barely assume the dual responsibility of nurturing and training both their biological children and the omo iyawos as the financial implication is overwhelming.⁴⁸

Usually, a child that is adopted in this manner loses touch with his or her natural family and is gradually integrated into the adoptive family as he grows into adulthood. In some parts of Nigeria, when a youth is brought up and his marriage is funded by his uncle, he is incorporated into the uncle's family and becomes a permanent member.⁴⁹ However, where his marriage is funded by his biological parents or brothers, he is compelled to return to his patrilineal family.⁵⁰ Informal adoption is also evident in cases where a widow or divorcee remarries and brings into her new home a child that was born in her previous marriage. The child is informally adopted by the step-father and the child usually adopts the last name of the step-father. This is generally the case where the child has no relationship with the patrilineal family.⁵¹

3.5. Northern Nigeria's perception of adoption

Nigeria's 36 States and its Federal Capital Territory are grouped into six geographical zones.⁵² These zones are North Central, North East, North West, South East, South South and South West.⁵³ The first three zones are identified as the Northern Nigeria while the last three are collectively called Southern Nigeria. Customary law adoption is mostly applicable in Southern Nigeria. There are no Islamic laws on adoption in Nigeria as Islam prohibits adoption.⁵⁴ This is

⁴⁷ Okaisabor N (2019) 15.

⁴⁸ Okaisabor N (2019) 15.

⁴⁹ Okaisabor reports that this practice is prevalent in Plateau State of Nigeria, which is located in the North Central of Nigeria. See Okaisabor N (2019) 13.

⁵⁰ Okaisabor N *Adoption, Guardianship and Fostering* (2019) 14.

⁵¹ Okaisabor N *Adoption, Guardianship and Fostering* (2019) 14.

⁵² 'Geographical zones of Nigeria' available at <http://www.easo.europa.eu>. (accessed 3 July 2021).

⁵³ Available at <http://www.easo.europa.eu>. (accessed 3 July 2021).

⁵⁴ Ladan MT 'The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 Northern States' (2007) 58. Paper presented at the Interactive forum for Sokoto State House of Assembly Legislators, Sokoto, Nigeria (hereafter Ladan MT The Child Rights Act 2003). See "5. Scope of study and literature review" in Chapter 1 of this thesis.

because there is a belief in Islam that it is unjust to assign paternity of a child to another person beside the biological father.⁵⁵ Islam has developed its concept known as kafalah. It is a concept where a child who cannot be cared for by its natural parents can be assimilated to live permanently with another family. However, the child cannot adopt the latter family name or inherit from them.⁵⁶

Although Islamic law does not recognise adoption, it provides for foster parenting.⁵⁷ Under the Islamic system, what is obtainable is a procedure where children and teenagers are taken to live with their Islamic scholars for an indefinite period.⁵⁸ They will return to their parents when the Islamic scholar is satisfied that such a child or teenager has been well trained in Islamic culture⁵⁹. This practice is common in the Islamic system.⁶⁰

It is worth noting that many of the states in northern Nigeria objected to the Child Rights Act of 2003.⁶¹ The goal of the Child Rights Act 2003 is to come up with a complete and a fixed body of rules on the rights and welfare of children. In addition, it provides for an efficient system of child justice management that meets international standards.⁶² The Act makes it obligatory for the states as well as the federal governments to establish and maintain adoption services and facilities.⁶³ It sets up a homogeneous institutional body for adoption throughout the country, which will harmonize the procedure and criteria of eligibility for adoption.⁶⁴

As commendable as the goals of the Child Rights Act 2003 are, only 25 out of the 36 states of Nigeria have adopted the Act.⁶⁵ The remaining 11 states, which object to the provisions of the

⁵⁵ Ladan MT *The Child Rights Act 2003* (2007) 58.

⁵⁶ Chukwu L 'Adoption of children in Nigeria under the Child Rights Act 2003' (2012). See also Van Bueren G 'The International Law on the Rights of the Child' 1998 *The Hague: Kluwer Law International* 95.

⁵⁷ NU Okaisabor *Adoption, Guardianship and Fostering* (2019)17.

⁵⁸ NU Okaisabor *Adoption, Guardianship and Fostering* (2019) 17.

⁵⁹ NU Okaisabor *Adoption, Guardianship and Fostering* (2019) 17.

⁶⁰ NU Okaisabor *Adoption, Guardianship and Fostering* (2019) 17.

⁶¹ The Child Rights Acts No 26 of 2003 with a commencement date of 31st July, 2003. See "2.4 1 Laws and Procedures under the Child Rights Act 2003".

⁶² Chukwu L *Adoption of Children in Nigeria under the Child Rights Act 2003* (2012) 2.

⁶³ S.125(c) of Child Rights Act.2003. Also see "2.4.2 The objective of the Act"

⁶⁴ Chukwu L (2012) 2.

⁶⁵ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' *theconversation.com*, 24 November 2019 (accessed 8 February 2021).

Act, are all in the northern part of Nigeria. They object because they proclaim a conflict between the Act and their religious and cultural norms.⁶⁶ Specifically, the 11 states asserted that the reasons for their objections are among others, the fact that the Act prohibits child marriages; marriages to members of an adoptive family; and defines a child as anyone below the age of 18 years.⁶⁷ The reason the Act disallows child marriage is a reaction to the prevailing practice where younger girls are given to older men. This practice is particularly widespread in the Northern part of Nigerian, where it wields power in favour of older men.⁶⁸

The World Health Organisation has established that there is a relationship between child marriage and health risks as it has observed that adolescent pregnancy is one of the major contributors to maternal and child mortality.⁶⁹ The 2008 Nigerian Demographic and Health Survey estimates that 48% of girls in northern Nigeria were married off at the age of 15 while 78% of them were married off before they were 18 years old, which put the median age for child marriage in the north-western region at 15.2. However, the most recent survey released in October 2019 did not include this data.⁷⁰ The concept of adoption is generally not recognised under Islamic law. Kafalah draws a distinction between biological children and non- biological children as it asserts that since the latter maintain blood relations with their biological family, they can be married to the members of the adoptive family.⁷¹ The political leaders in northern Nigeria view the Child Rights Act 2003 as opposing a practice validated by religion.⁷²

⁶⁶ 'The states that have objected to signing the Child Rights Act 2003 are Bauchi, Yobe, Kano, Sokoto, Adamawa, Borno, Zamfara, Gombe, Katsina, Kebbi, and Jigawa. 'Updated: 11 states in northern Nigeria yet to pass child rights law-UNICEF Official' Premium Times 11 May 2019 available at <https://www.premiumtimesng.com>.(accessed 8 February 2021). Also see Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children'.

⁶⁷ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' (2019).

⁶⁸ Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' (2019).

⁶⁹ Ogunniyi D (2019).

⁷⁰ Ogunniyi D (2019).

⁷¹ Chapter 33:4-6 of the Qur'an sees as valid a marriage between an adoptive parent and an adopted child as there is no blood relation between them. Also see Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' (2019).

⁷² Ogunniyi D There are still huge gaps in Nigeria's efforts to protect children' (2019).

3.6. Procedures for a valid customary law adoption

Where customary law adoption is acknowledged and endorsed, the procedures regulate the rights that are given to the adopted child.⁷³ This is difficult and creates a great challenge where customary law adoption is not endorsed and there is no legal structure to safeguard the adopted child.⁷⁴ Among the Efik tribe of southern Nigeria, it is cardinal that the members of the family of the intending adopter are present to witness the adoption process where the adopter formally nominates the adoptee.⁷⁵ In the absence of this procedure, the adoptive child will not be recognised nor given the right as other biological members of the family.⁷⁶ The adopted child's right to succeed to any property depends on the validity of the procedure.⁷⁷ In certain cases, customary exercises are imposed on the child for their rights not to be obstructed.

In *Chief Uzoukwu & Others v Ezeonu II, Igwe of Atani & Others*, the appellants argued that the respondent referred to and regarded them as slaves and persons of inferior stock, and for that reason were prevented from enjoying certain rights, such as owning property, taking titles, or taking part in developmental activities of the town.⁷⁸ It was alleged that the respondents required the appellants to observe a practice of "redemption," in order to be recognised as persons of equal status. Under redemption, the appellants would, among other things, slaughter a cow or goat, or make other offerings or sacrifices to the respondents.⁷⁹ Although the Nigerian Court of Appeal held in this particular case that the right to non-discrimination in section 42 of the Constitution presupposed a number of factors. First, that the discrimination complained against must have been based on law; second, the discrimination must be seen as an act of government or its agencies; third, that the discrimination complained against does not apply to other Nigerians.

⁷³ Dike SC & Chigbo C 'Customary Child Adoption (2019)113.

⁷⁴ Dike SC & Chigbo C 'Customary Child Adoption (2019)113.

⁷⁵ Onuoha RA Discriminatory Property Inheritance Under Customary Law in Nigeria (2008) 79.

⁷⁶ Onuoha RA Discriminatory Property Inheritance Under Customary Law in Nigeria (2008) 79.

⁷⁷ *Martin v. Johnson* (1936) 3 WACA 91. [appeal-(1945) 18 N.L.R. 41].

⁷⁸ (1991) 6 NWLR (Pt 200) 708. (hereafter *Uzoukwu v Ezeonu*).

⁷⁹ Onuoha RA Discriminatory Property Inheritance Under Customary Law in Nigeria (2008) 79.

Finally, the court held that a violation of section 42 can only be invoked where the discrimination falls within the protected grounds; namely: ethnic group, place of origin, sex, religion, political opinion or circumstances of birth.⁸⁰ It cannot be invoked if, in addition to protected grounds, there are other reasons why a person is discriminated against.⁸¹ The Court of Appeal also had this to say in this case:

Due to the development of Constitutional law in this field, distinct difference has emerged between “Fundamental Rights” and “Human Rights”. It may be recalled that human rights were derived from and out of the natural concept of natural rights. They are rights which every civilized society must accept as belonging to each person as a human being. These were termed human rights. When the United Nations made its declaration, it was in respect of ‘human rights’ as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of International law. Fundamental rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the constitution.⁸²

3.7. The rights of the Nigerian child

The Constitution of the Federal Republic of Nigeria has provided for the fundamental human rights of every person including a child adopted in line with customary law.⁸³ These rights include the right to life, a fair hearing, freedom from discrimination, right to acquire and own immovable property, dignity of human persons, private and family life, personal liberty, freedom of movement and right to freedom of expression.⁸⁴ These rights are accorded to the biological child in the customary law setting but are denied from the adopted child.⁸⁵ Children adopted under customary law are not recognised as a full-fledged member of the family. He or she is denied the

⁸⁰ *Uzoukwu v Ezeonu* (1991) 6 NWLR (Pt 200) 708.

⁸¹ *Uzoukwu v Ezeonu* (1991) 708. See also Umeh N ‘Reading ‘disability’ into the non-discrimination clause of the Nigerian Constitution’ (2016) 4 ADRY 53 76.

⁸² *Uzoukwu v Ezeonu* (1991) 708.

⁸³ The 1999 Constitution of the Federal Republic of Nigeria, as amended (hereafter the Constitution).

⁸⁴ Sections 33 -46 of the Constitution.

⁸⁵ *Dike SC & Chigbo C ‘Customary Child Adoption* (2019) 114.

right to inherit landed property from their adoptive parents and succeed them in customary positions.⁸⁶ They are denied the opportunity to share in the allotted farm portion and the right to harvest family fish ponds.⁸⁷ In *Ideozu v Ochoma*, the appellant sought a court injunction to stop the respondent, an adopted child from becoming the traditional custodian of an ancestral object of worship.⁸⁸ The Supreme Court rejected this application which was brought ten years after the respondent had become the traditional custodian of the ancestral object.⁸⁹ This case portrays how the adopted child is often denied rights that are freely enjoyed by the biological child.

3.7.1. *The rights of the adopted child in succession*

The place of the adopted child in relation to succession is not certain, but it has been confirmed that the position of the adopted child is subordinate to the legitimate child of the blood.⁹⁰ In *Administrator General v. Tuwase*, the estate of a Yoruba woman who had died without any biological child was claimed by many people.⁹¹ These included her husband from whom she was separated 44 years prior to her death, the deceased woman's adopted child who had predeceased her, by representation through her descendants, and also a number of collaterals from her maternal grandfather, which included an adopted daughter of an aunt. The claim of the husband was rejected but the court ordered that the descendants, including the adopted children of the deceased grandfather, should take one share each while the descendants of her adopted child should share per stirpes. It has been argued that the ruling in this case suggest that the rights of the adopted child is second-class to that of a legitimate child of the blood as the latter would have inherited the estate to the exclusion of all other beneficiaries.⁹²

⁸⁶ Dike SC & Chigbo C 'Customary Child Adoption (2019) 114.

⁸⁷ Dike SC & Chigbo C Customary Child Adoption (2019) 114.

⁸⁸ *Ideozu v Ochoma* (2006) 4 NWLR (Pt 970) 364.

⁸⁹ Dike SC & Chigbo Customary Child Adoption (2019) 114.

⁹⁰ Onuoha RA Discriminatory Property Inheritance Under Customary Law in Nigeria (2008) 10 *ICNL* 79.

⁹¹ (1946) 18 *NLR* 88.

⁹² Onuoha RA Discriminatory Property Inheritance Under Customary Law in Nigeria (2008) 79.

The application of customary law in relation to adoption is connected to the customary marriage type.⁹³ Six types of marriages are recognised in the Ekpeye tribe.⁹⁴ These marriages are monogamous marriage, polygamous marriage, early marriage, woman to woman marriage, child marriage and widowhood inheritance.⁹⁵ Monogamous marriage is portrayed as *ununwe utu*.⁹⁶ In this scenario, the man and his wife are having a marital experience for the first time. *Ununwe utu* is also represented in a polygamous marriage where a young woman is having a marital experience for the first time in a polygamous marriage. In *Ununwe uhwashi*, a woman's first husband has died and she is betrothed to another male member of her late husband's family.⁹⁷ The supreme court of appeal held in *Chinweze v Mazi*, in relation to *ununwe uhwashi*, that it is contrary to the course of nature for a dead man to produce children and that a man's family normally consists of himself, his wife or wives, as the case may be, and the children born to him in his lifetime.⁹⁸ It is on the ground of the above ruling by the court that an author stated: 'Under most customary laws in Nigeria, the death of a wife, irrespective of the system of marriage, terminates the marriage. But the death of a husband does not necessarily terminate the marriage'⁹⁹

Ununwe ugba depict a woman who remarries as a result of divorce or the death of the initial husband. In *ununwe uhwashi* and *ununwe ugba*, a man can still marry the initial wife and have children from the new wife (the widow or divorcee).¹⁰⁰ Customary law marriages are not recognised at the same level. There is disparity in the value and respect given to each marriage and the value accorded to a customary marriage type affects the children of that marriage.¹⁰¹ This is because monogamous marriage which is portrayed as *ununwe utu* is regarded as a perfect

⁹³ Dike SC & Chigbo C 'Customary Child Adoption (2019) 111.

⁹⁴ Okede GW & Wegbu BI 'Marriage Institution in Ekpeye Culture: Oral Information' (2014) 2 *AJHSS* 742 (hereafter Okede GW & Wegbu BI 'Marriage Institution in Ekpeye Culture').

⁹⁵ Okede GW & Wegbu BI 'Marriage Institution in Ekpeye Culture.

⁹⁶ This represents a perfect and well-grounded marriage. See Dike SC & Chigbo C (2019) 111.

⁹⁷ *Ununwe uhwashi* represents marriage undertaken by a widow. See Dike SC & Chigbo C (2019) 111.

⁹⁸ *Peter Chinweze & Anor v Veronica Masi & Anor* (1989)1 NWLR (Pt 97) 254 (hereafter *Chinweze v Masi*).

⁹⁹ Ebeku KS 'The Legal Status of Nigerian Children Born by a Widow: *Chinweze v. Masi* Revisited' (1994) 38 *Journal of African Law*, 46- 60. See also Dike SC & Chigbo C 'Customary Child Adoption (2019) 112.

¹⁰⁰ Dike SC & Chigbo C 'Customary Child Adoption (2019) 111.

¹⁰¹ Dike SC & Chigbo C 'Customary Child Adoption (2019) 111.

marriage. However, *ununwe uhwashi*, *ununwe ugba* and the other types of marriages which was explained earlier in this chapter are viewed as second class marriages.¹⁰² The result of this is that the respect that is given to a marriage is transferred to the offspring of that marriage. A derogatory status imparts on the rights of the child notwithstanding the fact that the child has been adopted in line with customary law recognition.¹⁰³ The derogatory status given to the adopted child was clearly demonstrated in the case of *Ideozu v Ochoma* which was discussed earlier in this chapter. The appellant sought to stop the respondent, an adopted child, from becoming the traditional custodian of an ancestral object of worship.¹⁰⁴ Similarly, the ruling in *Administrator General v. Tuwase* confirmed that the rights of the adopted child are subordinate to the legitimate child of the blood.¹⁰⁵

3.8. Challenges to the rights of the child adopted under customary law

The Constitution of the Federal Republic of Nigeria has provided for the fundamental human rights of every person including a child adopted in line with customary law.¹⁰⁶ These rights are enshrined in sections 33 – 46 of the Constitution.¹⁰⁷ Some of these rights are violated by virtue of adoption being contracted in accordance with customary law. Among the Egba tribe of Yorubaland in Nigeria, an adopted Child has no succession rights from his adoptive parents' intestate estate.¹⁰⁸ Children adopted under customary law in some communities are denied rights to inherit property, succession and family leadership.¹⁰⁹ The usual practice in most customary law communities is that the eldest member of the family is acknowledged as the head

¹⁰² See '3.7.1. The rights of the adopted child in succession'. See in particular note 96.

¹⁰³ Dike SC & Chigbo C (2019) 112. The term 'derogatory' is defined as showing strong disapproval and not showing respect. See Cambridge Advanced Learner's Dictionary 3 ed (2008) 378 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 23 May 2022).

¹⁰⁴ See '3.7. The rights of the Nigerian child'.

¹⁰⁵ (1946) 18 NLR 88.

¹⁰⁶ The Constitution.

¹⁰⁷ Sections 33 -46 of the Constitution.

¹⁰⁸ Chukwu L *Adoption of children in Nigeria under the Child Rights Act 2003* (2012) 33.

See also Partridge C *Native Law and Custom in Egbaland* (1911) 10 J.A.S. 422; Elias TO *The Nigerian Legal System* (1963) 311.

¹⁰⁹ Dike SC & Chigbo C *Customary Child Adoption* (2019) 117.

and the custodian of the family values. When a child adopted under customary law takes up a leadership role in certain communities, other members of the family may decline to gather in his house periodically for family meetings as the custom dictates. The reason is that he is not a biological member of the family.¹¹⁰ There have been reports of death brought about by trauma that was inflicted on such persons as a result of discrimination that contradicts the fundamental right stipulated in section 42(2) of the Constitution.¹¹¹

In the Ekpeye tribe, an adopted child is named *uyaya*.¹¹² This means that the child is a stranger and not a bona fide member of the family or community from which he or she emanates.¹¹³ This is in contradiction with the fundamental rights and dignity of the adopted child as s/he is given a status of a second-class citizen and her social and cultural status is derogated.¹¹⁴ The respect and dignity of such a person are reduced and he or she is not entitled to certain rights and privileges like other biological members of the family.¹¹⁵

3.9. Conclusion

It is notable that the literature on customary law adoption in Nigeria is inadequate and more research is needed to improve the dearth of information in this regard. It can be argued that customary law adoption is practiced among the Ekpeye tribe of Rivers State of Nigeria. This can be argued in the light of the judgement in *Uyi v Uyi*.¹¹⁶ For a man to live with another family for 53 years of his life cannot be mere fostering or guardianship. This is more so as it has been argued that one of the differences between adoption and other child care placement is the duration of the relationship.¹¹⁷ The decision in *Ideozu v Ochoma* also gives strength to the practice of customary law adoption in Ekpeye tribe. This is because a child who came into the family other

¹¹⁰ Dike SC & Chigbo C (2019) 117.

¹¹¹ Dike SC & Chigbo C (2019) 117. Section 42(2) states that: No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

¹¹² *Uyaya* means a stranger. Dike SC & Chigbo C Customary Child Adoption (2019) 110.

¹¹³ Dike SC & Chigbo C Customary Child Adoption (2019) 119.

¹¹⁴ Dike SC & Chigbo C Customary Child Adoption (2019) 110.

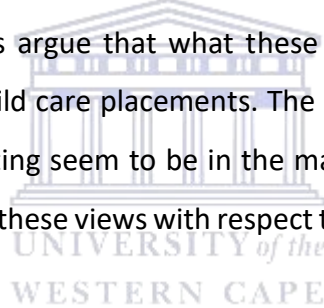
¹¹⁵ Dike SC & Chigbo C Customary Child Adoption (2019) 110.

¹¹⁶ Unreported case customary court of appeal Rivers State (22 February 2016).

¹¹⁷ NU Okaisabor Adoption, Guardianship and Fostering: Practice and Procedure (2019)15.

than through customary law adoption may not ascend to the throne such as the traditional custodian of an ancestral object of worship.¹¹⁸ It is ironic that a judicial pronouncement was made for the first time regarding customary law adoption in *Uyi v Uyi* as late as March 2012. One wonders why it had to take very long to happen in a tribe that is presumed to recognise customary law adoption. However, more needs to be done to enhance the dignity and the future of the adopted child in the Ekpeye tribe. This is because the future of the adopted child is uncertain due to the fact that in most cases their fundamental human rights are treated with contempt.¹¹⁹ The name and identity of the adopted are in jeopardy. This is because in some cases, the adopted child is intimidated with expulsion from his or her home and adoptive families. This happens even in old age.¹²⁰

In conclusion, views differ on whether or not there is customary law adoption in Nigeria.¹²¹ There are authors who believe that there is formal, informal, and even quasi- adoption under customary law, while others argue that what these authors regard as adoption under customary law is other forms of child care placements. The authors who argue that there is no adoption in the customary law setting seem to be in the majority.¹²² The next two chapters of this thesis will examine the merit of these views with respect to the other countries under review.



¹¹⁸ *Ideozu v Ochoma* (2006) 4 NWLR (Pt 970) 364.

¹¹⁹ Dike SC & Chigbo C Customary Child Adoption (2019) 115.

¹²⁰ See *Uyi v Uyi* (unreported case customary court of appeal Rivers State (22 February 2016)).

¹²¹ See '3.2 Origin of Customary Law Adoption'.

¹²² See '3.2 Origin of Customary Law Adoption'.

CHAPTER FOUR: CUSTOMARY LAW ADOPTION IN SOUTH AFRICA

4.1. Introduction

This chapter examined whether customary law adoption exists in South Africa and how the validity of such adoption is determined. It investigated how customary law adoption is regulated and the lapses inherent therein. An in-depth analysis of case law recognition of customary law adoptions in South Africa was done.

4.2. Customary law in South Africa

Customary law is an integral part of South African Law.¹ It was not part of the South African law until the advent of the South African interim constitution.² Customary law is defined in the Recognition of Customary Marriage Act as the usage and customs traditionally observed among the indigenous African peoples of South Africa, which forms part of the culture of those people.³ It is a body of law by which millions of South Africans regulate their lives.⁴ Prior to the enactment of the interim Constitution, customary law in South Africa was viewed as a term that was related to race. This has changed after the introduction of the 1996 Constitution, as customary law is now seen as African traditional practices imbedded within a right to culture.⁵ Customary law is now established in the legal system because section 211 of the Constitution mandates South African courts to apply customary law whenever it is applicable.⁶ The effect of Section 211(3) of

¹ In *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 478, it was held that “While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law”.

² The Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter referred to as the Interim Constitution) came into force on the 27 April 1994. The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution). The Constitution was signed into law by President Nelson Mandela at Sharpeville on 4 February 1997.

³ Section 1 of the Recognition of Customary Marriages Act 120 of 1998 (hereafter referred to as RCMA).

⁴ *Maneli v Maneli* [2010] ZAGPJHC 22 para 27.

⁵ Bennett in Bekker et al Legal Pluralism 18. Constitution of the Republic of South Africa, 1996.

⁶ S 211(3): “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

the Constitution is that it has upgraded customary law to the same status as the common law.⁷ Customary law obtains its validity from custom and social norms that the individual community accepts as obligatory.⁸ It is however not an easily accessible or ascertainable legal system like the common law.⁹ This is because most customary laws are unwritten. In effect, this means that the rules of customary law are flexible and change in response to changes in the socio-economic environment.¹⁰ Moore and Himonga argue that there are no groups of people designated to make the rules or authorised to define the norms of customary law.

Customary law is subject to constitutional review. Thus, any aspect that infringes on fundamental rights can be proclaimed as unconstitutional. Sections 30, 31 and 185 of the Constitution provide for the right to culture, which is the basis of customary law. It is an injunction of section 30 of the Constitution that everyone has a right to participate in the cultural life of their choice.¹¹ Section 31 further stipulates that persons belonging to a cultural community may not be denied the right to enjoy their culture, together with other members of that community.¹² The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is tasked with promoting respects for the rights of cultural communities and to recommend the recognition of cultural councils.¹³ In *Gumede v President of the Republic of South Africa*, the court held that all courts are required not only to apply customary law but to develop it.¹⁴ Ferreira observed that indigenous races in most countries are in the minority; but in South Africa, the indigenous race is the majority being black South Africans, who are governed

⁷ In *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), it was held that customary law, like any other law, must accord with the Constitution. Like any other law, customary law has a status that requires respect. See also Bennett in Bekker et al Legal Pluralism 17.

⁸ Bennett TW *Customary Law in South Africa* (2004) 128.

⁹ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 479. See also Monye S 'The Customary Law and Adoption: The "O e Gapa le Namane" Custom as a Reflection of Customary-Law Development in South Africa' (2017) 4 *Journal of Law, Society and Development* 7 (hereafter *The Customary Law and Adoption*).

¹⁰ Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 62.

¹¹ Section 30 of the Constitution. To infringe upon someone's rights or freedom means to take away some of their rights or limit their freedom. See Cambridge Advanced Learner's Dictionary 3 ed (2008) 741 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 23 May 2022).

¹² Section 31 of the Constitution.

¹³ Section 185 of the Constitution.

¹⁴ 2009 (3) BCLR 243.

by customary law. She argued that the importance of customary law and customary law adoption cannot be over- emphasised.¹⁵

In 1988, the Law of Evidence Amendment Act was enacted. Section 1(1) provides that “any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice”¹⁶ Customary law covers all matters relating to personal and family life including matters relating to children in the areas of care, contact, maintenance, guardianship and initiation.¹⁷ I proceed to examine the aspects related to children.

4.3. Development of adoption in customary law in South Africa

The belief in the African societies that each child is not just the biological parent’s child but everyone’s child gives a formidable communal approach to childcare, protection and welfare of children in traditional communities.¹⁸ This approach forms the basis for customary adoption which has been a great support to many children over the years, especially children who were orphaned by the HIV and AIDS pandemic in South Africa.¹⁹

Adoption in customary law is an informal set up that involves only the relatives of the adopted child and of the adoptive family.²⁰ Bennett says that adoption is not an established practice of customary law but he does agree that there are imitations of it within families.²¹ Ferreira argues that there is proof that the possibility of adoption exists in customary law.²² Moore and Himonga note that the practice of moving children within the extended family system

¹⁵ Ferreira S *Interracial and Intercultural Adoption* (unpublished LLD dissertation, 2009) 4.

¹⁶ Law of Evidence Amendment Act 45 of 1988. It was assented to on 15 April 1988 and the commencement date is 3 October 1988.

¹⁷ Moore E & Himonga C ‘Living Customary Law and Families in South Africa’ 2018 *Children, Families and the State* 62.

¹⁸ Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children’s Protection Rights in South Africa* (2011) 10.

¹⁹ Martin P & Mbambo B (2011)10.

²⁰ Maithufi 2001 De Jure 391.

²¹ Bennett TW *Human Rights* (1995) 107. See also Monye S ‘The Customary Law and Adoption (2017) 4 *Journal of Law, Society and Development* 7.

²² Ferreira S (unpublished LLD dissertation, 2009) 21.

is common among people that live according to customary law.²³ They, like Bennet, argue that adoption does not take place in customary law and any attempt to compare adoption with other customary care arrangements should be resisted because the idea of controlling child care arrangement will work against the notion that every child belongs to the larger family and not just the parents.²⁴ Within the African society, there are many ways that a child may be taken in by a member of the family and cared for as their own.²⁵ This happens when a child whose parents are deceased is raised by a member of the family.²⁶ The process of choosing who should raise such a child begins with the members of the family coming together to decide who should be entrusted with the responsibility of raising that particular child.²⁷ The final choice is determined by many factors including the closeness of the deceased parents with that person.²⁸ There are no financial incentives in this set up, and the child's inheritance, if any, is managed by that member of the family.²⁹

A child may however be adopted formally in a customary law adoption ceremony.³⁰ It was held in *Maneli v Maneli* that the rationale of the Xhosa customary law adoption ceremony in South Africa is to proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the child.³¹ Customary adoption are public ceremonies which effect the transfer of customary parental rights and responsibilities in respect of a child from one family

²³ Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 63. See also '3.2 ORIGIN OF CUSTOMARY LAW ADOPTION'.

²⁴ Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 63. See also Bennett TW Human Rights (1995) 107.

²⁵ Maithufi IP 'Metiso v Road Accident Fund no 44588/2001: Recent case law' 2001 De Jure 391.

²⁶ This was the case in *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T), where the court, per Bertelsmann J, held that although the act of adoption possibly incomplete, offer to adopt children a binding offer which can and should be enforced on behalf of children. The court also held that recognition of such duty to maintain is enforceable in terms of customary law and reconcilable with boni mores.

²⁷ Monye S 'The Customary Law and Adoption' (2017) 4 *Journal of Law, Society and Development* 8.

²⁸ Monye S 'The Customary Law and Adoption' (2017) 4 *Journal of Law, Society and Development* 8.

²⁹ Monye S 'The Customary Law and Adoption' (2017) 4 *Journal of Law, Society and Development* 8.

³⁰ See *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk), in which several traditional Xhosa rituals were performed and signified the adoption of the child. The court held that a child that is adopted according to customary law is entitled to compensation for loss of support resulting from the negligent killing of such Child's adoptive parent.

³¹ *Maneli v Maneli* [2010] ZAGPJHC 22.

to another.³² Maithufi explains that customary adoption normally take place between families that are related to each other by blood. However, it can also take place between non-relatives, and it is a process which, in terms of customary law, has the same legal consequences as common law adoptions.³³

Bennet and Maithufi agree that under customary law a man who has no sons or heirs to inherit his property at death and perpetuate his family name will usually turn to adoption.³⁴ Another reason people turn to adoption is to strengthen the adopting family with more children and to protect the interests of children where the biological parent(s) of such children cannot afford to maintain them.³⁵

4.3.1. Restrictions on adoption

Males and females may adopt a child.³⁶ Similarly, male and female children may be given up for adoption according to customary law.³⁷ When the head of a family has no son, he will usually secure the son of a closely related family head in his clan and make the child his heir.³⁸ Bennett compares this custom with the Roman-law's concept of adoption, whose aim is to carry on the adopter's bloodline.³⁹ A child adopted in this manner becomes a full member of the adoptive family and his connections with his biological family are extinguished.⁴⁰ It is important for the relatives of the adopted child and that of the adoptive family to reach an agreement regarding the adoption process for it to be valid.⁴¹ This agreement should be communicated to the

³² See Martin P & Mbambo *B* (2011) 42.

³³ Maithufi 2001 *De Jure* 391, 394; SALC Project 110 24.

³⁴ Maithufi 2001 *De Jure* 392. SALC Project 110 25. Bennett TW *Customary Law in South Africa* (2004) 319.

³⁵ SALC Project 110 25.

³⁶ SALC Project 110 27; Maithufi 2001 *De Jure* 392.

³⁷ Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 236.

³⁸ Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 284.

³⁹ Bennett *Customary Law in SA* (2004) 319. See also '2.3 Reasons for Adoption'.

⁴⁰ Bekker JC 'Children and young persons in indigenous law' in Robinson J A (ed) *The Law of Children and Young Persons in South Africa* (1997) 193.

⁴¹ Maithufi 2001 *De Jure* 391-392; SALC Project 110 24.

traditional ruler or chief of that community.⁴² However, whether the traditional ruler is informed or not does not affect the validity of the adoption if due publicity was given to the process.⁴³

A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.⁴⁴ The decision about the adoption rests solely on the biological father of the child, who may disregard the wishes of the mother.⁴⁵ Upon adoption, the adopted child becomes the child of the adoptive parent in all intents and purposes.⁴⁶ The adoptive parent(s) become(s) responsible for the maintenance of the adopted child.⁴⁷

Initially, only heads of families, who were usually male, could adopt children according to customary law.⁴⁸ Nowadays, both males and females, married or unmarried, and even persons married according to civil law may adopt children in terms of customary law.⁴⁹ Maithufi believes that adoption should be distinguished from fostering in terms of customary law.⁵⁰ He argues that whereas fostering does not affect the status of the child, adoption does in the sense that the adopted child becomes a member of the family of the adoptive parent(s).⁵¹ Bekker draws a distinction between adoption and fostering in terms of customary law in the following words:

Children may be sent to live with relatives, neighbours or close friends for various reasons: the child's parent may be too poor to raise him/her; there may be no woman available to look after a child on break-up of marriage; the foster parent might be lonely or might need help to run a household. In all these cases it is understood that the child will eventually return to his/her own parents, so there is no intention to sever relationships with the biological family, which typifies adoption.

⁴² Bekker JC Seymour's Customary Law in Southern Africa 5 ed (1989) 236.

⁴³ Maithufi 2001 De Jure 391-392; SALC Project 110 24.

⁴⁴ Maithufi 2001 De Jure 391-392; SALC Project 110 24. See also *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk).

⁴⁵ *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1147.

⁴⁶ Maithufi 2001 De Jure 392.

⁴⁷ Maithufi (2001) De Jure 392.

⁴⁸ Bennett *A Sourcebook of African Customary Law in Southern Africa* (1991) 375.

⁴⁹ SALC Project 110 27. However, it has been held that a duty of support or maintenance arising as a result of a valid customary law adoption is enforceable and not against public policy or the principles of natural justice *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk); *Metiso v Road Accident Fund* Case No 44588/2000 (T).

⁵⁰ Maithufi (2001) De Jure 391-392. SALC Project 110 24.

⁵¹ SALC Project 110 24.

Hence the child does not usurp rights of succession, or indeed acquire any rights at all in the foster parent's family.⁵²

However, customary law does not give children exclusive rights distinct from the welfare of the family as a whole.⁵³ Bennett says that the notion of children enjoying individual rights is fundamentally at variance with the African legal tradition where importance is placed on duties rather than rights.⁵⁴

4.4. Effect of statutory provisions on customary law adoption

For a long time, it was not clear if the statutory provisions that govern adoption supersede customary law.⁵⁵ Section 18(1)(a) of the Child Care Act provides that adoption must be accomplished by an order of a children's court.⁵⁶ However, it was held in *Kewana v Santam Insurance Co Ltd* that the previous Children's Act did not modify or repeal customary law adoption.⁵⁷ It was held earlier in *Zibi v Zibi* that the customary system of adoption did not have to comply with the requirements of the Child Care Act to be valid.⁵⁸



4.5. The validity of customary law adoption

The validity of adopting a child under customary law is largely determined by the agreement between the families. It is a fundamental requirement that the relatives of the adopted child and that of the adoptive family reach an agreement regarding the adoption process for it to be valid.⁵⁹

⁵² Bennett A *Sourcebook of African Customary Law in Southern Africa* (1991) 377 - 378.

⁵³ Nhlapo T et al *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*. (2014) Oxford University Press 123. Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 62.

⁵⁴ Bennett TW *Customary Law in South Africa* (2004) 296. Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 62.

⁵⁵ Bennett TW *Customary Law in South Africa* (2004) 320.

⁵⁶ Child Care Act 74 of 1983.

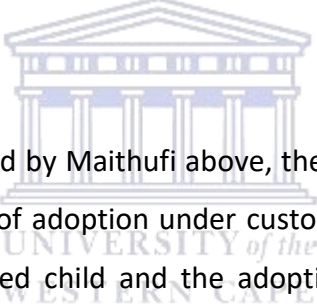
⁵⁷ Act 33 of 1960 regulated adoption before the Child Care Act 74 of 1983. See also *Kewana v Santam Insurance Co. Ltd* 1993 (4) SA 771 (TkA) at 776 B.

⁵⁸ 1952 (2) NAC 167 (S) at 170.

⁵⁹ Maithufi I (2001) *De Jure* 391-392; SALC Project 110 24.

In the absence of this, the adoption cannot be enforced. Maithufi describes the adoption process and the requirements for it as follows:

The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area or his or her representative. The formalities relating to the agreement between the families of the adopted child and the adoptive parent(s), as well as the report to the traditional leader or his or her representative, are aimed at indicating that the adopted child has been formally transferred from one family to another. Even in cases where the adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and adoptive parent(s). The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.⁶⁰



From the adoption process described by Maithufi above, there are more prerequisites to determine the validity of an act of adoption under customary law than agreement between the families of the adopted child and the adoptive family. There are two principal requirements to validate an adoption under customary law. There has to be an agreement between the families of the adopted child and the adoptive parent(s). Importantly, this agreement should be communicated to the traditional leader of the area or his or her representative. Secondly, due publicity must be given to the adoption process. The validity of the customary adoption rests solely on the above requirements and is summed up in these words from South African Law Commission review of the Child Care Act Project 110, 'adoption takes place in public and both the relatives of the adopted child and adoptive parents are involved because the adoption entails the alteration of the status of the child'.⁶¹

⁶⁰ (2001) 34 De Jure 390 at 391 - 392.

⁶¹ SALC Project 110 24.

In *Maswanganye v Baloyi*, the Applicant applied to the High Court in Pretoria for an order declaring her as the sole heir of her aunt's intestate estate.⁶² She claimed she had been customarily adopted by her aunt, whom she had lived with since the age of 10 years. She alleged that she had adopted her aunt's surname and took care of her during her life time. The aunt had four sons all of whom predeceased her. The first Respondent is the widow of one of her aunt's deceased sons, being the only son who had children. The issue for determination was whether the applicant had been customarily adopted by the deceased. The learned Judge Makgoka in determining the issue in dispute, said:

I will first have to establish the requirements of an adoption in African customary law. Those requirements can be gleaned from the judgments of *Kewana v Santam Insurance Co Ltd* above, and *Metiso v Padongeluxfonds*. It appears that the element of publicity is central to the process of customary adoption. In both *Kewana and Metiso*, this aspect seems to have weighed heavily on the courts to arrive at a conclusion that there had been customary adoption. The requirement of publicity appears to be in the form of a small, symbolic ceremony to mark the occasion. This is not surprising. Adoption is a significant and life-altering development for everyone concerned such as the child, its natural parent(s), as well as its adoptive parent(s). In the present case, all the applicant can establish is that she resided with the deceased. She does not suggest that there was any ceremony or publicity given to that significant development. From the aforementioned, it appears that residence on its own is not sufficient to constitute customary adoption. Something more, in the form of publicity, is required. In this regard, it is significant that the children in both cases of *Kewana and Metiso* also resided with their relatives. To signify an intention to adopt them, the relatives went a step further: they publicised the adoption of those children, which is lacking in the applicant's case.⁶³

In *Maneli v Maneli*, it was held that the rationale of Xhosa customary law adoption ceremony is to proclaim and signify to the world that the adoptive parents have formally accepted parental

⁶² *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917.

⁶³ *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917 para 9, 13–4.

responsibility for the minor child.⁶⁴ The adopted minor child is thereafter accepted and regarded by society as a child of the adoptive parents.⁶⁵

The learned judge Makgota citing the cases of *Kewana v Santam Insurance Co Ltd* and *Metiso v Padongeluxfonds*, made it explicitly clear that publicity is mandatory in determining the validity of act of adoption of a child under customary law. The judge defined publicity in this instance as a small, symbolic ceremony. Agreement between the families of the adopted child and the adoptive family is not sufficient. It is also not enough that the applicant had resided with the deceased for many years and had even adopted the deceased's surname as hers. The learned judge held in this case that the act of publicity was of paramountcy in validating a child adoption under customary law and its absence in this particular case voided the applicant's claim to have been adopted by the deceased. In the same vein, it was held in *Maneli v Maneli*, that the essence of the ceremony in Xhosa customary adoption law is to demonstrate to the world that there is a formal adoption under customary law. In the absence of this ceremony, the adopted child will not be regarded by the society as the child of the adoptive parents. The authorities in the three cases mentioned above lend support to the fact that the long period where the applicant resided with her aunt is not sufficient to validate a customary law adoption. In addition, the claim by the applicant that she adopted her aunt's surname and care for her in her life time were not strong enough to substantiate her claim. The element of publicity, which in the words of Judge Makgoka is a small, if symbolic, ceremony was vital and this was lacking in the *Maswanganye v Baloyi* case.

I believe that the outcome of this case was not fair to all the concerned parties. The learned Judge Makgoka in giving its ruling should have taken into consideration the long period of time the respondent lived with and cared for her aunt. Having lived with her since the age of ten years, she had used the greater part of her life for the welfare of her aunt. In the words of Diala, '...customary law ought to be the inspiration of the best interests of dependants' principle.⁶⁶

⁶⁴ *Maneli v Maneli* [2010] ZAGPJHC 22 para 5.

⁶⁵ *Maneli v Maneli* [2010] ZAGPJHC 22 para 5.

⁶⁶ Diala A 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2014) 14(2) African Human Rights Law Journal 633-654. See also '6.5. Guardianship in customary law'.

4.6. Regulation of adoption of children under customary in South Africa

Customary adoption ensures that children have access to alternative child care when their biological parents are deceased, or due to other circumstances are not able to care for them.⁶⁷ While there are statutory demands on states to ensure placement in alternative care systems is monitored and regulated to guarantee that the protection is adequate and judicially reviewed, customary adoption is not subject to judicial evaluation or legislative regulation.⁶⁸ Whilst preliminary social services investigations, court inquiries, monitoring and approved transfer of parental rights and responsibilities (PRR) in respect of the child usually herald placements governed by the Children's Act, customary child placement are not introduced by preliminary social services investigations. Also, there are no inquiries or court approved transfers of parental rights and responsibilities (PRR) regarding the child once placed within the extended family household.⁶⁹ Although adoption of children under customary law fulfils an important protective role in communities, they are unregulated, unmonitored and are not recognised by statutory law generating a risk of abuse and exploitation of vulnerable children.⁷⁰ The South African courts have recognised child adoption under customary law on a specific purpose of acknowledging a duty of support from an adoptive parent for the maintenance of a child adopted under customary law.⁷¹ In *Maneli v Maneli*, the high court recognised a customary law adoption for the specific purpose of enforcing a maintenance order in terms of the Children's Act.⁷² The result of this is that there

⁶⁷ Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa* (2011) 43.

⁶⁸ Article 9(1) of the Convention; Article 19(1) of the Charter; Article 25 of the Convention. Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa* (2011) 43.

⁶⁹ Martin P & Mbambo B (2011) 42.

⁷⁰ Martin P & Mbambo B (2011) 11.

⁷¹ Martin P & Mbambo B (2011) 44.

⁷² Customary law adoption is an established institution and is practised by millions of people who adhere to Xhosa customary law and traditions. Customary law adoption by a patriarch who has no male progeny of his own, to inherit his estate it is a custom that accepted and recognised in Xhosa customary law to be one which is in the best interests of a minor child. Consequently, customary law must be adapted and developed to put the minor child's interests first and to harmonise them with the following sources of authority, the Constitution, the Child Care Act, The Children's Act, The Maintenance Act, Public Policy, and the United Nations Conventions. *Maneli v Maneli* [2010] ZAGPJHC 22 (para 39).

In the premises the conclusion that the respondent has a legal duty to maintain the minor child as a consequence of the development of the common law is in accordance with the precepts of the Bill of Rights and promotes the values that underlie an open and democratic society based on human dignity, equality and freedom. *Maneli v Maneli* [2010] ZAGPJHC 22 (para 44).

is an accession of the legal consequences of customary and common law adoption especially as it relates to the duty of parents to materially support adopted children.⁷³

Martin and Mbambo argue that there is no general common law recognition of adoption of children under customary law. This contradicts the right to equality.⁷⁴ The inequality in the recognition of the relationships of children in common law and customary law settings is discriminatory in nature and creates limitations in enforcing non-material parental responsibilities.⁷⁵

The failure of the Children's Act to recognise and regulate customary adoption in South Africa is potentially harmful to the child's right to protection. This is because it creates loopholes for the exploitation and abuse of children who are already susceptible to victimisation.⁷⁶ There are unconfirmed allegations that adoption of children under customary law has been exploited by opportunists. This is achieved when there is a deliberate adoption of a child in order to gain access to the support grant paid to the primary caregiver of children living in poverty.⁷⁷

4.6.1. Provisions of the Children's Act 38 of 2005

Sections 104 - 110 of the Children's Act 2005 deals with Child protection systems and section 110 specifically provides for reporting of abused or neglected children in need of care and protection.⁷⁸ The Children's Act provides that any correctional official, immigration official, legal practitioner, medical practitioner, religious leader, social worker, teacher, traditional health practitioner, or member of staff at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report the harm in the prescribed

⁷³ Martin P & Mbambo B (2011) 43.

⁷⁴ Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa* (2011) 44.

⁷⁵ Martin P & Mbambo B (2011) 44.

⁷⁶ Martin P & Mbambo B (2011) 44.

⁷⁷ Mbambo B (2011) presentation at a workshop hosted by the HRC and UNICEF in South Africa, Midrand on equity and child rights in South Africa, March 2011.

⁷⁸ The Children's Act 38 of 2005 was assented to on 8 June 2006 and gazette on 19 June 2006. The English text was signed by the President on this day and the Act was gazetted in GG 28944 on 19 June 2006. This Act will be referred to as the Children's Act of 2005. For more details on the aim of this Act, see '2.5.5 Children's Act 38 of 2005'.

form to a designated child protection organisation, the provincial department of social development or a police official.⁷⁹ It also provides that any person who on reasonable grounds believes that a child needs care and protection may report to the provincial department of social development, a designated child protection organisation or a police official.⁸⁰

The Act further provides that the person referred to in subsection (1) and (2) must substantiate that conclusion or belief and anyone who makes a report in good faith is not liable to a civil action on the basis of the report.⁸¹ A police official to whom a report has been made in terms of subsection (1) or (2) must ensure the safety and well-being of the child concerned. If the child's safety or well-being is at risk, he must notify the provincial department of social development or a designated child protection organisation within 24 hours. In addition, a report and any steps that have been taken with regard to the child should be stated.⁸²

The provincial department of social development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must ensure the safety and well-being of the child concerned. If the child's safety is at risk, an investigation on the truthfulness of the report should be carried out. Once the report is authenticated proceedings should be initiated and particulars submitted as may be prescribed by the Director-General.⁸³

A designated child protection organisation to whom a report has been made must report the matter to the relevant provincial department of social development and the provincial head of social development must monitor the progress of all matters reported to it.⁸⁴ The provincial department of social development or child protection organisation which has conducted an investigation may take measures to assist the child, such as counselling, mediation, rehabilitation, prevention and early intervention services to mention only a few. A referral to another suitably qualified person or organization can also be done or the offender may be removed from the child's residence if it is in the best interest of that child not to be removed

⁷⁹ Section 110(1) Children's Act of 2005.

⁸⁰ Section 110(2) Children's Act of 2005.

⁸¹ Section 110(3) Children's Act of 2005.

⁸² Section 110(4) Children's Act of 2005.

⁸³ Section 110(5) Children's Act of 2005.

⁸⁴ Section 110(6) Children's Act of 2005.

from the his/her dwelling.⁸⁵ The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.⁸⁶

However, as laudable as the above provisions of the Children's Act are, there is currently no duty on state officials to help vulnerable children and families access promotive, prevention and/or early intervention services.⁸⁷ Children whose survival, safety and development are at risk should be linked with the services necessary to promote development and prevent further harm.⁸⁸ To achieve this, the National Child Care and Protection Policy proposes that all relevant departments and agencies have a duty to recognise vulnerable children and families through a basic screening process and to provide the promotive and preventative services for which they are primarily responsible.⁸⁹ This aspect of the chapter that discusses assisting vulnerable children to access promotive and prevention services is relevant to the adoption of children under customary law as it has been postulated that child adoption under customary law protects the rights of children to alternative child care system when their biological parents are deceased, or who, due to other circumstances, are not able to care for them.⁹⁰ The policy defines vulnerable children as inter alia: children living in poverty, orphaned children, children separated from or living without their biological parents and children with disabilities.⁹¹

Statistics South Africa estimated there were 2.3 million orphans in the country in 2018.⁹² More than 60% of South African children are poor while six out of ten children (62.1%) are identified as multidimensionally poor.⁹³ In 2018, there were 2.7 million orphans in South Africa, which includes children without a living biological mother, father or both parents, and it was equivalent to 14% of all children in South Africa.⁹⁴ The total number of orphans increased by over a million

⁸⁵ Section 110(7) Children's Act of 2005.

⁸⁶ Section 110(8) Children's Act of 2005.

⁸⁷ Proudlock P & Rohrs S 'Recent developments in law and policy affecting children' 2018 *Children, Families and the State* 15 (accessed 15 July 2021).

⁸⁸ Proudlock P & Rohrs S (2018) 15.

⁸⁹ Department of Social Development *Draft Child Care and Protection Policy* (2018) 93 – 95 (accessed 17 July 2021).

⁹⁰ Martin P & Mbambo B (2011) 43.

⁹¹ Department of Social Development *National Child Care and Protection Policy* (2019) 17.

⁹² Available at <https://m.polity.org.za>.(accessed 15 July 2021).

⁹³ A report on *Child Poverty in South Africa* released by **Statistics South Africa** on 8 July 2020 available at <http://www.statssa.gov.za>.(accessed 15 July 2021).

⁹⁴ Hall K & Sambu W 'Demography of South Africa's children' 2019 *South African child gauge* 218.

between 2002 and 2009, after which the trend reversed and by 2017, orphan numbers had fallen to below 2002 levels which was largely the result of improved access to antiretrovirals.⁹⁵ Although the discussion in this chapter focused on child adoption under customary law in South Africa, the information on orphans is needed as many of the children adopted in this manner are orphans.

4.6.2. Draft Child Care and Protection Policy

In December 2017, the Department of Social Department invited civil society organisations to submit comments on the first draft of the Child Care and Protection Policy (CCPP).⁹⁶ The policy recognises that many children are trapped in an intergenerational cycle of risk and the government is not providing the developmental services to address the risks and break the cycle.⁹⁷ The policy therefore seeks a national public programme that ensures that all children survive, develop to their full potential, are protected, and participate in decisions affecting them.⁹⁸ It requires that multiple role players must work together to provide a continuum of developmental as well as protective care and protection services.⁹⁹ The draft was released in late 2017 and the June 2018 draft which was circulated as the “final” draft, was approved by the cabinet at the end of October 2019 and has been published.¹⁰⁰

The policy seeks inter alia to introduce a government-wide screening platform to identify and refer vulnerable children as well as supporting children in kinship care.¹⁰¹ It did not make

⁹⁵ Hall K & Sambu W ‘Demography of South Africa’s children’ 2019 *South African child gauge* 218.

⁹⁶ Department of Social Development *Draft Child Care and Protection Policy* (2017) see Proudlock P & Rohrs S ‘Recent developments in law and policy affecting children’ 2018 *Children, Families and the State* 14.

⁹⁷ See Foreword by the Minister, National Child Care and Protection Policy (2019) 8.

⁹⁸ Sebopela M ‘Department of Social Development Presentation to the National Child Care and Protection Forum’ 18 April 2018 slide 2. See Proudlock P & Rohrs S ‘Recent developments in law and policy affecting children’ 2018 *Children, Families and the State* 14 (accessed 15 July 2021). See also National Child Care and Protection Policy *Executive Summary* (2019) 9.

⁹⁹ Sebopela M ‘Department of Social Development Presentation to the National Child Care and Protection Forum’ 18 April 2018 slide 13. See also Proudlock P & Rohrs S ‘Recent developments in law and policy affecting children’ 2018 *Children, Families and the State* 14 (accessed 15 July 2021).

¹⁰⁰ The Department of Social Development published the Policy in Government Gazette 44636. Cabinet also pointed out that Section 28 of the Constitution “recognises the right of all children to social services and protection from violence, abuse, neglect and exploitation” available at: <https://legal.sabinet.co.za/articles/national-child-care-and-protection-policy-published>. (accessed 15 July 2021).

¹⁰¹ Department of Social Development *National Child Care and Protection Policy* (2019) 16.

specific provisions for customary adoption, but it does provide for kinship care. Kinship care is close in form to customary adoption since kinship care is defined as the full-time care, nurturing and protection of a child by relatives, members of their tribe or clan, godparents, stepparents or other adults who have a family relationship to a child.¹⁰² Kinship care is also defined as an arrangement in which children live with and are taken care of by another family member, because their parents are unable to take care of them.¹⁰³

The National Child Care and Protection Policy defines kinship care as a form of care provided to a child by a family member.¹⁰⁴ These definitions are similar to but not in totality with the definition of customary adoption. Child adoption under customary law is defined as an unofficial placement where relatives and friends take up children to nurture and bring up as their own.¹⁰⁵ The policy distinguishes between children living with kin who have a living parent residing elsewhere and those living with kin whose parents have died or abandoned them.¹⁰⁶

There are about 3 - 3.5 million children living in the first category and approximately 500,000 – 1 million children living in the second category.¹⁰⁷ For children living with kin who have a living parent residing elsewhere, the policy proposes that kinship caregiver and parent should formalise their arrangement by concluding a parenting rights and responsibility (PRR) agreement following the relevant procedures prescribed in law.¹⁰⁸

Section 22 of the Children's Act requires PRR agreements to be made an order of court or registered with the family advocate before it can be considered legitimate.¹⁰⁹ This requirement

¹⁰² Available at <https://www.childwelfare.gov>. (accessed 15 July 2021).

¹⁰³ Available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 15 July 2021).

¹⁰⁴ Department of Social Development *National Child Care and Protection Policy* (2019) 16.

¹⁰⁵ Onyango P & Bali S (1996) 142.

¹⁰⁶ Proudlock P & Rohrs S 'Recent developments in law and policy affecting children' 2018 *Children, Families and the State* 17.

¹⁰⁷ The policy defines "orphan" to include paternal orphans (those that have lost a father), maternal orphans (those that have lost a mother) and double orphans (those who have lost both parents). The draft Children's Third Amendment Bill (August 2018) defines an orphan as a child who has lost both parents, thereby restricting the definition to double orphans only. See Proudlock P & Rohrs S (2018) 17.

¹⁰⁸ Department of Social Development *Draft Child Care and Protection Policy* (2018) 87.

¹⁰⁹ Children's Act No 38 of 2005.

has been criticised because the PRR agreement could become a document requested when caregivers apply for schools or social grants for their children. If this happens, it will be necessary for the caregivers to secure the services of the family advocate or the courts. Authors are of the view that less administratively burdensome method to proving the status of the caregiver would be to adopt the documents currently listed in Regulation 11(3) of the Social Assistance Act for proving primary caregiver status.¹¹⁰

The definitions of child adoption under customary law and kinship care may be similar but the two are different concepts. It is crucial that child adoption under customary law be specifically provided for in the policy and other legislation in order to avoid ambiguities. Until that is done there will be no clarity and child adoption under customary law continues to be in a state of neglect. Currently, child adoption under customary law is still unregulated and the transfer of parental rights and responsibilities (PRR) are not recognised by statutory law in South Africa.

4.7. Case law recognition of customary law adoption in South Africa

There are not many cases in the South African courts where child adoption under customary law is a major issue for consideration. In most cases, the issue of adoption of children under African customary law came up as an auxiliary matter to the main issue for consideration. This aspect of the chapter analyses a selection of cases that deliberated on child adoption under customary law in South Africa. It is hoped that going forward there will be more case law adjudicating on this subject. This will give prominence to an adoption that is as old as the human race but currently struggling to be endorsed and recognised in its own right.¹¹¹

¹¹⁰ Regulation 11 (3) provides that a caregiver may prove that they are the primary caregiver for the purposes of a social grant application, by providing any of the following documents: (i) an affidavit from a police official; (ii) a report from a social worker; (iii) an affidavit from a biological parent of the child; or (iv) a letter from the principal of the school attended by the child.

¹¹¹ Van der Walt G 'The history of the law of adoption in South Africa' 2014 *Obiter* 421–422.

4.7.1. *Kewana v Santam Insurance Co Ltd*

The issue for determination in the *Kewana* case was whether the procedure laid down by customary law for a valid adoption should also incorporate some of the requirements prescribed by the Child Care Act, 1983.¹¹² The Transkei Appellate Division had to decide whether to uphold a decision that a child adopted in terms of customary law was not entitled to compensation for loss of support resulting from the negligent killing of the adoptive parent in terms of the Transkei Compulsory Motor Vehicle Insurance Act.¹¹³ In this case, a traditional adoption ceremony was held. A sheep and a goat were slaughtered for the occasion “to give the occasion the significance and solemnity of an act being done in accordance with tribal customs”.¹¹⁴ The court rejected the view that ‘because the child was not adopted under the Children’s Act 33 of 1960, there was no duty of support’. The Transkei Appellate Division, in deciding this issue, said the following: Adoption which played a great role in Roman law, was obsolete in Roman-Dutch law. It was first introduced by the Adoption of the Children’s Act 1923 (see Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* at 358). This legislation therefore introduced a right which did not exist. It filled a vacuum in the common law, but there was no basis for ruling that it also modified or replaced adoption under customary law which remains enforceable under s 53 of the Constitution while adoption under the Children’s Act is governed by the provisions of that Act. It cannot be said that only adoption under the Children’s Act is recognised in Transkei. A child adopted according to the law of any country, say England or Germany, would not be precluded from enforcing a right to be maintained by his adoptive parent in Transkei.¹¹⁵

¹¹² *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA).

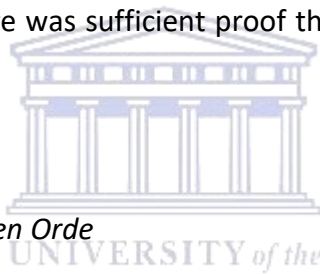
¹¹³ 25 of 1977.

¹¹⁴ *Kewana v Santam Insurance Co Ltd*. In establishing whether the deceased had an obligation to maintain the child, the court had to determine whether the ceremony described by the appellant was an adoption and whether such adoption is part of customary law, particularly because the adoptive parent was a woman. See Louw A ‘A De Facto Adoption Doctrine for South Africa?’ 2017 *Obiter*? 2017 *Obiter* 463.

¹¹⁵ *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk) at 776B.

4.7.2. *Metiso v Padongelukfonds*

In *Metiso v Padongelukfonds*, a mother had abandoned her two minor children. She left the children in the care of their father, who later died.¹¹⁶ After the death of their father, the children were taken into the custody of their uncle, their father's brother who wished to adopt the children. In terms of the customs and traditions of the community, the children had to be formally adopted by the adoptive parent and the adoption had to be made public, preferably through a report to the traditional leader. All that was observed. The only procedural step missing was that the mother or her family were not involved in the process leading to the adoption in question.¹¹⁷ The court, by invoking the 'best interests of the child' standard, indicated that this omission could be used to invalidate the process as this could be against the interests of the children, even in the case where it was proved that the mother and her family were to be consulted.¹¹⁸ The court concluded that it had been established that the adoption had been performed by the paternal family of the children and that there was sufficient proof that the adoption had been properly announced.¹¹⁹



4.7.3. *Thibela v Minister van Wet en Orde*

In *Thibela v Minister van Wet en Orde* the issue before the court was whether an agreement in terms of which a husband paid lobola for his wife and her "illegitimate" son is sufficient to create a duty of support between the husband and the "illegitimate" son in terms of the Pedi custom.¹²⁰ Expert evidence corroborated the fact that such payment would result in the child becoming a "child" of the husband. The court held that the privation suffered by the child as a result of the death of his deceased "father", who could no longer fulfil his duty of supporting him, must be included in the mother's claim for damages.¹²¹

¹¹⁶ *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T).

¹¹⁷ 2001 (3) SA 1142 (T).

¹¹⁸ SALC Project 110 24.

¹¹⁹ See *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917 (para 11).

¹²⁰ 1995 (3) SA 147 (T).

¹²¹ *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T).

4.7.4. *Motsepe v Khoza*

Similarly, it was held in *Motsepe v Khoza* that the concept of “*O e gapa le namane*”, applies to children in the context of indigenous customs, practices and traditions.¹²² The applicant relied on the concept “*O e gapa le namane*”, as the basis for the liability of the respondent towards her minor children, who are not the biological children of the respondent.¹²³ “*O e gapa le namane*”, loosely translated, says, “You lead it with its calf”.¹²⁴ The learned Judge Thulare further held that, “To take a child born of another man into your marriage with his/her mother”, for all intents and purposes, is equal to the customary adoption of a child.¹²⁵ A man who does not intend to take a child who is under the age of 14 born of another man into his marriage with the mother of the child must express such intention during the negotiations and entering into a customary marriage.¹²⁶

4.7.5. *Zibi v Zibi*

In *Zibi v Zibi*, it was held that in customary law, there is no preference for adopting an infant. An adult may be adopted for the purpose of choosing an heir.¹²⁷ It was also held that it is unnecessary to comply with the statutory provisions of the Adoption of Children Act for the customary system of adoption to be valid.¹²⁸

4.7.6. *Maswanganye v Baloyi*

The issue for determination in *Maswanganye v Baloyi* was whether the applicant had been customarily adopted by the deceased and whether she was entitled to inherit from her estate as the sole heir of the deceased’s estate.¹²⁹ The court had to establish the requirements of an adoption in African customary law. Those requirements were gleaned from the judgments of

¹²² *Motsepe v Khoza* (unreported case number 15078/2012, South Gauteng High Court, 8 April 2013).

¹²³ *Motsepe v Khoza* (para 9).

¹²⁴ *Motsepe v Khoza* (para 11).

¹²⁵ *Motsepe v Khoza* (para 15).

¹²⁶ *Motsepe v Khoza* (para 16).

¹²⁷ 1952 (2) NAC 167 (S).

¹²⁸ *Zibi v Zibi* 1952 (2) NAC 167 (S).

¹²⁹ *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917 (para 1).

Kewana v Santam Insurance Co Ltd and Metiso v Padongeluxsfonds.¹³⁰ Makgoka J, held that the element of publicity is central to the process of customary adoption.¹³¹

South African courts continue to recognise child adoption under customary law for the specific purpose of enforcing the duties of parents to maintain their children. This is the case in four out of the six cases that were highlighted in this chapter. It is laudable that parents are obliged to maintain their children in accordance with the Maintenance Act in order to perform their duty of support towards the children.¹³² However, other elements inherent in child adoption under customary law adoption can be harnessed for greater benefits to many children who are in a vulnerable and disadvantaged state.

4.8. Conclusion

Customary law is a basic element of the South African legal system, having been upgraded to the same status as common law by section 211(3) of the Constitution.¹³³ Child adoption under customary law on the other hand, has not been duly recognised as a form of adoption in South Africa. Nonetheless, it has been recognised in a few cases for the specific purpose of maintenance of children by their adoptive parents.¹³⁴ As stated in the conclusion of chapter two of this thesis, the various Children's Acts made no provisions for nor reference to adoption of children under customary law. The first enactment on adoption was the endorsement of the Children Act 25 of 1923. There were four other enactments thereafter. In all the five enactments, there is no provision for adoption of children under customary law. The only time customary law is alluded to with regard to adoption is in section 236 of the Children's Act, which provides that no consent

¹³⁰ *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917 (para 9).

¹³¹ *Maswanganye v Baloyi N.O and Another* (2015) ZAGPPHC 917 (para 13).

¹³² Act No 99 of 1998.

¹³³ S 211(3) 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. *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

¹³⁴ *Maneli v Maneli* [2010] ZAGPJHC 22.

is required when adopting children.¹³⁵ The National Child Care and Protection Policy 2019 does not provide for child adoption under customary adoption. However, it refers to customary care arrangements.¹³⁶ It is not clear if customary care arrangements refer to customary foster care, kinship care or child adoption under customary law. The policy provides for kinship care, whose characteristics incline more to child adoption under customary law. However, kinship care is listed as foster care.

It is hoped that going forward, child adoption under customary law will be addressed specifically by legislative enactments. Conversely, the fact that legislation is abstaining from making specific provisions for adoption under customary law may lend credence to the idea postulated by Bennett and Himonga that adoption is not an established practice of customary law although they do agree that there are replications of the practice within families.¹³⁷

I submit that adoption under customary law should be recognised in statutory enactments in the same manner as common law adoption. This is crucial as the two have the same legal consequences¹³⁸. The National Child Care and Protection Policy of 2019 appears to close some of the gaps in the regulations of welfare of children in South Africa. Currently, the gaps in the regulations of child adoption under customary law are still visible as there are no regulations to monitor or screen prospective adoptive parents. Once they are concluded, there is no review on adoption under customary law. Henceforth, more research is needed to close these gaps.

In conclusion, the South African courts continue to recognise child adoption under customary law on an ad hoc basis of enforcing maintenance of children by their adoptive parents.

¹³⁵ S.236(4)(c) of the Children's Act 2005 provides that a biological father who was not married to the child's mother at the time of the child's conception or at any other time can become eligible to give his consent to an adoption order by paying damages in terms of customary law.

¹³⁶ Large numbers of children do not live with their biological parents. This is a phenomenon unique to South Africa and driven by a range of factors, including historic population control, labour migration, poverty, housing and educational opportunities, low marriage and co-habitation rates, high rates of divorce, customary care arrangements, as well as high orphaning rates. See '3.3.1.3 Family Structures and Living Arrangements of Children' The National Child Care and Protection Policy (2019) 42.

¹³⁷ Bennett TW Human Rights (1995) 107. See also Monye S 'The Customary Law and Adoption: The "*O e Gapa le Namane*" Custom as a Reflection of Customary-Law Development in South Africa' (2017) 4 *Journal of Law, Society and Development* 7.

¹³⁸ Maithufi I 2001 De Jure 391, 394; SALC Project 110 24.

It is hoped that the other benefits inherent in child adoption under customary law can be harnessed for the advantage of many helpless children. These benefits include access to parental care, good family environment for orphans and vulnerable children.



CHAPTER FIVE: CUSTOMARY LAW ADOPTION IN BOTSWANA

5.1. Introduction

The preceding chapter examined whether customary law adoption exists in South Africa, showing the effect of statutory provisions on child adoption under customary law and how the validity of such adoption is determined. It investigated how customary law adoption is regulated and the lapses therein and thereafter took us through an in-depth analysis of case law recognition of customary law adoption in South Africa.

This chapter examined how Botswana's legal framework provides for the adoption of children under customary law and examined the strengths and weaknesses inherent in it. The different types of child adoption under customary law was discussed. An inference was deduced by examining why child adoption under customary law is a very unfamiliar subject in Botswana with the result that very little information is available for research purposes.



5.2. Historical development of adoption laws in Botswana

Prior to Botswana being proclaimed as a Protectorate, the Batswana people lived as independent units.¹ In 1891, the South African High Commissioner was given the authority to administer the Protectorate. This resulted in Roman-Dutch law having an influence on Botswana, which initially applied to non-Batswana, but subsequently applied to all persons in Botswana.² The legal system of Botswana is plural, comprising of Roman-Dutch law, statutory enactments and Customary law. Today, Roman-Dutch subsists and is recognised as an independent source of law together with Statute law, known as the common law.³ The Court of Appeal held that:

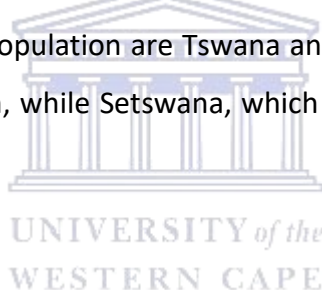
¹ Nsereko D *Constitutional Law in Botswana* (2002) xv. Botswana was known from colonisation until independence in 1966 as Bechuanaland. The name, Bechuanaland, was given to the territory today known as Botswana by British colonial government. The term Bechuanaland appears to come from 'Bechuana', a colonial adulteration of the indigenous label 'Batswana' (See Molokomme A *Children of the Fence* (1991) 28). See 2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'.

² Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 11.

³ Molokomme A *Children of the Fence* (1991) 29.

It is to be noted that the common law of Botswana is the Roman-Dutch Law. Although this was laid down as long as 1909 (by Proclamation No. 36 of 1909) when Botswana was still a Protectorate of Bechuanaland, the Roman-Dutch law has continued to be applied in Botswana to this day.⁴

The two systems of common law and customary law, which comprise Botswana's dual legal system, co-exist, although there are differences in both systems as they apply to different sections of the population based on ethnic origin, religious belief, and other factors.⁵ I had earlier stated in chapter two that statutory law applies to all individuals while customary law varies from community to community.⁶ It was also noted in chapter two that the relationship between customary law and statute law is most times uncertain but very distinct with regard to adoption. This is because the later can take place in terms of statute and also in terms of customary law.⁷ At present, 79% of the Botswana population are Tswana and of Tswana speaking descent. The official speaking language is English, while Setswana, which is widely spoken, has the status of co-official and national language.⁸



5.3. Customary law in Botswana

Before the British colonialists arrived in Botswana, certain traditional norms and values were already in existence. This undeveloped legal system meant that the various groups that occupied

⁴ *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* ([1996] BLR 190 at 194-195.

⁵ Molokomme A & Mokobi K in Ncube *Children's Rights in Eastern and Southern Africa* (1998)183.

⁶ Molokomme A *Children of the fence* (1991) 26. Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84. See '2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'.

⁷ Molokomme A & Mokobi K in Ncube *Children's Rights in Eastern and Southern Africa* (1998)186; Quansah EK *Family Law in Botswana* (2006) 138. S 16 of the Adoption of Children Act 1952 states that nothing in the Act shall be construed to prevent the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law. In other words, customary adoption will only be possible where both the child and the prospective adoptive parent are subject to customary law. See '2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'.

⁸ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm> (accessed 17 September 2021).

the territory had developed a structure that ensured order in their dealings with one another.⁹ Customary law has been practiced for centuries, but its specific content was unknown as it was not written.¹⁰ Customary law has been defined as a body of rules, principles and usages of different tribes that have their roots in the cultures of pre-colonial Tswana societies, which may differ from tribe to tribe and vary from within.¹¹ The term customary law replaced the colonial tag 'native law and custom' and is recognised by the state as an autonomous source of law.¹² It is not codified, but is defined by statute as consisting of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana. They are rules that are not inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice.¹³ What remains of customary law has been handed down by oral tradition from one generation to another and some of it has been lost as a result of the rapidly changing socio-economic conditions.¹⁴ Customary law is always changing and therefore difficult to say what the applicable rules are in any given circumstance.¹⁵ Similarly, there are no fixed rules of customary procedures and the application of the rules is not of paramount importance.¹⁶ Being Africans, the vast majority of the people of Botswana live and settle their disputes profoundly in accordance with customary law, which is administered by the chiefs (*dikgosi*). The chiefs confer with the elders of the community and also with each other on matters of significance at the House of Chiefs and the cases are generally dealt with at the *kgotla*.¹⁷ Botswana enacted a special Statute to deal with customary law, which makes customary law primarily applicable to civil actions

⁹ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm> (accessed on 17 September 2021).

¹⁰ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

¹¹ Molokomme A *Children of the fence* (1991) 26. Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84. See '2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'.

¹² Molokomme A *Children of the fence* (1991) 26.

¹³ Seepapitso IV K 'Does customary law have a future in Botswana?' in Brothers S, Hermans J & Nteta D (eds) *Botswana in the 21st Century: Proceedings of a symposium* (1994) 343. See S 4(1) of the Common Law and Customary Law Act 1969. See also chapter one: Scope of Study and Literature Review.

¹⁴ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

¹⁵ Molokomme A *Children of the fence* (1991) 27.

¹⁶ Molokomme A *Children of the fence* (1991) 27.

¹⁷ See '2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'. *Kgotla* means customary court. Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 11. See also Molokomme A. *Children of the Fence* 40.

between tribesmen subject to three exceptions.¹⁸ First, where the parties expressly or impliedly intended common law to apply; secondly, where the transaction out of which the action arose is unknown to customary law, and thirdly where the parties express their written consent to the application of the common law. In cases involving 'non-tribesmen', the position is the reverse: common law applies to them unless they give their written consent, or expressly or impliedly intended customary law to apply.¹⁹

5.4. The Botswana courts

5.4.1. Historical overview of the courts in Botswana

Prior to the arrival of the British colonists, customary courts were already in existence in Botswana. During this period, customary law was administered by family heads, ward heads and section heads and these various heads reported to the chief. Courts existed at these levels and maintained law and order in their units, allocated resources such as land, settled disputes and disputes that could not be resolved at these lower levels were referred to the chief who was the final court of appeal.²⁰

When the British colonists arrived, external pressure was brought to bear on the traditional legal system of the Batswana people and the ways of life of these visitors completely changed the role of customary laws.²¹

A British Order in Council of 9 May 1891 gave the High Commissioner of Botswana power to establish courts and appoint various officials. The High Commissioner administered the

¹⁸ The Customary Law (Application and Ascertainment) Act was passed in 1969. It lays down general principles for the application and ascertainment of customary law. See also S. 4 Customary Law Act. See Himsworth 1972 *Journal of African Law* 4. See also Molokomme A *Children of the Fence* (1991)40.

¹⁹ Molokomme A *Children of the Fence* (1991) 234.

²⁰ Boo L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm> (accessed 17 September 2021).

²¹ Boo L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm> (accessed 17 September 2021).

territory from the seat in Cape town, thereafter, Pretoria and passed laws for the territory by extending the decrees made for what is now known as South Africa to Botswana.²²

The equivalent system of colonial courts that co-existed with the Tswana courts are still in existence today. It has at the lowest level the various grades of customary courts, followed by the different grades of magistrate courts, the high courts and the court of appeal.²³ The first two courts are known as the subordinate courts; the high courts and the courts of appeal are called the superior courts of record, and the non-customary courts are known as the courts of general jurisdiction.²⁴

5.4.2. Customary courts

The customary courts in Botswana today replaced a complex system of courts that existed before the colonialists arrived in Botswana. These pre-colonial courts have survived in a different form since then.²⁵ These courts emanated from the socio-political organisation of pre-colonial Tswana societies. In some villages, customary courts that are headed by headmen still exist in every ward. In some other villages, the scenario is different depending on the socio-economic changes that have affected the unity of such wards.²⁶

The Customary Court Act ratifies three classes of customary courts. These are the lower customary courts, which are parallel to the traditional ward courts under a headsman. The second category is the higher customary courts, which are usually the chiefs' courts that act as courts of appeal from the lower customary court and sometimes as courts of first instance. These two grades of customary courts may hear matters that are justiciable under customary law or any other written law that they are empowered to adjudicate upon.²⁷ The third category of customary courts are the customary court of appeal. These are constituted by persons who are

²² Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm> (accessed 17 September 2021).

²³ Molokomme A *Children of the fence* (1991) 30.

²⁴ Molokomme A *Children of the fence* (1991) 30.

²⁵ Molokomme A *Children of the fence* (1991) 30.

²⁶ Molokomme A *Children of the fence* (1991) 31.

²⁷ Molokomme A *Children of the fence* (1991) 31.

knowledgeable and well versed in tradition and have had previous experiences in local government and justice administration. This category of customary court is situated in the capital city of Gaborone but also sits in turn other parts of the country.²⁸

Most customary law adoptions in Botswana are private arrangements between the natural parents of the child and the adoptive parents. As such, they usually do not end up in the customary courts. In some cases, adoption matters end up in the high court in instances where issues of inheritance rights and maintenance of an adoptive child arise.²⁹ Customary courts in villages and towns in which there are magistrates' courts next to such villages and towns no longer hear cases of adoption. They refer such cases to the magistrate court to be dealt with under the Adoption Act. The reason cases are brought forward is that adoption requires a change of surnames of the adoptive children in the birth register and this requires an order from the magistrate court made under the Adoption Act.³⁰

5.4.3. Customary law and its application in Botswana courts

The Customary Ascertainment Act lays down provisions for its ascertainment by the courts.³¹ Although the Act provides for its ascertainment by the Botswana courts in general, in practice, it is only the non-customary courts that ascertain the existence or contents of any customary law as the latter are not knowledgeable about customary law.³² Customary courts in general hardly use the Ascertainment Act because it is assumed that members of the court and the community are conversant with customary law.³³ The problems usually emerge when there is an appeal from the customary courts to the high courts, as the latter are empowered by statutes to hear appeals

²⁸ Molokomme A *Children of the fence* (1991) 33.

²⁹ *Montshiwa v Montshiwa* [1999] 2 BLR 216 (HC).

³⁰ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 19. Section 13 of the Adoption of Children Act, 1952, [Cap 28:01] Law of Botswana makes provision for the alteration of births register as a result of adoption.

³¹ Section 11 of the Act provides that a court that entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to arrive at a decision in the matter.

³² Molokomme A *Children of the fence* (1991) 27.

³³ Molokomme A *Children of the fence* (1991) 27.

from the customary courts and to administer customary law in such cases.³⁴ In resolving issues of conflict in customary law, the non – customary courts most of the times used documented texts. Sometimes, persons that are knowledgeable in customary law such as chiefs, are called as expert witnesses in particular cases.³⁵

Although these documented texts on customary law are convenient and easily accessible by the non–customary courts, authors believe that the high courts have not exercised enough caution and restraints when using documentary sources of customary law. This is because the high courts in most cases tend to use Schapera 's handbook and Roberts' Restatement of Tswana Family law (1972a) as the codified Tswana customary law rather than as guidelines to the general principles of the Batswana people.³⁶ Molokomme believes that the documented texts present Tswana customary law outside its social context. She added that this makes it doubtful whether the law applied by the non-customary courts is related to the living customary law of the Batswana people. Further, she notes that the authors of the Restatement of African Law Series accepted the limitations of their approach during their work.³⁷ The application of the Acts regulating the jurisdiction and procedures of the customary courts is limited by the levels of and training of the chiefs (*dikgosi*), the lack of dissemination, training and awareness-raising which is done amongst the public at large.³⁸ *Dikgosi* are often involved with dispute resolution outside the court system where there is room for discretion in the way they exercise their powers and the difficulties in overseeing their activities. This is as a result of the fact that the bulk of customary law is unwritten and practice can fluctuate between different *dikgotla* as customs vary according to different traditions.³⁹ Customary courts are bound by the applicable provisions of

³⁴ Section 42(3) of the Customary Courts Act. Volume 1 (Cap 04:05).

³⁵ Molokomme A *Children of the fence* (1991) 27. In *Marman v Marman and others* [2003] 1 BLR 96 (HC) 98, the court had to resort to calling an expert in customary law to explain the procedures in such adoption. See '2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA'.

³⁶ Molokomme A *Children of the fence* (1991) 28.

³⁷ Molokomme A *Children of the fence* (1991) 28.

³⁸ Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 11.

³⁹ Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 11. *Dikgotla* means Customary Court.

the Children's Act, since they act as Commissioners for Child Welfare. However, it is not clear in practice whether they are always implementing it fully.⁴⁰

5.5. Definition of a child

Unlike statutory law, there are no rules that define what a child is under customary law. The rank of a child is determined by the laws and customs of the individual tribe.⁴¹ In statutory law, there is no uniform definition of a child in Botswana as different statutes define the child in various ways. The Adoption of Children Act defines a child as a person under the age of 19 years, while the Children's Act defines a child as any person who is under the age of 18 years.⁴² Both the United Nations Convention on the Rights of the Child and the African Children's Charter define a child as a human being under 18 years of age.⁴³

In customary law, there are no specific rules that determine the end of childhood, especially with regard to age limits. However, under the traditional practices of *bojale* and *bogwera*, completion of these rites bestows the status of adulthood on the individual.⁴⁴ It is not clear how childhood and adulthood are currently determined under customary law, as there has been a marked decline in the practice of these rites.⁴⁵

5.5.1. Adoption of children under customary law in Botswana

As stated in chapters one and two of this study, Botswana became an independent country on 30 September 1966. Prior to that time, customary law was the only law that regulated the

⁴⁰ Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 23.

⁴¹ Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84.

⁴² Section 2 Adoption of Children Act 1952 [Cap 28:01] Law of Botswana. See also section 2 of the Children's Act, 2009.

⁴³ See Article 1 of the UNCRC and Article 2 of the ACRWC.

⁴⁴ *Bojale* and *bogwera*, are initiation rites for females and males respectively.

⁴⁵ Report to the Committee on the Rights of the Child on the Implementation of the CRC (2003) 23.

communities that made up the country.⁴⁶ Common law was introduced after independence, which brought about a new universal law that applied to all individuals living in Botswana.⁴⁷ Botswana has a great variety of ethnic groups and the indigenous people of that country are the majority.⁴⁸ Botswana currently recognises both customary and statutory adoption. Adoption in Botswana was initially carried out using customary law. This was in agreement with the customary practices of the people. These practices were not written down, as a result they were always changing even as the ways of life of the people developed.⁴⁹ In Botswana, a system exists where children are sent to live with a relative but the biological parents remain the guardians of the child and continue to have a say in the child's life.

I agree with authors who believe that this situation in Botswana should not be referred to as adoption but rather as some form of foster care.⁵⁰ Referring to this system as adoption is inappropriate. I am of the opinion that although it may be argued that it is in the best interest of the child if the biological parents continue to have a say in the child's life, the child's life will be void of stability which is pivotal for the upbringing of a child. The connection between a child and the biological parents was never totally cut off by adoption as a child could return to the biological parents at any time.⁵¹ As I already explained in the scope of study and literature review, customary law is not codified in Botswana. However, the term "customary law" is defined by statute as consisting of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules, which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice.⁵² This means that customary law

⁴⁶ Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84. See chapter one: SCOPE OF STUDY AND LITERATURE REVIEW. See chapter two: 2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA.

⁴⁷ Tabengwa et al in Sloth-Nielsen & du Toit *Trials & Tribulations* 84. See chapter one: 5 SCOPE OF STUDY AND LITERATURE REVIEW. See also 2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA.

⁴⁸ Nsereko DDN *Constitutional Law in Botswana* (2002) xxi. See chapter one: 5 SCOPE OF STUDY AND LITERATURE REVIEW. See also 2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA.

⁴⁹ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, University of Cape Town, 2008) 18.

⁵⁰ See Ferreira S (unpublished LLD dissertation, 2009) 453.

⁵¹ Roberts S *Tswana Family Law* (1972) 13.

⁵² See Chapter One: 5 SCOPE OF STUDY AND LITERATURE REVIEW. Seepapitso IV in Brothers et al *Botswana in the 21st Century* 343. See S 4(1) of the Common Law and Customary Law Act 1969.

is applicable to members of a tribe or tribal communities within Botswana.⁵³ In similarity to South Africa, adoption in terms of customary law is not available to everyone in Botswana. However, the common law and customary law Act 1969 provides that in all cases in which customary law is the proper law to apply, the courts have to apply customary law.⁵⁴ What this means is that the courts do not have the discretion to apply customary law or statutory law.

Molokomme and Mokobi believe that in traditional customary law, the rights of the child are not separated from the rest of the family as a unit.⁵⁵ They also believe that parents are defined in a different manner from the western concept as biological parents are not necessarily recognised as a child's only parents.⁵⁶ I believe that the African practice where a child was considered to belong not only to his or her parents but to the extended family and to the community as a whole, played a major role in affecting the manner in which parents are defined in the African context.⁵⁷ Molokomme and Mokobi also believe that this broad definition of parents in the African concept can be both beneficial and detrimental to the interest of the child. Ferreira also believes this view is not conducive to the best interest of the child. In determining the best interest of a child, the child and nobody else should be considered.⁵⁸

As argued in chapter one of this dissertation, there are a few disturbing issues concerning customary law adoption in Botswana.⁵⁹ These issues arise due to lack of written rules or procedures to be followed for the adoption of children in terms of customary law.⁶⁰ In addition, records of proceedings in customary courts are rarely kept and this results in the failure to know the locus classicus to rely on in subsequent cases of customary law adoption.⁶¹ Customary

⁵³ Quansah EK *Family Law in Botswana* (2006)126. S 3 of the Common Law and Customary Law Act defines a tribesman as "a member of a tribe or tribal community of Botswana ...".

⁵⁴ S.5 of the Common Law and Customary Law Act.

⁵⁵ Molokomme A & Mokobi K in *Ncube Children's Rights in Eastern and Southern Africa* (1998)186.

⁵⁶ Molokomme A & Mokobi K in *Ncube Children's Rights in Eastern and Southern Africa* (1998)184.

⁵⁷ Onyango P & Bali S 'Regional Practice: The African Situation' in *Doek J el al (eds) Children on the Move: How to Implement Their Right to Family Life* (1996) 142.

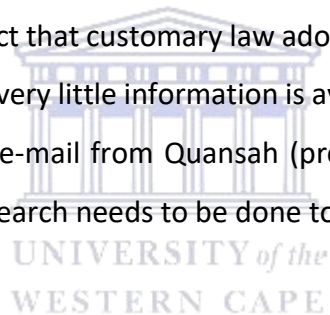
⁵⁸ Molokomme A & Mokobi K in *Ncube Children's Rights in Eastern and Southern Africa* (1998)184. See also Ferreira S *Interracial and Intercultural Adoption: A South African Legal Perspective* (unpublished doctoral thesis, University of South Africa, 2009) 381(hereafter *Interracial and Intercultural Adoption*) 379.

⁵⁹ See chapter one: Scope of study and literature review.

⁶⁰ Molokomme A *Children of the Fence* (1991)27.

⁶¹ See Chapter One: 'SCOPE OF STUDY AND LITERATURE REVIEW'.

adoption is informal as it is based on agreement between the biological parents of the child and the prospective adoptive parents. The biological parents have the sole right to determine whether the child should stay with them or go to a relative.⁶² In *Marman v Marman*, it was confirmed that an agreement to adopt and the implementation of the adoption constitutes a customary adoption.⁶³ In other words, the transfer of a child from the biological parents to the adoptive parents is accomplished by an agreement between the families. I have argued that it is of great concern that an encroachment on the life a child could be affected by a mere agreement.⁶⁴ The child's views are not taken into consideration as the biological parents are expected to have his/her best interest at heart in all matters affecting the child. They are regarded as the spokesperson of the child in all matters of customary law.⁶⁵ Similarly, in the above case, in deciding whether there was a customary adoption or not, the court had to call in an expert to explain the procedure of adoption.⁶⁶ As I have already indicated severally in this thesis, I shall simply reiterate the fact that customary law adoption continues to be an unfamiliar subject in Botswana. To this effect, very little information is available on this subject for research purposes.⁶⁷ Ferreira notes that an e-mail from Quansah (professor of University of Botswana) supports this argument.⁶⁸ More research needs to be done to close this gap.



5.6. Different types of customary law adoption in Botswana

In Botswana, there are two types of customary law adoption: temporary and permanent adoption.⁶⁹ Each type will be explained next.

⁶² Schapera I *Tswana Law and Custom* (1970) 173.

⁶³ 2003 (1) BLR 97 (HC) at 98.

⁶⁴ See '2.2 DEFINITION OF ADOPTION'.

⁶⁵ Sigweni S (unpublished LLM thesis, 2008) 35.

⁶⁶ *Marman v Marman* [2003] 1 BLR 96 (HC) 99. See chapter one: 'Scope of study and literature review'.

⁶⁷ See Chapter One: Scope of Study and Literature Review.

⁶⁸ The email is dated 23 October 2008. See Ferreira S *Interracial and Intercultural Adoption* (unpublished LLD dissertation, 2009) 377.

⁶⁹ See '2.2 DEFINITION OF ADOPTION'. See also Chapter One: 5 SCOPE OF STUDY AND LITERATURE REVIEW.

5.6.1. *Temporary adoption*

As explained earlier in this thesis, in temporary adoption, a child is sent to live with a paternal or maternal relative, as a symbol of close ties between two families or due to the fact that such a child is ill or unhappy at home.⁷⁰ I also pointed out that the biological parents are the only people to decide whether a child should be sent to live with relatives. They also remain the guardians of the child as there is no change in the child's status.⁷¹ It is worth to reiterate that the ties between the biological parents and the child are never extinguished. Thus, he or she could return to the biological parents at any time.⁷² This arrangement should not be referred to as adoption but rather as other forms of child care. As earlier defined in this thesis, common law adoption is a legal process whereby a person obtains a parenting role over another, usually a child, from that person's biological parents or the state, and thereby permanently assumes all the rights and responsibilities of a parent.⁷³ I have also defined customary law adoption as an unofficial placement where relatives and friends take up children to nurture and bring up as their own.⁷⁴ Conversely, temporary customary law adoption does not agree with the above two definitions. I am of the opinion that what is termed temporary adoption does not fit within the confines of the term 'adoption'. The aforementioned authors aver that adoption only creates unnecessary confusion.⁷⁵ I am also of the opinion that adoption is a formal procedure and referring to it as an informal arrangement is inconsistent with the formalities that must be complied with in adoption. This arrangement should therefore be called foster care or guardianship.

⁷⁰ Schapera I *Tswana Law and Custom* (1970) 173. See '2.2 DEFINITION OF ADOPTION'.

⁷¹ Schapera I *Tswana Law and Custom* (1970) 173-174. See '2.2 DEFINITION OF ADOPTION'.

⁷² Roberts S *Tswana Family Law* (1972) 22- 23, 64, 101,199-200, 265-266, 296. See '2.2 DEFINITION OF ADOPTION'.

⁷³ Singh D 'Adoption of children born out of wedlock' (1996) 29 De Jure 305. See '2.2 DEFINITION OF ADOPTION'.

⁷⁴ Onyango P & Bali S 'Regional Practice: The African Situation' in Doek J el al (eds) *Children on the Move: How to Implement Their Right to Family Life* (1996) 142. See '2.2 DEFINITION OF ADOPTION'.

⁷⁵ Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 381.

5.6.2. *Permanent adoption*

I have explained earlier in this study that a child may be permanently adopted under customary law in Botswana.⁷⁶ This will usually take place when a couple has no child of their own or where they have children of one sex.⁷⁷ Here, members of the extended family assist other family members or friends who do not have biological children.⁷⁸ Ferreira argues that the focus here is on the needs of the adults and the tribe and not the need or the best interests of the children.⁷⁹ I agree with this statement. In permanent child adoption under customary law, there is a difference between adoption by relatives and adoption by friends. When a child is adopted by a relative, the child is seen as the child of the adoptive parent in every way and purport that the child was the natural child of the adoptive parents.⁸⁰ This is similar to statutory adoption.

I explained earlier that statutory adoption is defined as a legal process whereby a person obtains a parenting role over another, usually a child, from that person's biological parents or the state, and thereby permanently assumes all the rights and responsibilities of a parent.⁸¹ However, if the child is maltreated in any form by the adoptive parents, the biological parents may take him back or the child may flee to them.⁸² The issue that remains to be resolved is what is the definition of maltreatment? What yardstick is used to determine when a child is maltreated and who determines when a child is maltreated? I believe that it is important to have a standard definition for maltreatment and a yardstick for measuring maltreatment in the statutes. Although maltreatment of a child is abuse against the child, it cannot be denied that there is a situation where there is always a sword over the heads of the adoptive parents and they may never know

⁷⁶ See Chapter One: 5 SCOPE OF STUDY AND LITERATURE REVIEW.

⁷⁷ Schapera I *Tswana Law and Custom* (1970) 174. See '2.2 DEFINITION OF ADOPTION'.

⁷⁸ Schapera I *Tswana Law and Custom* (1970) 174. See '2.2 DEFINITION OF ADOPTION'.

⁷⁹ Ferreira S (unpublished LLD dissertation, 2009) 381.

⁸⁰ Schapera I *Tswana Law and Custom* (1970) 174.

⁸¹ See '5.5.1 Temporary adoption'.

⁸² Schapera I *Tswana Law and Custom* (1970) 174.

when the child will be taken away from them.⁸³ This is similar to the situation that was prevalent in Nigeria prior to 1965 as explained earlier in this thesis.⁸⁴

Prior to 1965, when the first statute on adoption was enacted, there was no statutory legislation that regulated adoption in any part of Nigeria.⁸⁵ This resulted in difficulties for couples who truly wanted to adopt children. When couples took children into their homes with the intention to legally adopt them, it was not recognised as adoption but viewed as fostering or guardianship.⁸⁶ The result was that the natural parents of such children could demand the return of their children from anticipating adoptive parents, despite the fact that a close relationship may have been fostered between the latter and the children.⁸⁷ In a similar manner, when a child is adopted by a relative under Botswana customary law, there is a great uncertainty as the adoptive parents may never know when their adoptive child will be taken away from them by the natural parents and a sense of belonging needed by the child to form an attachment with the adoptive parents is never developed.⁸⁸



5.6.2.1. *Permanent adoption of a weaned child*

Permanent adoption under African customary law is also visible when a child is given to a relative or a friend soon after that child is weaned. The permanency emanates from the fact that the child is given to the relative or friend soon after the child is weaned and he or she grows with that particular family until s/he is married or given away in marriage.⁸⁹ A male child may decide to

⁸³ Ferreira S (unpublished LLD dissertation, 2009) 382.

⁸⁴ Nigeria is another Country that is under review in this study. Statutory adoption in Nigeria is dealt with in '2.4 HISTORY OF ADOPTION LAWS IN NIGERIA'. Chapter Three of this thesis is all about customary law adoption in Nigeria.

⁸⁵ Chukwu L Adoption of children in Nigeria under the Child's Rights Act 2003. Adoption of Bill (2012) 6. See also Kigbu SK 'Child Adoption: Nature and Procedure under Nigerian Law' available at <http://hdl.handle.net/10485/384>. See '2.4 HISTORY OF ADOPTION LAWS IN NIGERIA'.

⁸⁶ Tajudeen OI Adoption Practice in Nigeria (2013) 19 *Journal of Law, Policy and Globalisation* 8. See '2.4 HISTORY OF ADOPTION LAWS IN NIGERIA'.

⁸⁷ Tajudeen OI Adoption Practice in Nigeria (2013) 19 *Journal of Law, Policy and Globalisation* 8. See '2.4 HISTORY OF ADOPTION LAWS IN NIGERIA'.

⁸⁸ Ferreira S (unpublished LLD dissertation, 2009) 382.

⁸⁹ Schapera I *Tswana Law and Custom* (1970) 173.

return to his natural parents even after marrying.⁹⁰ In permanent adoption under customary law in Botswana, the relationship between an adopted child and his or her natural parents are never completely severed and a child adopted in this manner may not automatically inherit from his or her adoptive parents' estate.⁹¹ Where the adoptive parents have sons, the adoptive child will not inherit from the adopted parents unless the adoptive child is included and made provisions for in the will of the heir.⁹² However, in cases where the adoptive child is the only son of the adoptive parents, the former will be the heir.⁹³ The advantage of permanent adoption is that the dictates of the United Nations Convention on the Rights of the Child as enjoined in Article 8 are enforced. The child is raised amongst family members, who are well known to the child.⁹⁴ This type of arrangement helps the child to stay amongst people of same culture and similar background, which will help the child to bolster his or her confidence and identity. Additionally, it will promote the general well-being of the child, which is one of the ideals of the CRC. There is also a similar provision in Article 25 of ACRWC.⁹⁵

I believe that permanent adoption is no doubt a way of continuity in a child's upbringing, ethnic and linguistic background. This is more so, when it is a permanent adoption by a relative as the relative will most probably be of the same ethnic and linguistic background with the natural parents of the adoptive child. The manner of child's upbringing by the adoptive parent will be the same or similar to that of the natural parents of the child.

⁹⁰ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 19.

⁹¹ Roberts S, *Tswana Family Law* (1972) 13.

⁹² Roberts S, *Tswana Family Law* (1972) 13.

⁹³ Roberts S, *Tswana Family Law* (1972) 13.

⁹⁴ Article 8 states that States Parties must undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

⁹⁵ Article 25, paragraph 3 states that 'When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background'.

5.6.2.2. *Permanent adoption by a friend*

If a child is adopted by friends, the manner of control exercised over a child by the adoptive parents is different from what the situation would be if the child was adopted by relatives.⁹⁶ When a child is adopted by a friend, he (friend) is expected to consult and inform the natural parents about all important matters and issues that involves a decision about the child 's dealings. This is not necessary when the adoptive parent is a relative.⁹⁷ The parent-child relationship between biological parents and the child is not completely broken and could be resumed at any time. This situation places the child in an uncertain and non-permanent situation regarding the adoptive parents.⁹⁸ When a girl child is adopted by relatives, the adoptive parents would negotiate and keep the bride price. However, when a girl child is adopted by friends, the natural parents will negotiate and receive the bride price, but will hand over a portion of it to the adoptive parents.⁹⁹

5.6.2.3. *Permanent adoption by a natural father*

The common law rule that a child born out of wedlock cannot inherit from their father or paternal relations is still valid in Botswana.¹⁰⁰ The only right such a child can claim from the father is the maintenance rights. The Roman - Dutch law only recognises the relationship that a child has with the mother and the maternal relatives to the exclusion of the child's relationship with the father and the paternal relatives.¹⁰¹ In *Samsam v Seakarea*, the application by the children of the deceased (who died intestate) to be recognised as heirs failed.¹⁰² It was held that a child born out of wedlock is only entitled to maintenance from the parents. Here, the court drew a distinction between maintenance rights and a right to inherit. It held that the children were only entitled to

⁹⁶ Schapera I *Tswana Law and Custom* (1970) 174.

⁹⁷ Schapera I *Tswana Law and Custom* (1970) 173.

⁹⁸ Ferreira S (unpublished LLD dissertation, 2009)) 382.

⁹⁹ Roberts S *Tswana Family Law* (1972) 13.

¹⁰⁰ *Green v Fitzgerald and Others* 1914 AD 88.

¹⁰¹ Spiro E *Law of Parent and Child* 4 ed (1971) 450.

¹⁰² 2004 (1) BLR 378.

a maintenance claim. The position under customary law of a child born out of wedlock is just as controversial. This was analysed in *Hendrick v Tsawe*.¹⁰³

The applicant in this case, who was born out of wedlock, claimed the right to inherit from the estate of the father who died intestate. The right was denied as it was held that he had not been formally adopted under customary law. It was held by the high court per Nganunu J, in the same case, that a man cannot claim a child he fathered out of wedlock and a child born out of wedlock cannot inherit from the father unless certain conditions are met. These conditions are marriage that was symbolised with the payment of *bogadi* and the second condition is a valid adoption of the child.¹⁰⁴

The application failed as the Applicant failed to prove the existence of any of the above conditions. When a child is adopted by his or her natural father, it is essential for the father to pay *bogadi*. This usually happens where a child born out of wedlock is adopted by the natural father, but non-payment of *bogadi* does not invalidate an adoption that has been concluded.¹⁰⁵ In the pre-colonial times, payment of *bogadi* was a pre-condition for all adoption agreements in Botswana. Presently, apart from *bogadi* that is paid by the natural father in respect of a child born out of wedlock, there is usually no financial implications for adoption under customary law.¹⁰⁶

5.6.2.4. *Permanent adoption by a step father*

Another type of permanent adoption which is very common in Tswana societies is where a man who is not the natural father of a child of the woman he wants to marry, takes the child with the mother into his home. The intention to take the child into his home is usually communicated in the presence of the members of the family. Prior to the declaration of the man's intention in the

¹⁰³ 2008 (3) BLR 447. The customary court of appeal was the court a quo. (The court of first instance).

¹⁰⁴ 2008 (3) BLR 447, 450. The case of *Hendrick v Tsawe* was on appeal to the high court from the customary court of appeal.

¹⁰⁵ *Bogadi* means bride price but in context of adoption it means payment in cattle as consideration for the child's upbringing. *Marman v Marman* [2003] 1 BLR 96 (HC) 99. See also Sigweni S *Adoption Laws and Procedures of Botswana* LLM (2008) 20.

¹⁰⁶ Schapera I *Tswana Law and Custom* (1970) 174.

presence of the families, there is an agreement between the man and the woman he wants to marry. The child moves in to the mother's matrimonial home and becomes the child of the husband of the mother when the marriage is concluded. The adoption is finalised upon the change of the surname of the child to that of the adoptive father and thereafter the child can claim all the rights that a child can against a father, including the right to inherit from his or her father's estate as an intestate heir.¹⁰⁷ In *Lesomo and Another v Otukile and Another*, the applicants asked for an order to be declared as the heirs of the estate of the deceased, who they claimed had married their mother according to customary law.¹⁰⁸ In the alternative, they sought a declaration that they were adopted by the deceased according to customary law. The high court held that for an application to be declared as the heirs of the deceased's estate to succeed, the applicants had to prove that a *patlo* has been conducted and there must also be evidence of adoption.¹⁰⁹ The court held inter alia that evidence from maternal uncles, who play a critical role in the marriage of a young woman, as well as evidence of adoption, were lacking.¹¹⁰ The claim that the applicants were the heirs of their mother's late husband therefore failed.

The evidence of adoption by the step father of a child was disputed in *Montshiwa v Montshiwa*.¹¹¹ Here, the applicant sought an order against the respondent, to pay maintenance for herself and her minor child, who was born before her marriage, to the respondent. The child was not the biological child of the respondent, but the applicant stated that the respondent promised to take care of her son, support and eventually adopt him under customary law. She stated that she married the respondent on condition that he would become a father to her son. The respondent admitted that although the applicant informed him that she had a son, he denied that the applicant married him on the condition that he would adopt her son. The court held that the right of a child to be maintained by its father arises from a legal obligation created by law. A

¹⁰⁷ See *Montshiwa v. Montshiwa* [1999] 2 BLR 216 (HC).

¹⁰⁸ 2008 (2) BLR 192.

¹⁰⁹ *Patlo* is a ceremony where a young man's family requests the hand of a woman in marriage and pays *bogadi*. See also Mokobi E *Lingering Inequality in Inheritance Law: The Child Born Out of Wedlock in Botswana* (Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana on 28 and 29 March 2014).

¹¹⁰ Adoption is signified by the payments of cattle and other livestock to the maternal relatives of the mother.

¹¹¹ [1999] 2 BLR 216 (HC).

man is obliged to maintain a child either because he is the natural father of the child or he has adopted the child under the Adoption of Children Act (Cap. 28:01) or under customary law. There would seem to be no legal basis upon which a man who was not the natural father of a child or had never adopted a child could be ordered to pay maintenance for the child. If a man was not the biological father of a child and wished to adopt that child, there was a clear procedure laid down in the Adoption of Children Act that had to be followed. The court concluded that there was no evidence of customary adoption. This was compounded by the fact that the child was still using the mother's surname. The court refused to make a maintenance order in favour of the child.

5.7. Customary child adoption in relation to international instruments

In order to uphold the promotion and protection of human rights, Botswana has signed, ratified and acceded to several international and regional treaties that place emphasis on children's rights. These include the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the Amendment to the Convention on the Rights of the Child.¹¹² The Children's Act 2009 was enacted with the aim to fully domesticate the Convention on the Rights of the Child.¹¹³ Included in the new Act is the Bill of Child Rights, which guarantees the fundamental rights of the child and ensures the protection of the child from all forms of violence from persons entrusted with the care of the child.¹¹⁴ Article 12 provides that children do not only have a right to express their views on matters that affect them, they also have a right to have those views heard by adults.¹¹⁵

¹¹² The United Nation Convention on the Rights of the Child was acceded to 14 March 1995. The African Charter on the Rights and Welfare of the Child was ratified on 10 July 2001. Amendment to the Convention on the Rights of the Child (Article 43, paragraph 2) was accepted on 6 March 2002.

¹¹³ The Children's Act No. 8 of 2009.

¹¹⁴ The Bill of Child's Rights is set out in Part III the Children's Act.

¹¹⁵ Article 12 states that parties that are signatories to the CRC shall ensure that the child who is capable of forming his or her own views is given the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

However, research has shown that immense variations continue to exist between the dictates of treaties and the real experiences of children in Botswana. What the children experience is far different from what the Convention mandates the signatories to deliver to the children.¹¹⁶ Adults cannot represent the views of children in a satisfactory way as they observe them from a remote point of view.¹¹⁷ Although Botswana has signed several international and regional treaties on the rights of the child, many children do not know their rights. The reason adduced for this situation, as pointed out in many seminars, workshops, conferences and documented literature, is the absence of pressure groups and a weak civil society clamouring for children's rights.¹¹⁸

5.8. Analysing laws against child abuse in Botswana

The idea that children have their individual rights as opposed to the collective rights of the family or community is viewed by many as primitive. This is due to the belief in some cultures that children are communal properties or possession of parents and not holders of individual rights.¹¹⁹ Many parents in Botswana do not believe that children have rights. In a radio program, where child welfare workers were called to educate the public about children's rights, some parents verbally asserted in these reproduced quotes *'my children are my property and do not have their own rights'*. In the same radio programme, some other parents said *'the government have signed documents emphasising children's rights without understanding the implications'*, whilst other parents said *'the reasons why children are uncontrollable is that they have been told that they have rights. I brought my children into this world and nobody is going to tell me how to raise them or tell me that they have rights.'*¹²⁰

¹¹⁶ Maundeni T & Levers L 'Concerns about Child Subject Research in Botswana: A call for Establishing Structures and Guidelines that Protect Children' (2005) 9 *African Sociological Review* 155 (hereafter Concerns about Child Subject Research in Botswana).

¹¹⁷ Maundeni T & Levers L 'Concerns about Child Subject Research in Botswana' (2005) 9 *African Sociological Review* 154.

¹¹⁸ Maundeni T & Levers L Concerns about Child Subject Research in Botswana (2005) 9 *African Sociological Review* 159.

¹¹⁹ See Shumba A & Moorad F 'A Note on the Laws against Child Abuse in Botswana' (2000) 14 *Botswana Journal of African Studies*, 173.

¹²⁰ See Maundeni T & Levers L Concerns about Child Subject Research in Botswana (2005) 9 *African Sociological Review* 160.

Furthermore, a great portion of the Botswana population is not aware of the rights of children and the enactments that provide for these rights.¹²¹ Similarly, many children do not realise that they have rights. This places them at risk due to their social standing in the society.¹²² This is because it has been recognised that children are in a relatively powerless position because of their dependency on adults or caregivers in society.¹²³ It is crucial to state here that children's rights are so easily abused in Botswana due to the way children are trained to respect adults. This nurturing is known in Botswana as *Botho* where a child who disrespects an adult is termed in a phrase *Ga ona botho*, which means having bad manners. It is an indictment on a child when he is referred to in the above term. The outcome of this upbringing is that a child may endure abuse silently and refuse to make a report in order not to be termed as having bad manners.¹²⁴

5.8.1. *The role of non-governmental organisations in campaigning for the rights of children*

The role of non-governmental organisations in championing the rights of the child cannot be overlooked. Childline, the leading non-governmental organisation (NGO) campaigning for the rights of children in Botswana, was founded in response to the rising cases of child abuse in Botswana. It has a vision to have a nation that is child friendly, respects the rights of its children and deviate from their abuse.¹²⁵ Childline has many laudable ideals that include providing emergency services to children who are in need; helping parents/caregivers who are experiencing difficulties with their children; giving members of the public an opportunity to report cases of suspected child abuse; advocating for children's rights, as well as educating the public on child abuse and children's rights.¹²⁶ Although the NGO is going a good job, it is

¹²¹ See Shumba A & Moorad F (2000) 14 Botswana Journal of African Studies 173.

¹²² Maundeni T & Levers L Concerns about Child Subject Research in Botswana (2005) 9 *African Sociological Review* 161.

¹²³ See Shumba A & Moorad F (2000) 14 Botswana Journal of African Studies 173.

¹²⁴ Maundeni T & Levers L 'Concerns about Child Subject Research in Botswana: A call for Establishing Structures and Guidelines that Protect Children' (2005) 9 *African Sociological Review* 161.

¹²⁵ Available at <https://charterforcompassion.org/11eleven-project/childline-botswana> (accessed 3 September 2021).

¹²⁶ Available at <https://charterforcompassion.org/11eleven-project/childline-botswana> (accessed 3 September 2021).

handicapped because it is based in Gaborone the capital city. Moreover, the structure of its services is centralized and the result is that other children based in other parts of the country are not able to enjoy its services. It must be pointed out that there are other NGOs championing the cause of children. Some of these are Botshabelo Rape Rehabilitation Centre, Save Our Souls (SOS), Caritas Botswana (also known as Tirisanyo Catholic Commission). However, Caritas Botswana is focused majorly on provisions of educational, nutritional, welfare and healthcare services for children.¹²⁷ Other NGOs are hampered by shortage of resources to promote their ideals.¹²⁸

It worth stating here that what is viewed as child abuse differs from culture to culture. Some people believe that giving rights to children will bring about friction in families as a result of different cultural practices.¹²⁹ Increase in the nuclear family system, a weakening of the extended family system, rise in the number of people migrating to urban areas, coupled with adoption of new ideas and values, have eroded the values of socialisation of children. Botswana continues to experience a blend of modern and traditional value systems and different ethics on how to raise children.¹³⁰



5.9. Conclusion

Customary law adoption continues to be validated only by agreements between the families of the adoptive parents and the adoptive child. It has been held in *Marman v Marman* that what creates adoption under customary law is an agreement to adopt and the enforcement of that agreement.¹³¹ I submit that a stronger structure should be put in place to validate customary law adoption. I have argued in this chapter and in previous chapters that it is of great concern that

¹²⁷ Available at [https:// caritas-africa.org/ caritas-botswana-tirisanyo-catholic-commission](https://caritas-africa.org/caritas-botswana-tirisanyo-catholic-commission). (accessed 27 November 2021).

¹²⁸ Maundeni T & Levers L 'Concerns about Child Subject Research in Botswana: A call for Establishing Structures and Guidelines that Protect Children' (2005) 9 *African Sociological Review* 160.

¹²⁹ See Shumba A & Moorad F 'A Note on the Laws against Child Abuse in Botswana' (2000) 14 *Botswana Journal of African Studies*, 174.

¹³⁰ Maundeni T & Levers L 'Concerns about Child Subject Research in Botswana: A call for Establishing Structures and Guidelines that Protect Children' (2005) 9 *African Sociological Review* 161.

¹³¹ 2003 (1) BLR 97 (HC) at 98.

an encroachment on the life a child could be attained by a mere agreement.¹³² The child's views are not taken into consideration when these agreements are made, which is against the ideals of international treaties.¹³³ As I explained above, there are no rules that define what a child is under customary law. The status of a child is determined by the laws and customs of the individual tribe.¹³⁴ Even in statutory law, there is no uniform definition of a child in Botswana. Different statutes define the child in various ways.¹³⁵ I submit that there should be a standard definition that will cut across various statutes and international treaties. The standard definition of a child should include customary law adoption. This will proffer a solution to having a standard definition that cuts across various legislation.

Furthermore, the fact that there are no written rules or procedures to be followed for the adoption of children in terms of customary law continues to create a big void that must be corrected by enactments. Records of proceedings in customary courts are rarely kept and the consequence of this is that it is almost impossible to know what to rely on in subsequent cases of customary law adoption. Closely related to this is the fact that customary law adoption continues to be an unfamiliar subject in Botswana. The result is that very little information is available on this subject for research purposes.¹³⁶

In conclusion, I submit that the communities that make up Botswana, including children, should be educated and informed about the rights of the child. It should form part of the school curriculum from the early grades at school until the university level. This will assist in instilling awareness of these rights in children.

¹³² See 5.5.1 Adoption of children under customary law in Botswana. See also chapter one: Scope of study and literature review.

¹³³ See Article 12 UNCRC and Article 7 ACRWC require that a child who is capable of forming his or her own views is given the right to express those views freely in all matters affecting the child.

¹³⁴ See 5.5 DEFINITION OF A CHILD.

¹³⁵ 5.5 DEFINITION OF A CHILD.

¹³⁶ See 5.5.1 Adoption of children under customary law in Botswana. See also Chapter one: Scope of Study and Literature Review.

CHAPTER SIX: CUSTOMARY LAW ADOPTION VERSUS OTHER FORMS OF CHILDCARE

6.1. Introduction

The preceding chapter examined customary law adoption in Botswana and discussed the historical development of adoption laws in Botswana. It explained that prior to Botswana being proclaimed as a Protectorate, the Batswana people lived as independent units. However, there was a change when the Roman Dutch law was introduced by the South African High Commissioner, who was given the authority to administer the Protectorate.¹ The Botswana legal system is plural, comprising of Roman-Dutch law, statutory enactments and the customary law. Roman Dutch law and statute law also known as the common law subsists today.² The previous chapter also examined how Botswana's legal framework provides for the adoption of children under customary law and the strengths and weaknesses inherent in this framework. It observed that customary law adoption continues to be validated only by agreements between the families of the adoptive parents and the adoptive child. Indeed, the court found in *Marman v Marman* that what creates adoption under customary law is an agreement to adopt and the enforcement of that agreement.³ The child's views are not taken into consideration when these agreements are made, which is against the ideals of international treaties.⁴

This chapter distinguished between customary law adoption and other forms of childcare such as foster care and guardianship. Similarities and dissimilarities between the different forms were highlighted. The aim is to harness the benefits in the other forms of childcare and recommend that such benefits be incorporated into customary law adoption. This chapter explored how the best interest of the child in human rights instruments features in forms of childcare.

¹ Nsereko DDN Constitutional Law in Botswana (2002) xv. See 2.7 HISTORY OF ADOPTION LAWS IN BOTSWANA. See also 5.2 HISTORICAL DEVELOPMENT OF ADOPTION LAWS IN BOTSWANA.

² Molokomme A Children of the Fence (1991)29.

³ *Marman v Marman* and others [2003] 1 BLR 96 (HC) 98.

⁴ Article 12 of the CRC states that in all matters affecting a child, the views of the child must be heard.

6.2. Foster care

Foster care is the temporary placement of a child whose biological parents are unable to care for him or her, in the care of someone who is not the parent or guardian of the child.⁵ Preference is given to placement with family members over non family members of the child and cluster care schemes.⁶ The South African legislation defines foster parent as one who is fit to care for a child and provide a conducive environment for the child's growth and development.⁷ The communal view point that each child is everyone's child is the foundation for customary adoption and foster placement.⁸

Foster care is an important unit of child placement. It has been of great support to many children whose parents are deceased or not able to care for them.⁹ There is no doubt that every child needs basic necessities of life such as food, shelter, safe environment, parental care and affection for a healthy development. When these basic needs are not available for a child, it will result in destitution in the life of that child. Children that lack parental care and affectionate environments need foster placement.¹⁰

Foster placement has been provided for in international treaties that are signed and ratified by the countries under review in this thesis.¹¹ Children who cannot live with their parents because such parents are incapable of caring for them will need a safe environment without the necessity of cutting the parental ties. This is usually achieved through foster placement or guardianship.¹²

⁵ S.180 of Children's Act 38 of 2005.

⁶ Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 520.

⁷ S 182 of Children's Act 38 of 2005.

⁸ Onyango & Bali S 'Regional Practice: The African Situation' in Doek J el al (eds) *Children on the Move: How to Implement Their Right to Family Life* (1996) 142.

⁹ Martin P & Mbambo B (2011)10.

¹⁰ Tajudeen OI 'Adoption Practice in Nigeria- an Overview' (2013) 19 *Journal of Law, Policy and Globalisation* 7 (hereafter Adoption Practice in Nigeria).

¹¹ These countries are Nigeria, South Africa and Botswana.

¹² Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 7.

In some parts of West Africa, at a certain point, many children were raised by people other than their natural parents. This was not as a result of childlessness but because the practice of polygamy ensured that children were placed in extended family household.¹³ Until about 70 years ago, more than 90% of children in parts of Africa were raised through foster care, as it was believed that it was embarrassing for parents to claim ownership over their biological children.¹⁴ Goody believes that the burden of parenting should be shared between biological parents and social parents. She added that this can be done if the various parental functions are taken up by different people. She calls adoption and fostering social parenting and justifies them as functional and reasonable.¹⁵

6.2.1. Foster Care under the Child Rights Act 2003

The Child Rights Act 2003 requires that an application for a foster care order must be made by a person who is not less than 25 years old and is a citizen of Nigeria.¹⁶ The applicant must be resident in the same state as the child and must be of unquestionable integrity.¹⁷ The applicant must be financially capable and medically fit to assume that responsibility.¹⁸ He or she must be at least 21 years older than the child to be fostered.¹⁹ Where the applicant is married and is the sole applicant, the spouse must consent to the order.²⁰ Furthermore, the applicant must be of the same sex with the child and there must be a certificate of capability.²¹ Children that can be fostered include those that have been abandoned, orphans, destitute children, and children found wandering with no safe home or settled place of abode.²² Where a child under customary

¹³ Howell S 'Adoption of the Unrelated Child: Some Challenges to the Anthropological Study of Kinship' (2009) 38 *Annual Review of Anthropology* 154. (hereafter Adoption of the Unrelated Child).

¹⁴ Howell S Adoption of the Unrelated Child (2009) 38 *Annual Review of Anthropology* 154.

¹⁵ Goody E 'Parenthood and Social Reproduction: Fostering and Occupational Roles in West Africa' (1982) 17 *Man* 789 -790 (hereafter Parenthood and Social Reproduction).

¹⁶ S.104(1)(a) &(c) Child Rights Act 2003.

¹⁷ S.104(1)(b) & (e) Child Rights Act 2003.

¹⁸ S.104(1)(d) & (f) Child Rights Act 2003.

¹⁹ S.104(a) Child Rights Act 2003.

²⁰ S.105(1) Child Rights Act 2003.

²¹ S.104(2) Child Rights Act 2003.

²² S.101 Child Rights Act 2003.

law or any other circumstances is under the care of another person, the consent of the person must be sought and obtained before an application can be made.²³

It is worth noting that the court may dispense with any consent required in section 105(2) if the person has abandoned, neglected, persistently ill-treated the child; cannot be found, is incapable of giving his consent or unreasonably withholds his consent.²⁴

The order of court must include maintenance, care, education and the general welfare of the child.²⁵ A register known as the fostered child register will be kept, where entries of orders made by the court are compiled.²⁶ There are Non-Governmental Organisations that are running foster care facilities. Whilst some are genuine, others have fraudulent intentions. For example, a baby factory was discovered a few years ago where teenagers are impregnated or come in pregnant and their babies are voluntarily or forcefully taken away from them for a fee. The government has been able to clamp down some illegal foster homes. The outcome of the babies and their mothers are not known as there is no evidence to prove that there are centres for rehabilitating such babies and their mothers.²⁷ There is also a similar story which was highlighted in chapter two of this thesis.²⁸ A woman was arrested who was operating out of Good Shepherd Orphanage in Lagos. She had in the orphanage amongst others ten girls and a dozen babies. Six of the ten girls were pregnant and held against their will, having been enticed with offers of money.²⁹

²³ S.105 (2) Child Rights Act 2003.

²⁴ S.105 (3) Child Rights Act 2003.

²⁵ S.110 Child Rights Act 2003.

²⁶ S.112(1) Child Rights Act 2003.

²⁷ Okaisabor N 'Adoption, Guardianship and Fostering: Practice and Procedure – Customary Law Perspective'. A presentation at the National Workshop for Area/Sharia/Customary Court Judges organized by the National Judicial Institute, Abuja 18th – 22nd March 2019 at 12(hereafter Okaisabor N Adoption, Guardianship and Fostering).

²⁸ See '2.4.3.1 Establishment of adoption services.'

²⁹ See Newspaper Article: 'Woman arrested in Nigerian child slavery probe'. Irish Examiner 8 March 2005 available at <https://www.irishexaminer.com> (accessed 24 February 2021).

6.2.2. Foster care and guardianship in Botswana

The indigenous people of Botswana had a culture where they shared the responsibility of caring for the children of other members of the family who are not able to care for their own children.³⁰ Adoption, foster care and guardianship were major ways through which this culture was carried out. Here, members of a family can assist relatives and friends who have no children of their own by giving them their own children to bring up.³¹ In Botswana, adoption as a permanent separation between a child and the biological parents is rare but foster placement or other forms of mutual exchange is common.³² Adoption by relatives of the natural parents has been equated to guardianship. Here, relatives of the natural parents take in children to raise them as their own when the parents of such children are dead or not able to care for them.³³ According to UNICEF estimates, there are about 130,000 orphans living in Botswana.³⁴ Most of these orphans are left in rural areas and in the care of relatives who are grandparents.³⁵ Others have siblings who are minors as family heads. Due to customary practices, the head of the family has the power to decide that a particular member of a family has to take care of a particular child. This is done without considering the number of children of the chosen family member, his or her financial means and whether the child will be raised in accordance with the right family values.³⁶

The family head is the one who determines what is in the best interest of the child.³⁷ Sigweni said it is difficult to differentiate adoption by relatives of the natural parents from guardianship while Okaisabor argued that customary law, adoption overlaps with guardianship.³⁸ I believe that adoption by the relatives of the natural parents and customary law adoption are connected. This is because often times, adoption by relatives of natural parents is usually in the

³⁰ Onyango P and Bali S *Regional Practice* (1996) 142.

³¹ Schapera I *Tswana Law and Custom* (1970) 174.

³² Howell S *Adoption of the Unrelated Child* (2009) 38 *Annual Review of Anthropology* 154.

³³ Sigweni S (unpublished LLM thesis, 2008) 31.

³⁴ Available at <https://www.soschildrensvillages.ca/botswana> (accessed 23 December 2021).

³⁵ Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 531.

³⁶ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 31.

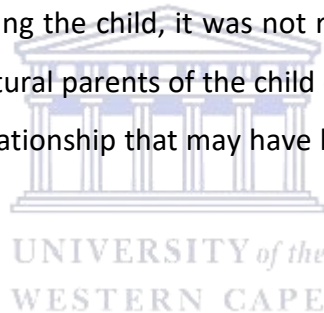
³⁷ Report to the United Nations Committee for the Convention on the Rights of the Child (2001) 19.

³⁸ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 31. Okaisabor N *Adoption, Guardianship and Fostering* 14. See also '3.4.2 Informal customary law adoption'.

form of customary law adoption. It has been argued that adoption as a permanent breakup between a child and the biological parents is rare in customary law but foster placement or other forms of mutual exchange are common.³⁹

6.2.3. *Legal implications of foster care*

Most foster placements are made with the aim of the children and their natural parents coming back together at a later date, while in adoption, there is a permanent separation of relationship between the child and the natural parents so that the legal rights and duties between them are cut off in favour of the adoptive parents.⁴⁰ In Nigeria prior to 1965, as explained in chapter three of this thesis, there was no statutory recognition of adoption.⁴¹ The result was that there was foster placement and no statutory adoption. This is because when couples took in a child into their homes with the aim of adopting the child, it was not regarded as adoption but a form of foster care or guardianship. The natural parents of the child can demand for his or her return at any time regardless of the close relationship that may have been established between the child and the foster parents.⁴²



6.3. **Foster care in customary law**

Scholars are of the opinion that what is available in customary law in the real sense is foster placement or guardianship and not adoption.⁴³ This takes place where biological parents who are not able to care for their children, are assisted by other members of the extended family.⁴⁴ The proposition that what is available under customary law is foster placement is borne out of the

³⁹ Howell S Adoption of the Unrelated Child (2009) 38 Annual Review of Anthropology 154. See also Bennett TW *Customary Law in South Africa* (2004) 323. See also Chapter One 'Scope of study and literature review'.

⁴⁰ Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 7.

⁴¹ See '2.4 HISTORY OF ADOPTION LAWS IN NIGERIA'.

⁴² Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 8.

⁴³ Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 11. See also Chukwu L Adoption of children in Nigeria under the Child Rights Act 2003 (2012) 5. See also 3.2 Basis of adoption under customary law in Nigeria.

⁴⁴ Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 63.

belief that where family members assist others to care for their children, it should not be termed as adoption. It should rather be called foster care or guardianship.⁴⁵ It has been argued that adoption does not occur in customary law and that customary care arrangements should not be equated with adoption.⁴⁶

6.3.1. Lack of recognition and regulation of customary foster care in South Africa

Customary law adoption and foster care have played important roles in securing alternative support for children whose parents are deceased, absent or not able to care for them. However, they are unregulated and unmonitored creating a loophole for abuse and exploitation of children who are already in vulnerable positions.⁴⁷ Customary forms of child placements are not regulated by legislation or judicially reviewed. There is a demand on states to ensure that placement in alternative care and the adequacy of protection that is provided for the children is judicially reviewed.⁴⁸ Unlike child placements recognised and regulated by the Children's Act, customary forms of placement are not preceded by initial preliminary social services investigations and monitoring. There are no court approved investigations or transfer of parental rights and obligations.⁴⁹ In addition, there is no official monitoring of the welfare of the children once placed within the extended family household to ensure that the children are well taken care of.⁵⁰

As explained in chapter four of this thesis, legislation should recognise and regulate customary adoption and foster placement pedestal so that the practice of customary placement may become widely exercised. This will ensure that the children involved enjoy the same level of

⁴⁵ Chukwu L Adoption of children in Nigeria under the Child Rights Act 2003 (2012) 4. See '3.2 Basis of adoption under customary law in Nigeria' for my argument in that regard.

⁴⁶ Bennett TW *Customary Law in South Africa* (2004) 323. See Chapter One 'Scope of study and literature review'.

⁴⁷ Martin P & Mbambo B (2011) 11.

⁴⁸ See Article 9 of the UNCRC. See also Article 19(1) of the ACRWC.

⁴⁹ Martin P & Mbambo B (2011) 43. See Chapter One 'Scope of study and literature review'.

⁵⁰ Article 25 of the UNCRC recognises the right of a child who has been placed for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided and all other circumstances relevant to his or her placement. See '4.6 Regulation of adoption of children under customary in South Africa' for a detailed discussion on the lack of regulations of customary placements in South Africa.

protection accorded children in statutory alternative care arrangements.⁵¹ As argued in chapter four, the failure of the Children's Act 2005 to recognise and regulate foster care placement in statutory enactments in South Africa could hamper the child's rights to protection. This is because it creates loopholes for the exploitation and abuse of children who are already susceptible to victimisation.⁵² There are allegations that adoption of children under customary law has been exploited by opportunists who deliberately adopt a child in order to gain access to the child's support grant paid to the primary caregiver of children living in poverty.⁵³

6.4. Guardianship

Guardianship is a state where a person is given the legal right and responsibility of the care of someone who cannot take care of himself/herself, such as a child whose parents have died.⁵⁴ Guardianship is administering and safeguarding a child's property interests, representing the child in contractual and other legal matters, and giving or refusing any consent that is legally required in respect of the child.⁵⁵



6.4.1. Guardianship in Nigeria under the Child Rights Act 2003

In Nigeria, guardianship is provided for under the Child Rights Act 2003 and there are two types of guardians. There is the legal guardian and the guardian ad litem. The Act states that the guardian ad litem shall be appointed in accordance with the rules of court to safeguard the best interest of the child.⁵⁶ Where a child is not represented by a legal practitioner, the court will

⁵¹ Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa* (2011) 94. See '4.6 Regulation of adoption of children under customary in South Africa'.

⁵² Martin P & Mbambo B (2011) 44. See '4.6 Regulation of adoption of children under customary in South Africa'.

⁵³ Mbambo B (2011) presentation at a workshop hosted by the HRC and UNICEF in South Africa, Midrand on equity and child rights in South Africa, March 2011. See '4.6 Regulation of adoption of children under customary in South Africa'.

⁵⁴ Cambridge Advanced Learner's Dictionary 3 ed (2008) 639 available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689> (accessed 7 November 2021).

⁵⁵ S.18(3) of the Children's Act No 38 of 2005.

⁵⁶ S.89(2) Child Rights Act 2003.

appoint one to represent the child if it appears in the best interest of the child to be so represented.⁵⁷ In the case of a guardian ad litem, the guardianship will expire at the end of the litigation process. However, a legal guardian may have a parental responsibility which is for a longer period of time. A legal guardian may act for adults who lack the capacity to take decisions or persons who are mentally challenged.⁵⁸ The application for guardianship may be granted to a person in favour of a child where a child has no parents with parental responsibilities over him or her or where the child's parent or guardian in respect of whom a previous guardianship order was made has died.⁵⁹ Consent is required from a person appointed as a guardian before an appointment can take effect.⁶⁰ The appointment of a guardian can be revoked on application by the natural parents or where the court finds it expedient to do so.⁶¹ Where there is dispute between joint guardians regarding the well-being of a child, an application can be made to the court by either of the parties for direction.⁶²

6.5. Guardianship in customary law

Customary law has a great impact on majority of Africans, especially in the areas of personal law. However, in its application, it tends to be discriminatory in areas of guardianship, traditional authority and inheritance.⁶³ In South Africa, efforts were made to codify customary law and transform it into a precedent-based system.⁶⁴ To promote this, South African courts interpreted customary law through their decisions and in the process created official and non-official types of customary law.⁶⁵ It has been posited that much of the customary law in South African courts

⁵⁷ S.89(3) & (4) Child Rights Act 2003.

⁵⁸ S.82 Child Rights Act 2003.

⁵⁹ S.84(1) Child Rights Act 2003.

⁶⁰ S.85 Child Rights Act 2003.

⁶¹ S.86 Child Rights Act 2003.

⁶² S.88 Child Rights Act 2003.

⁶³ Ndulo M 'African Customary Law, Customs and Women's Rights' (2011) 18 *Indiana Journal of Global Legal Studies* 88.

⁶⁴ Bennett TW Human Rights and African Customary Law under the South African Constitution (1995) 61-62.

⁶⁵ Maithufi I 'The Best Interests of the Child and African Customary Law' in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 137.

prior to 1994 was taken from precedents and the validity is therefore doubtful.⁶⁶ Authors called this official customary law which also developed in Nigeria and Ghana “judicial customary law” and argued that the official customary law will differ significantly from the customary law that the people concerned follow in reality.⁶⁷ This is because the living customary law which the people concerned follow exists in the norms of their everyday life and it is dynamic because it changes in line with the circumstances and beliefs of the people it applies to.⁶⁸ Diala argues that because the norms of living customary law grow from the way in which people adapt to internal and external social changes, they ought to be the inspiration of the best interests of the dependants’ principle.⁶⁹

In South Africa, the non-official customary law does not accept a woman as a party in a dispute over custody, marriage negotiations or lobolo (bride wealth). After lobolo has been paid in a customary marriage, the reproductive capacity of the woman devolves on the husband’s family so that the husband gains the custody and guardianship over her children.⁷⁰ Where a woman is not married, the guardianship of children born to such a woman vests on the father or male guardian. This is because such a woman is still considered as a minor under customary law.⁷¹ There was a reshaping of customary law in the South African case of *Sekupa v Jonkman* where the court held that the natural mother of a child could be admitted as a litigant in a custody case.⁷² Authors believe that this change is possible because of the regular interpretation of customary law by the legal system inherited from the colonial rule and not by those who are

⁶⁶ Bennett TW *Customary Law in South Africa* (2004) 29.

⁶⁷ Allott A ‘What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950’ (1984) 28 *J. AFR. L.* 60.

⁶⁸ Himonga C ‘The future of living customary law in African legal systems in the 21st century and beyond, with special reference to South Africa’ in Fenrich J, Galizzi P & Higgins T (eds) *The Future of Customary Law* (2011) 31-57.

⁶⁹ Diala A ‘Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa’ (2014) 14(2) *African Human Rights Law Journal* 633-654.

⁷⁰ Maithufi I ‘The Best Interests of the Child and African Customary Law’ in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 143 -144.

⁷¹ Maithufi I ‘The Best Interests of the Child and African Customary Law’ in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 145.

⁷² *Sekupa v Jonkman* 1966 B.A.C. (C) 20.

traditionally saddled with the interpretation of evolving customary law.⁷³ The South African Law Commission recommended that the customary court should have civil jurisdiction over matters that emanate from customary law with the exception of matters that relate to custody and guardianship of minors, maintenance and dissolution of marriages.⁷⁴ Although women groups supported this move, traditional leaders strongly opposed it because they saw it as a limitation to their authority. However, the SALC stated that the recommendation is to promote the values of equality, non-sexism in the Constitution and the principle of the best interests of the child.⁷⁵

6.6. Similarities and dissimilarities between different forms of childcare

Although the underlying principle in the different forms of child care is that one person is called upon to protect or represent the interest of another, the consequences of adoption have a more far reaching effect than foster care and guardianship.⁷⁶ Adoption raises the status of the adopted child to the natural child of the adoptive parents, while foster care and guardianship are usually for a certain duration and towards a specific purpose respectively.⁷⁷ Fostering comes to an end upon the attainment of majority, while guardianship may be for the purpose of representing the interest of a particular person in a certain proceeding or as a result of infirmity, disability, incapacity or infancy.⁷⁸ In foster care, there is no intention to break off the relationship with the biological family; therefore, the child does not acquire any property rights from the foster parents' family.⁷⁹ Foster care does not affect the status of a child but adoption does.⁸⁰ Studies have shown that there is more inclination towards statutory or customary foster care than

⁷³ Kent A 'Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights Under Customary Law in Africa' 28 *Mich. J. Int'l L* 516 (hereafter Custody, Maintenance, and Succession).

⁷⁴ SALC Project 90, Traditional Courts and the Judicial Function of Traditional Leaders (2003) 10 available on https://www.justice.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf (accessed 4 November 2021) The SALC was renamed as the South African Law Reform Commission (SALRC) on 17 January 2003.

⁷⁵ SALC Project 90, Traditional Courts and the Judicial Function of Traditional Leaders (2003) 10. available on https://www.justice.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf (accessed 4 November 2021).

⁷⁶ Okaisabor N *Adoption, Guardianship and Fostering* (2019) 4.

⁷⁷ *Robb v Mealey's Executor* (1899) 16 SC 133–136. See '2.2 DEFINITION OF ADOPTION'. See also Okaisabor N *Adoption, Guardianship and Fostering* (2019) 4.

⁷⁸ Okaisabor N *Adoption, Guardianship and Fostering* 4.

⁷⁹ Maithufi I (2001) in SALC (2002) 26.

⁸⁰ Martin P & Mbambo B (2011) 43.

adoption because the foster care aligns more with the traditional extended family care ethic.⁸¹

In a study, members of the community asserted that:

There is no passion for adoption as someone is always already (sic) looking after a child. We don't actively have to look for someone in the community to look after a child. The community automatically takes care of them.⁸²

The study also revealed that when people who are engaged in informal child placement are encouraged to transform from foster care to adoption, they always refuse by saying that there is no need for adoption as the child involved is already a member of the family.⁸³

A number of participants in a South African focus group said that there was a strong cultural disapproval to adoption. The participants emphasised that:

It is not possible to adopt a child whose surname you do not know. Whose ancestors are you going to call when you do not know his or her source? The only thing you can do is report this child to the ancestors, slaughter a goat so that the child can be protected while in your home but you can never give this child your family's surname. Her ancestors will fight you.⁸⁴

6.6.1. Distinction between customary adoption and other forms of child care

As earlier stated, customary law adoption and guardianship often overlap.⁸⁵ This is the reason why people often wonder what the distinguishing factor is. The distinguishing factor between customary adoption and other forms of child care will appear to be the length of time in which the adoptee resides with the adopter and the financial investments involved in raising the child. This is because customary law adoption has a longer duration while guardianship has a shorter

⁸¹ Martin P & Mbambo B (2011) 43.

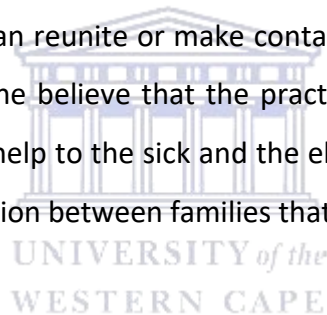
⁸² Martin P & Mbambo B (2011) 43.

⁸³ Martin P & Mbambo B (2011) 43.

⁸⁴ Martin P & Mbambo B (2011) 43.

⁸⁵ See '6.2.2 Foster care and Guardianship in Botswana'.

time frame. This longer duration of relationships invariably results in greater financial commitment. This scenario was discussed in chapter three of this thesis.⁸⁶ It is a custom in Yoruba land, western Nigeria identified as *omo iyawo*. *Omo iyawo* literally means child of the bride. Here, the bride brings into her new home, non-biological children. *Omo iyawos* are raised up to adulthood as the biological children of the new home. When they are getting married, the adoptive parents assume the financial responsibilities of the marriage ceremony and all the necessities of starting a new home. In addition, the adoptive parents also train the *omo iyawos* in various skills. However, this line of demarcation has been criticised. It has been argued that in the absence of a specified time frame and details of financial investment, it is difficult to determine which of the two categories the relationship falls into.⁸⁷ Authors believe that adoption should be reserved for children whose parents are dead or whose whereabouts are unknown, whilst children who fall into the other categories should be put out for foster placement or guardianship. This is so that they can reunite or make contact with their natural parents in the future.⁸⁸ Bledsoe and Isiugo-Abanihe believe that the practices of fostering and adoption will reduce the risk of famine, provide help to the sick and the elderly. They added that in addition, adoption provides a lasting connection between families that are involved.⁸⁹



6.7. Comparisons of children raised in foster care placement and other institutions

A study that compared children who were raised in foster placement with those who were raised in institutions prior to being placed in foster care at about the age of three years revealed that certain problems were identified with the latter group. Some of the problems identified with the children that were raised in institutions prior to being placed in foster care were aggressive behaviour, hyperactivity, and restlessness.⁹⁰ Authors believe that a possible explanation for the

⁸⁶ See '3.4.3 Quasi – adoption'.

⁸⁷ Okaisabor N Adoption, Guardianship and Fostering (2019) 15.

⁸⁸ Tajudeen OI 'Adoption Practice in Nigeria' (2013) 19 *Journal of Law, Policy and Globalisation* 12.

⁸⁹ Bledsoe C & Isiugo-Abanihe U 'Strategies in child-fosterage among Mende grannies in Sierra Leone' in Lesthaeghe JL (ed) *Reproduction and Social Organization in Sub-Sahara Africa* (1989) 4 *Univ of California Press* 442-74.

⁹⁰ Goldfarb W 'The Effects of Early Institutional Care on Adolescent Personality' (1943)14 *Child Dev* 213. See also Golombok S 'Attachment' in Gaber I & Aldridge J (eds) *In the Best Interests of the Child: culture, identity and transracial adoption* (1994)108- 109 (hereafter Golombok in Gaber & Aldridge *In the Best Interests of the Child*).

behavioural patterns found in the children that were raised in institutions prior to being placed in foster homes and which were not found in those raised by foster families is that the latter must have adapted to the particular institutional context.⁹¹ Moreover, the authors expressed the belief that the children raised in institutions must have imbibed those behavioural patterns because they have seen their older peers have their needs met through such behaviour.⁹²

6.8. Foster care and inter-country adoption

Although this chapter is about foster care and guardianship, I believe that it is important to discuss inter-country adoption because there were instances where parents placed their children in orphanages believing that it would be a kind of temporary foster placement and subsequently lost the child through inter-country adoption.⁹³ Generally, inter-country adoption is not a new experience but inter-country adoption from African countries to the United States has increased in the last few years.⁹⁴ In 2017, the number of adoptions to the USA increased in 42 countries. Nigeria is one of the dozen countries in four continents that experienced double digit increase in adoption to the USA.⁹⁵ The increase in the number of intercountry adoptions to the USA is as a result of the reduction in the number of children available for adoption in United States. A factor that all the countries involved in intercountry adoption to the USA have in common is their relatively low per capita GDP in comparison to the USA.⁹⁶ The low per capita GDP of these countries is a cause for concern, as there are worries that these countries may not be economically strong to monitor and regulate intercountry adoption to the USA.⁹⁷

⁹¹ Tharp-Taylor S *The Effects of Early Social Deprivation on Children Reared in Foreign Orphanages* (2003) 26 available at ERIC, ED475594.

⁹² Tharp-Taylor S (2003) 26.

⁹³ Bowie F 'Adoption and the Circulation of Children' (2004) 3 *Cross-Cultural Approaches to Adoption* 14.

⁹⁴ Root V, 'Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations' (2007) 8 *Chicago Journal of International Law* 325 (hereafter Angelina and Madonna).

⁹⁵ Available at <https://travel.state.gov/content/dam/Newadoptionassets/pdfs/> (accessed 15 December 2021).

⁹⁶ Root V Angelina and Madonna (2007) 8 *Chicago Journal of International Law* 333.

⁹⁷ Root V Angelina and Madonna (2007) 8 *Chicago Journal of International Law* 333.

The African Charter and the UNCRC protect the rights of children by limiting inter-country adoption to those countries that have signed the ACRWC or the UNCRC.⁹⁸ This allows the countries to guarantee a minimum standard of care for children in the adoptive countries. This minimum standard of care includes laws that relate to parental rights, enforcement of adoption laws and other relevant issues that will determine the best interest of the child when deciding whether or not to allow inter-country adoption.⁹⁹

Nigeria is one of the ten most popular non-Hague Convention on Inter-country Adoption (HCIA)- member countries from which the USA adopted children in 2005.¹⁰⁰ In April 2016, the Ministry of Social Welfare and the High Court Family Division in Lagos state, Nigeria stated that the ministry will no longer require prospective adoptive parents to be Nigerian citizens or of Nigerian descent in order to pursue an inter-country adoption of a Nigerian child in Lagos state.¹⁰¹ There is a growing number of adoption that are taking place and not meeting the minimum standards required for intercountry adoption. This has made it necessary to re-evaluate the procedures involved so as to ensure that the principle for the best interest of the child is fulfilled in these adoptions.¹⁰²

However, Nigeria has some stringent rules to govern adoption. These include foster placement for up to one year before inter-country adoption is granted and in-person investigation in the state where the adoption is granted to ensure that the information given in the adoption decree is genuine.¹⁰³ I believe that these steps are good safety measures that ensure the protection of children and curtail the occurrence of child trafficking which has become prevalent in Nigeria in recent years.

The African Charter declares that:

⁹⁸ Article 24(b) ACRWC. See also Article 21(b) UNCRC.

⁹⁹ See Article 4 & Article 20 of ACRWC. See also *Root V Angelina and Madonna (2007) 8 Chicago Journal of International Law 342.*

¹⁰⁰ *Root V Angelina and Madonna (2007) 8 Chicago Journal of International Law 334.*

¹⁰¹ Available at <https://travel.state.gov//> Intercountry Adoption News and Notices. (accessed 23 December 2021).

¹⁰² *Root V Angelina and Madonna (2007) 8 Chicago Journal of International Law 335.*

¹⁰³ S.125 Child Rights Act 2003.

inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this [African] Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin.¹⁰⁴

6.9. Problems associated with inter- country adoption

There are many problems associated with inter-country adoption, since this type of adoption has the ability to upset the birth parents, the extended family and the child. Inter-country adoption can also affect the adoptive parents, the birth country of the child and the receiving countries. This is because inter- country adoption not only involves the encroachment on the life of a child but also movement of a child from one family to another across two different countries. In inter-country adoption, a myriad of people and a minimum of two countries are affected.

Some of the problems include agitations that promoting inter-country adoption may encourage many parents to abandon their children when temporary problems arise with the hope that they can give up their children for adoption.¹⁰⁵ There are concerns that allowing inter-country adoption may give rise to black market sale of children and also child trafficking.¹⁰⁶ There are also fears that the children that are adopted in this manner are usually the brightest and healthiest children in the communities. In addition, there is an anxiety that the children's sense of identity can be eroded because of inter-country adoption. This is because a sense of identity can only be fostered in the children's country of origin, since the western cultures of the receiving countries differ from the African values of the sending countries.¹⁰⁷

¹⁰⁴ Article 24(b) ACRWC. See also Article 21(b) UNCRC.

¹⁰⁵ *Root V Angelina and Madonna* (2007) 8 *Chicago Journal of International Law* 342.

¹⁰⁶ Olsen L *Live or Let Die: Could Inter-country Adoption Make the Difference* (2004) 22 *Penn State Intl Law Review* 490 (hereafter *Live or Let Die*).

¹⁰⁷ *Root V Angelina and Madonna* (2007) 8 *Chicago Journal of International Law* 342.

6.10. Regulating foster care in treaties

The United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement is an attempt to protect children who are orphans or have been abandoned.¹⁰⁸ It reaffirms the statement of the UN Declaration on the Rights of the Child that natural parents should raise their children and if not possible, children should be raised in an emotionally, materially and morally safe environment. Article 17 makes preference for children to be raised in domestic foster care or adoptive families over foreign ones.¹⁰⁹

6.11. Best interest of the child in forms of childcare

International and regional treaties identify the best interests of the child as being of paramount importance. The UNCRC and the ACRWC provide that in all actions concerning children, the best interests of the child shall be a primary consideration.¹¹⁰ A child must not be separated from the parents except if it is in the best interest of the child to do so.¹¹¹ The UNCRC and ACRWC also provide that a child that is deprived of his or her family environment or in whose best interests cannot be brought up or allowed to remain in that environment shall be placed in an alternative care which includes a foster placement.¹¹²

In an attempt to define the best interest of the child, Linda Olsen said that “every child deserves the right to grow up and live in a community that provides security, stability and love”.¹¹³ Foster care is believed to be the best form of alternate care for children outside of their maternal home because it usually takes place within the family environment and it offers security

¹⁰⁸ United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986).

¹⁰⁹ Article 17 United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.

¹¹⁰ Article 3(1) UNCRC, Article 4(1) ACRWC.

¹¹¹ Article 9(1) UNCRC, Article 19(1) ACRWC.

¹¹² See Article 20 UNCRC and Article 25 ACRWC.

¹¹³ Olsen L Live or Let Die (2004) 22 Penn State Intl Law Review 487.

and safety to the child. Despite the many benefits of foster care, there are many deficiencies that have been identified worldwide, which make foster care doubtful for serving the best interests of the child at all times and complying with the principles of social justice.¹¹⁴

When a child is not raised by a biological parent, he or she will very likely be raised in a foster home. This is because the prerequisite put in place for a child to go to a foster home are easier and less burdensome than an adoption. The first viable option therefore is for a child to be raised in a foster home. Some scholars believe that children that are nurtured in foster environments will usually be moved from one foster home to another and the life of the children will be devoid of stability. The writers are of the opinion that it will be in the best interests of the children if they are adopted as soon as possible. Golombok maintains that children who were fostered in a couple of foster homes may not be able to form attachments between them and their foster parents.¹¹⁵ Bass, Shields and Behrman stated that “For too many of these children, foster care is no safe haven. Instead, the children drift from foster home to foster home, lingering in care while awaiting to become part of a permanent family.”¹¹⁶

A study confirmed that grandparents are in the top list of foster parents followed by nuclear families that are related to the child. This confirms that foster care is within the family context.¹¹⁷ When grandparents act as foster parents, children grow up within a family environment and not in an institution. I believe that when children grow up with their grandparents, it will be advantageous to the well-being of the child, as he or she will grow up in a familiar environment filled with affection, warmth and love. My argument is in agreement with the international and regional treaties, which provides that in considering an alternative family care of the child and the best interests of the child, regard should be had for continuity in the child’s upbringing and to the child’s religious, ethnic and linguistic background.¹¹⁸ Some writers have posited that

¹¹⁴ Böning A & Ferreira S ‘An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa’ (2013) 49(4) *Social Work* 519.

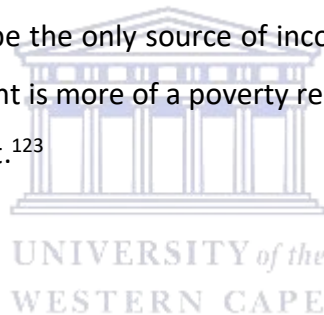
¹¹⁵ Golombok in Gaber & Aldridge *In the Best Interests of the Child* (1994) 111.

¹¹⁶ Bass S, Shields M & Behrman R ‘Children, Families, and Foster Care: Analysis and Recommendations.’ *The Future of Children* (2004) 14 Princeton University 5.

¹¹⁷ Böning A & Ferreira S ‘An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa’ (2013) 49(4) *Social Work* 531.

¹¹⁸ Article 25(3) ACRWC, Article 20(3) UNCRC.

grandparents are the best in caring for young children since they have had enough experience in caring for their own children and possibly other people's children.¹¹⁹ Grandparents have sufficient knowledge on food that are appropriate for children of different ages and are also believed to be more affectionate and attentive to the children under their care than the younger women.¹²⁰ Nevertheless, the question that arises is whether grandparents are qualified to guide the children through the different stages of growth due to the age differences and absence of sustained foster care services. Such family formations will definitely encounter difficulties in terms of acting in the best interest of the child.¹²¹ In addition, foster grants are not always employed in the best interest of the child's physical, social, emotional or intellectual wellbeing. This is because foster children are usually placed in poor families as a result, the grants become part of the total income of the family which is employed to take care of all the occupants.¹²² Studies have shown that in many cases, there is more than one child in the foster care, which shows that the foster grant might be the only source of income for such family structures. This supports the discourse that the grant is more of a poverty relief package and that the child does not benefit the most from the grant.¹²³



6.12. Conclusion

Adoption raises the status of an adopted child to that of the natural child of the adoptive parents, while foster care and guardianship are for a certain duration or a specific purpose. The underlining principle in the various forms of child care is that one person is called upon to protect or represent the interest of another.¹²⁴ Customary law adoption and guardianship often overlap,

¹¹⁹ Bledsoe C & Isiugo-Abanihe U 'Strategies in child-fosterage among Mende grannies in Sierra Leone' in Lesthaeghe JL (ed) *Reproduction and Social Organization in Sub-Sahara Africa* (1989) 4 *Univ of California Press* 453.

¹²⁰ Bledsoe C & Isiugo-Abanihe U 'Strategies in child-fosterage among Mende grannies in Sierra Leone' in Lesthaeghe JL (ed) *Reproduction and Social Organization in Sub-Sahara Africa* (1989) 4 *Univ of California Press* 453.

¹²¹ Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 532.

¹²² Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 539.

¹²³ Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 532.

¹²⁴ See '6.6 Similarities and Dissimilarities between different forms of childcare'.

but the distinguishing factor is the duration of the relationship and the financial obligation involved.¹²⁵ However, this thin line of demarcation has been criticised. It has been argued that adoption should be for children whose parents are deceased or whose whereabouts are unknown.¹²⁶ Other categories of children should be put up for guardianship and foster care. This will create a platform for them to reunite with their natural parents in the future. Foster care does not break off the relationship between a child and the biological family as a result a child does not acquire property rights from the foster parents' family.¹²⁷ Foster care is believed to be the best form of alternate care for children as they remain within a familiar environment. Another benefit of foster care is that it creates a forum for the child to reunite with the natural parents at a later date. This is perhaps the reason for the inclination towards foster care than adoption because the former aligns with the extended family care ethic.¹²⁸ However, there are many deficiencies associated with foster care that makes it doubtful whether it serves the best interest of the child at all times and complies with the principles of social justice.¹²⁹

Although grandmothers are alleged to be the best in caring for young children as a result of long experience, questions have arisen as to whether grandparents are qualified to give the necessary guidance to children through the different stages of growth as a result of the age difference and absence of continuous foster care services.¹³⁰ Such arrangements will certainly encounter difficulties in serving the best interest of the child. Moreover, there are arguments that the foster care grant is more of a poverty relief package that are not always employed in the best interest of the child. This is because in most cases the foster care grant is the only source of income for the whole family.¹³¹ Employing the foster grant as a poverty relief package will negate the purpose of the grant.¹³² However, the benefits of having grandmothers as foster parents are

¹²⁵ 3.4.2 Informal customary law adoption. See also Okaisabor N Adoption, Guardianship and Fostering (2019) 15.

¹²⁶ See '6.6.1 Distinction between customary adoption and other forms of child care.'

¹²⁷ See '6.6 Similarities and Dissimilarities between different forms of childcare'.

¹²⁸ See '6.6 Similarities and Dissimilarities between different forms of childcare'

¹²⁹ See '6.10 Best interest of the child in forms of childcare'.

¹³⁰ See '6.10 Best interest of the child in forms of childcare'.

¹³¹ See 6.10 Best interest of the child in forms of childcare. See also Böning A & Ferreira S (2013) 532.

¹³² Article 20(2)(a). provides that states are to assist parents and other persons responsible for the child with regard to nutrition, health, education, clothing and housing.

numerous and can be harnessed for the well-being of the child, while the deficiencies inherent in that family structure can be mitigated by ensuring that foster grants are employed in the best interest of the child and not for the whole family.



CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

7.1. Introduction

This study set out to investigate how the legal framework of Nigeria, South Africa and Botswana provide for customary law child adoption. While there is a comprehensive legal framework for the adoption of children under statutory law, there is less clarity on adoption under customary law in the three countries under review. Majority of the children who live in customary law communities in these three countries are found to be entrenched in poverty, gender inequality and low levels of rights enjoyment.¹ This research examined how these frameworks reflect indigenous African values and the best interest of the child principle. In so doing, it investigated how the rights of adopted children as enjoined in the human rights instruments are protected.

To answer the research questions, the study utilised literature review and content analysis of judicial decisions in South Africa, Nigeria and Botswana examined how customary law adoption is recognised. It assessed and interpreted the principles that underlie customary law adoption in these countries.² Legislative sources such as the 1999 Constitution of the Federal Republic of Nigeria, the 1996 Constitution of the Republic of South Africa, and the 1966 Constitution of Botswana were examined. The Nigerian Child Rights Act 2003, the Adoption of Children's Act No. 25 of 1923, the Children's Act 31 of 1937, and the Children's Act 33 of 1960 were also examined. The Childcare Act 74 of 1983 and the Children's Act No. 38 of 2005 were contrasted with the works of scholars that are relevant to this study. Court decisions from these three countries were analysed for judicial attitudes and patterns. The researcher used physical and online libraries to access textbooks, articles on customary law, customary law adoption and children's rights. There was an examination of data from empirical work done by organisations that work hand in hand

¹ Martin P & Mbambo B *An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa* (2011) 8.

² Hutchinson TC & Duncan N 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) *Deakin Law Review* 83–119.

with children. What follows this introduction is a summary of the study's findings, as well as suggested legislative and policy recommendations.

7.2. Summary of chapters

7.2.1. Chapter one

Chapter one provided a background to the entire study. It highlighted the research problem and the scope of the study. The main question the study sought to answer was: In what ways does the legal framework of Nigeria, South Africa and Botswana provide for child adoption under African customary law? This question was explored with the following sub-questions:

- a) What factors promote or inhibit the development of a legal framework for child adoption under African customary law in these three countries?
- b) How does customary law adoption impact on children's rights in these countries?
- c) What are the consequences of unwritten rules, laws or procedures for the adoption of children under customary law in these three countries?



The chapter explained the research methodology that was employed. Finally, it outlined the justification for the research.

7.2.2. Chapter two

Chapter two commenced with a working definition of adoption. It observed that the reasons why people opt for adoption are diverse and vary from person to person. It analysed the history of adoption laws in Nigeria, South Africa and Botswana and the legal framework that govern them. It is evident from the chapter that the legal framework does not formally accommodate customary law adoption. It was also observed that there are no statutory laws governing customary law adoption in all of the three countries.

This chapter found that Nigeria's earliest state legislation on adoption was enacted in 1965. Thereafter, other states of the federation enacted their legislation on adoption. Currently, the Child Rights Act of 2003 regulates adoption in that country. The CRA of 2003 is the first attempt of the federation to have a uniform legislation to govern adoption. Although it states that its provisions supersede those of other enactments on adoption, it made no reference to customary law adoption.

On the other hand, South Africa's first enactment on adoption was the Adoption of Children's Act No 25 of 1923. There were subsequently four other enactments. The current legislation is the Children's Act No 38 of 2005. In all of these five enactments, there was no provision for customary law adoption.

Whilst Botswana's only legislation on adoption to date is the Adoption of Children Proclamation No. 63 of 1952, it contains no provisions to govern customary law adoption.³ This study observed that this is the situation, despite the fact that the vast majority of the people in Botswana being Africans live and settle their disputes largely in accordance with customary law. It was elucidated that adoption was always part of Roman law. Although the *adrogatio* and the *adoptio* were two ways that adoption takes place under the Roman law, there was a difference between both in form and function.

7.2.3. Chapter three

This chapter sought to answer the study's central question in respect of Nigeria. It investigated the origin and purpose of customary law adoption in Nigeria, with emphasis on the Ekpeyi tribe of the Cross-River State. The chapter found that in Nigeria, adoption has its origin in the principle that childcare is viewed as a communal responsibility and not the sole duty of the child's biological parents.⁴ The chapter made a distinction between formal and informal customary law adoption. It found that formal customary law adoption is initiated by a ceremony involving the

³ Adoption of Children Proclamation is now known as the Adoption of Children Act [Cap 28:01], Laws of Botswana.

⁴ Onyango P & Bali S (1996) 142.

families of both the intending adopter and the adoptive child.⁵ The aim of the ceremony is to formally transfer the rights and duties of the natural parents of the adoptive child to the intending adopter. In informal adoptions, there are no ceremonies involved. The chapter also discussed the procedures for a valid customary law adoption. It finds that it is cardinal that the members of the family of the intending adopter are present to witness the adoption process where the adopter formally nominates the adoptee.⁶ In the absence of this procedure, the adoptive child will not be recognised nor given the right as other biological members of the family. The adopted child's right to assume any property depends on the validity of the procedure.⁷ It is based on the foregoing that this chapter highlights the challenges to the rights of the child adopted under customary law. The chapter explained that the fundamental human rights provided in the Constitution of the Federal Republic of Nigeria, is denied the child adopted under customary law. The chapter concludes that the authors who are of the view that there is no adoption in the customary law setting but other forms of child care placements are in the majority.



7.2.4. Chapter four

This chapter examined whether customary law adoption exists in South Africa and how its validity is determined. Accordingly, it found that there has been an ongoing debate on whether or not customary law adoption exists in South Africa. This chapter drew attention to the different arguments by various writers on this issue.

The chapter showed that there are two principal requirements to validate an adoption under customary law. There has to be an agreement between the families of the adopted child and the adoptive parent(s). This agreement should be communicated to the traditional leader of the area. Secondly, due publicity must be given to the adoption process.⁸ The validity of customary law adoption rests on the above requirements.

⁵ Osondu AC *Modern Nigerian Family Law & Practice* (2012) 257.

⁶ Onuoha RA 'Discriminatory Property Inheritance Under Customary Law in Nigeria' (2008) 10 *ICNL* 79.

⁷ Onuoha RA (2008) 10 *ICNL* 79.

⁸ (2001) 34 *De Jure* 390 at 391 - 392.

The chapter examined how customary law adoption is regulated and its gaps. It found that they are unregulated, unmonitored and not recognised by statutory law, generating a risk of abuse and exploitation of vulnerable children.⁹

The chapter found that there is no general common law recognition of adoption of children under customary law. This contradicts the right to equality.¹⁰

The chapter found that the Children's Act provides for reporting of abused or neglected children and children in need of care and protection.¹¹ However, there is currently no duty on state officials to help vulnerable children, family access to prevention and/or early intervention services.¹² The chapter drew the attention of the efforts made by the National Child Care and Protection Policy to close the gaps in this regard. However, the policy has not made specific provisions for customary law adoption. It provides for kinship care, which is listed as foster care. The chapter argued that definitions of child adoption under customary law and kinship care may be similar but the two are different concepts.

This chapter concludes that South African courts continue to recognise customary law adoption on an *ad hoc* basis of enforcing maintenance of children by their adoptive parents. It proposes that other benefits in customary law adoption should be harnessed for the advantage of many helpless children.

7.2.5. Chapter five

This chapter examined how Botswana's legal framework provides for the adoption of children under customary law and its strengths and weaknesses. Accordingly, it found that before the British colonialists arrived in Botswana, certain traditional norms and values were already in existence. This customary law has been practiced for centuries, but its specific content was

⁹ Martin P & Mbambo B (2011) 11. UNCRC, Article 9(1); ACRWC, Article 19(1); UNCRC Article 25.

¹⁰ Martin P & Mbambo B (2011) 44.

¹¹ Section 110 of the Children's Act 38 of 2005.

¹² Proudlock P & Rohrs S 'Recent developments in law and policy affecting children' 2018 *Children, Families and the State* 15.

unknown as it was not written.¹³ It found that Botswana currently recognises both customary law and statutory adoption. Customary law adoption was the original type of adoption in Botswana and it was in agreement with the customary practices of the people. These practices were not written down and as a result they were always changing even as the ways of life of the people developed.¹⁴

It found that most of the adoption under customary law in Botswana are private arrangements between families and most often, do not end up in the customary courts. In some cases, adoption matters end up in the high court in instances where issues of inheritance rights and maintenance of an adoptive child arise.¹⁵ The chapter found that, a system exists in Botswana where children are sent to live with a relative but the biological parents remain the guardians of the child. The biological parents continue to have a say in the child's life. The connection between a child and the biological parents was never totally cut off by adoption as a child could return to the biological parents at any time.¹⁶ The chapter argued that this type of arrangement will deprive a child of stability that is pivotal for the upbringing of a child. The chapter revealed that customary law is applicable to members of a tribe or tribal communities and consequently, adoption in terms of customary law is not available to everyone in Botswana.¹⁷

7.2.6. Chapter six

Chapter six explained that the distinguishing factor between customary law adoption and guardianship is the length of time in which the adoptee resides with the adopter and the financial investments involved in raising the child.¹⁸ The chapter explained that this line of demarcation has been criticised.

¹³ Booi L Globalex available at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

¹⁴ Sigweni S *Adoption Laws and Procedures of Botswana* (unpublished LLM thesis, 2008) 18.

¹⁵ *Montshiwa v Montshiwa* [1999] 2 BLR 216 (HC).

¹⁶ Roberts S *Tswana Family Law* (1972) 13.

¹⁷ Quansah EK *Family Law in Botswana* (2006) 126.

¹⁸ Okaisabor N *Adoption, Guardianship and Fostering* (2019)15.

The chapter sought to highlight the similarities and dissimilarities between the different forms of child care. Accordingly, it shows that the underlying factor in the different forms of child care is that one person is called upon to protect or represent the interest of another. However, the consequences of adoption have a greater effect than foster care and guardianship.

The chapter argues that one of the benefits of foster care is that it usually takes place within the family environment. It also creates a forum for the child to reunite with the natural parents at a later date.¹⁹

The chapter argues that international and regional treaties identify the best interest of the child as being of paramount importance. The UNCRC and ACRWC also provide that a child who is deprived of his or her family environment shall be placed in an alternative care which includes a foster placement.²⁰ Chapter six concludes that foster care has many benefits. However, its shortcomings make it doubtful for serving the best interest of the child at all times and complying with the principles of social justice.²¹



7.3. Policy Recommendations

Considering the analysis in the preceding chapters, there are obviously lapses and gaps in customary law adoption that are need to be closed. There continues to be wide discrepancies between the statutory system of adoption and customary law adoption in the three study countries. This is despite the fact that the two types of adoption have the same consequences. Children who are affected by customary law adoption continue to be marginalised and denied rights that are available to biological children. Accordingly, the policy recommendations below are offered as potential measures to address the relevant issues and objections with regard to the legal framework for customary law adoption in the three countries under review.

¹⁹ Tajudeen OI 'Adoption Practice in Nigeria' (2013) 12.

²⁰ See Article 20 UNCRC and Article 25 ACRWC.

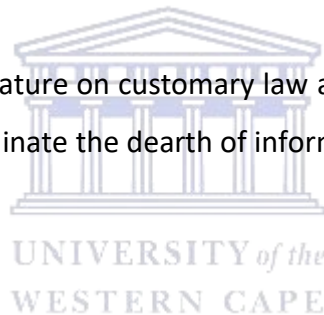
²¹ Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 519.

7.3.1. Nigeria

7.3.1.1. Enforcement of equality rights in Nigeria

This study proposes that equality of persons as provided for in the Constitution of the Federal Republic of Nigeria should be accorded to the adopted child and there should be no discrimination of persons in customary law settings. The Constitution of the Federal Republic of Nigeria provides for the fundamental human rights of every person, which includes dignity of human persons and rights to acquire and own immovable property.²² These rights are accorded to the biological child in customary law settings in some tribes but are denied to the adopted child. It has been confirmed in *Administrator General v. Tuwase* that in relation to succession, the position of the adopted child is subordinate to the legitimate biological child.²³ The case of *Ideozu v Ochoma* portrayed how the adopted child is often denied the rights that are freely enjoyed by the biological child.²⁴

Since this study found that the literature on customary law adoption in Nigeria is inadequate, it recommends more research to eliminate the dearth of information in this regard.



7.3.2. South Africa

7.3.2.1. Recognition of customary law adoptions by South African courts

Chapter four analysed a selection of cases that deliberated on child adoption under customary law in South Africa. South African courts continue to recognise customary law adoption on an *ad hoc* basis of enforcing maintenance of children by their adoptive parents. There are other benefits inherent in customary law adoption. These benefits, which include access to parental care and good family environment for many orphans and vulnerable children, should be harnessed for the advantage of many helpless children. This study proposed more judicial

²² Sections 33 -46 of the 1999 Constitution of the Federal Republic of Nigeria, as amended (hereafter the Constitution).

²³ (1946) 18 NLR 88.

²⁴ (2006) 4 NWLR (Pt 970) 364.

decisions on this subject. This will give prominence to a system of adoption that is obsolete and difficult to be endorsed and recognised in its own right.

7.3.2.2. Monitoring and screening prospective adoptive parents in South Africa

There should be regulations to monitor and screen prospective adoptive parents in South Africa. Although the National Child Care and Protection Policy of 2019 appears to close some of the gaps in the regulations of the welfare of children in South Africa, the gaps in the regulation of child adoption under customary law are still visible. There are also no reviews of these adoptions once they are concluded. More research is needed to close these gaps.

7.3.2.3. Specific provision for customary law adoption in NCCPP

Definitions of child adoption under customary law and kinship care may be similar, but the two are different concepts. It is crucial that child adoption under customary law be specifically provided for in policy and statutes in order to avoid ambiguity. Until that is done, there will be no clarity and child adoption under customary law will continue to be in a state of neglect. Currently, adoption of children under customary law is still unregulated and the transfer of parental rights and responsibilities are not recognised by statutory law in South Africa.

7.3.3. Botswana

7.3.3.1. Stronger structure to validate customary law adoptions in Botswana

This study proposes that a stronger and more profound structure than mere agreement should be put in place to validate customary law adoption in Botswana. This is because an encroachment on a child's life that is brought about by adoption should be validated by a wide formation. The dictates of regional and international treaties on taking into consideration the views of the child in matters that concern them should be enforced by legislation. This is because currently the views of children adopted under customary law are disregarded.

7.3.3.2. *Standard definition of a child*

There should be a standard definition of a child that will be effective in various legislation in Botswana. This definition should also be effective in terms of customary law adoption. This will result in uniformity as far as the definition of a child in legislation is concerned.

7.3.3.3. *Promoting the rights of children*

Although Botswana has signed several international and regional treaties on the rights of the child, many children do not know their rights. This has been attributed to the absence of pressure groups and a weak civil society clamouring for children's rights. Pressure groups and civil societies should be empowered through the provisions of the necessary resources and facilities that will enable them to promote the enforcement of the rights of children. Communities that make up Botswana including children should be educated and well informed about the rights of children. This can be achieved inter alia, by making this part of the school curriculum that will be taught in schools. This curriculum should be taught from the early grades at school until university level. This will help to inculcate awareness on the rights of children in the communities.

7.3.4. *Foster care and guardianship*

Foster care and guardianship are viable forms of child care whose benefits can be harnessed and incorporated into customary law adoption. Some of the benefits of both forms of child care include the opportunity to grow up in a familiar environment and reunite with their natural parents in the future. Grandmothers have been proved to be very experienced in caring for children. Grandmothers and other mature nuclear family members who act as foster parents can be empowered to be better foster parents through the provision of a viable structure. This structure should enable a sustained foster care service and ensure that foster grants are used strictly in the best interests of the child and not for the whole family.

7.4. Closing remarks and further research

Customary law adoption has been the foundation of support for many helpless children living in customary law communities in the countries under review. This study has shown that there is no legal framework in place to regulate adoption under customary law. This is in spite of the innumerable years of its practice. It is hoped that the result of this study will create an awareness of the gaps in the administration of customary law adoption and instigate law reform aimed at redressing this loophole. This is crucial as children are naturally vulnerable and prone to be abused by opportunists who will take advantage of their helplessness. Specific provisions should be provided to address customary law adoption. This will help to modify the argument that adoption is not an established practice of customary law. Customary law adoption should be recognised in statutory enactments in the same manner as statutory adoption in all the three countries under review. This is critical because the two kinds of adoption have the same legal consequences.

There is obviously a need for further research on customary law adoption in Botswana, Nigeria, and South Africa. Such research will reveal the lack of protection of the fundamental human rights that some children adopted under customary law are entitled to. Further research will also reveal some unacceptable disparities between adoption under statutory law and customary law.

BIBLIOGRAPHY

Books and book chapters

Bekker JC 'Children and young persons in indigenous law' in Robinson JA (ed) *The Law of Children and Young Persons in South Africa* (1997) Durban: Butterworths.

Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) Cape town: Juta.

Bennett TW 'The conflict of laws' in Bekker JC, Rautenbach C & Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2 ed 2006 Durban: LexisNexis Butterworths.

Bennett TW *A Sourcebook of African Customary Law in Southern Africa* (1991) Cape town: Juta.

Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) Cape town: Juta.

Bledsoe C & Isiugo-Abanihe U 'Strategies in child-fosterage among Mende grannies in Sierra Leone' in Lesthaeghe JL (ed) *Reproduction and Social Organization in Sub-Sahara Africa* (1989) Univ of California Press.

Bowie F 'Adoption and the Circulation of Children' in *Cross-Cultural Approaches to Adoption* (2004) Routledge: Abingdon.

Chynoweth P 'Legal research' in Knight A & Ruddock L (eds). *Advance Research Methods in the Built Environment* (2008) West Sussex: Blackwell Publishing Ltd.

Golombok S 'Attachment' in Gaber I & Aldridge J (eds) *In the Best Interests of the Child: Culture, Identity and Transracial Adoption* (1994) London: Free Association Books.

Himonga C 'The future of living customary law in African legal systems in the 21st century and beyond, with special reference to South Africa' in Fenrich J, Galizzi P & Higgins T (eds) *The Future of Customary Law* (2011) Cambridge University Press.

Maithufi I 'The best interests of the child and African customary law' in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) Lansdowne: Juta.

Martin P & Mbambo B *An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa* (2011) Cape Town: Save the Children.

Molokomme A & Mokobi K 'Custody and guardianship of children in Botswana' in Ncube W (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) Aldershot: Ashgate.

Molokomme A *Children of the Fence: the maintenance of extra-marital children under law and practice in Botswana* (1991) Leiden: African Studies Centre.

Nhlapo T et al *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape town: Oxford University Press.

Nigerian Institute of Advanced Legal Studies(ed.) *Restatement of Customary Law of Nigeria* (2013) Ibadan: Safari Books.

Nsereko DDN *Constitutional Law in Botswana* (2002) Gaborone: Pula Press.

Nwogugu E.I *Family Law in Nigeria* (1990) Ibadan: Heinemann.

Obi S.N.C *Modern Family Law in Southern Nigeria* (1966) London: Sweet & Maxwell.

Onyango P & Bali S 'Regional Practice: The African Situation' in Doek J el al (eds) *Children on the Move: How to Implement Their Right to Family Life* (1996) The Hague: Martinus and Nijhoff Publishers.

Osondu, AC *Modern Nigerian Family Law & Practice* (2012) Lagos: Printable Publishing Company.

Poste E *Gai Institutiones* 4 ed (1904) Oxford: Clarendon Press.

Quansah EK *Introduction to Family Law in Botswana* 4 ed (2006) Gaborone: Pula Press.

Roberts S *Tswana Family Law* (1972) London: Sweet & Maxwell.

Schulz F *Classical Roman Law* (1951) Oxford: Clarendon Press.

Seepapitso IV K 'Does customary law have a future in Botswana?' in Brothers S, Hermans J & Nteta D (eds) *Botswana in the 21st Century: Proceedings of a symposium organized by the Botswana society* (1994) Gaborone: Botswana Society.

Spiro E *The Law of Parent and Child* 4 ed (1985) Cape Town: Juta.

Tabengwa M, Khan A & partners 'Law reform – the emerging protection of children in Botswana?' in Sloth-Nielsen J & du Toit Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) Wetton: Juta.

Thomas JAC *Textbook of Roman Law* (1976) Amsterdam: North-Holland Publishing Company.

Van Hoeke M 'Legal doctrine: Which method(s) for what kind of discipline?' in Van Hoeke M (ed) *Methodologies of legal research: What kind of method for what kind of discipline?* (2011) Oxford and Portland: Hart Publishing.

Van Zyl DH *History and Principles of Roman Private Law* (1983) Durban: Butterworths.



Journal Articles

Allott A 'What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28(1-2) *Journal of African Law* 56-71.

Blom-Cooper LJ 'Whither the law of adoption' (1956) *Modern Law Review* 202-206.

Böning A & Ferreira S 'An Analysis of, and Different Approach to, Challenges in Foster Care Practice in South Africa' (2013) 49(4) *Social Work* 519 - 543.

Coetsee et al 'A Doctrinal Research Perspective of Master's Degree Students in Accounting' 2018 *South African Journal of Higher Education* 71-89.

Diala A 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2014) 14(2) *African Human Rights Law Journal* 633-654.

Dike SC & Chigbo C 'Customary Child Adoption: Ekpeye Tribe Perspective in Relation to Human Rights Challenges' (2019) 12 *The Journal of Jurisprudence* 112.

- Ebeku KS 'The Legal Status of Nigerian Children Born by a Widow: *Chinweze v. Masi* Revisited' (1994) 38 *Journal of African Law* 46- 60.
- Ehiribe I 'The Validity of Customary Law Arbitration in Nigeria' (1996) 18 *Comparative Law Yearbook of International Business* 131-154.
- Goldfarb W 'The Effects of Early Institutional Care on Adolescent Personality' (1943) 14 *CHILD DEV.* 213 – 223.
- Goody E 'Parenthood and Social Reproduction: Fostering and Occupational Roles in West Africa' (1982) 17 *Man* 789 -790.
- Hall K & Sambu W (2019). 'Demography of South Africa's children' 2019 *South African child gauge* 216-220.
- Himsworth CMG 'The Botswana Customary Law Act, 1969' (1972) 16(1) *Journal of African Law* 4-18.
- Howell S 'Adoption of the Unrelated Child: Some Challenges to the Anthropological Study of Kinship' (2009) 38 *Annual Review of Anthropology* 149-166.
- Hutchinson TC & Duncan N 'Defining and describing what we do: Doctrinal legal research' 2012 17(1) *Deakin Law Review* 83–119.
- Joubert DJ 'Interracial Adoptions: Can we learn from the Americans?' (1993) 110 *SALJ* 726-738.
- Kent A 'Custody, Maintenance and Succession: The Internalization of Women's and Children's Rights Under Customary Law in Africa' (2006) 28 *Mich. J. Int'l L* 507-516.
- Kigbu SK Child Adoption: Nature and Procedure under Nigerian Law available at <http://hdl.handle.net/10485/384>.
- Louw A 'A De Facto Adoption Doctrine for South Africa?' 2017 *Obiter* 457 -484.
- Maithufi I 'Metiso v Road Accident Fund case no 44588/2000 (T): Adoption according to customary law' 2001 *De Jure* 390-397.

Maudeni T & Levers L 'Concerns about Child Subject Research in Botswana: A call for Establishing Structures and Guidelines that Protect Children' (2005) 9 *African Sociological Review* 153 - 167.

Monye S 'Customary Law and Adoption: The "O e Gapa le Namane" Custom as a Reflection of Customary-Law Development in South Africa' (2017) 4 *Journal of Law, Society and Development* 1-19.

Moore E & Himonga C 'Living customary law and families in South Africa' 2018 *Children, Families and the State* 21 – 128.

Ndulo M 'African Customary Law, Customs and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 87 -120.

Ogwezzy O. Legal Perspective of Child Adoption under the Nigerian Law (2018) *AGORA Int'l J. Jurid. Sci.* 57-63.

Okede GW & Wegwu BI 'Marriage Institution in Ekpeye Culture: Oral Information' (2014) 2(5) *Asian Journal of Humanities and Social Studies* 742.

Olsen L 'Live or Let Die: Could Inter-country Adoption Make the Difference' (2004) 22 *Penn State Intl Law Review* 483 -525.

Onuoha RA 'Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue' (2008) 10 *Int'l J. Not-for-Profit L* 79.

Owasanoye B 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 *Family Law Quarterly* 405-428.

Proudlock P & Rohrs S 'Recent developments in law and policy affecting children' 2018 *Children, Families and the State* 10-20.

Root V, 'Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations' (2007) 8 *Chicago Journal of International Law* 323-354.



Shumba A & Moorad F 'A Note on the Laws against Child Abuse in Botswana' (2000) 14 *Botswana Journal of African Studies* 172 - 177.

Singh D 'Adoption of children born out of wedlock' (1996) 29 *De Jure* 305 -314.

Umeh N 'Reading "disability" into the non-discrimination clause of the Nigerian Constitution' (2016) 4 *African Disability Rights YearBook* 53-76.

Van der Walt G 'The history of the law of adoption in South Africa' 2014 *Obiter* 421–452.

Van Gestel R & Micklitz HW 'Why methods matter in European legal scholarship?' (2014) 20(3) *European Law Journal* 292–316.

Table of cases

Nigeria

Administrator General v. Tuwase (1946) 18 NLR 88

Akinwande vs Dogbo (Unreported case no AB/26/68 (14 July 1969)

Alake v Pratt (1955) 15 WACA 20

Chief Uzoukwu & Others v Ezeonu II, Igwe of Atani & Others, (1991) 6 NWLR (Pt 200) 708.

Ideozu v Ochoma (2006) 4 NWLR (Pt 970) 364

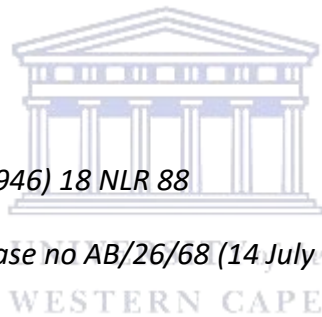
Martin v. Johnson (1936) 3 WACA 91

Martin v. Johnson (1945) 18 NLR 41

Olaiya v. Olaiya (2002) 8 NWLR (Pt. 782) 652

Peter Chinweze & Anor v Veronica Masi & Anor (1989)1 NWLR (Pt 97) 254

Uyi v Uyi. Unreported case customary court of appeal Rivers State (22 February 2016).



South Africa

Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC)

Edwards v Fleming 1909 TH 232

Green v Fitzgerald and Others 1914 AD 88

Gumede v President of the Republic of South Africa 2009 (3) BCLR 243.

Kewana v Santam Insurance Co Ltd 1993 (4) SA 771 (TCA)

Maneli v Maneli [2010] ZAGPJHC 22 *Maneli v Maneli* [2010] ZAGPJHC 22

Maswanganye v Baloyi N.O and Another (2015) ZAGPPHC 917

Metiso v Padongelukfonds 2001 (3) SA 1142 (T) at 1150

Motsepe v Khoza (unreported case number 15078/2012, South Gauteng High Court, 8 April 2013)

Robb v Mealey's Executor (1899) 16 SC 133

Sekupa v Jonkman 1966 BAC (C) 20

Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC)

Thibela v Minister van Wet en Orde 1995 (3) SA 147 (T)

Zibi v Zibi 1952 (2) NAC 167 (S) at 170.

Botswana

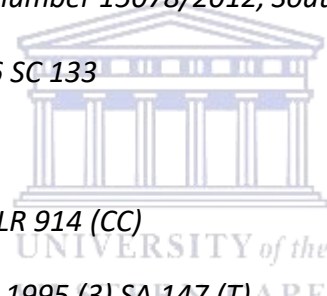
Hendrick v Tsawe 2008 (3) BLR 447

Lesomo and Another v Otukile and Another 2008 (2) BLR 192

Montshiwa v Montshiwa [1999] 2 BLR 216 (HC)

Samsam v Seakarea 2004 (1) BLR 378

Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd ([1996] BLR 190 at 194-195.



Legislation

South Africa

The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, Act 200 of 1993

Adoption of Children Act 25 of 1923

Children's Act 31 of 1937

Children's Act 33 of 1960

Child Care Act 74 of 1983

Children's Act 38 of 2005

Law of Evidence Amendment Act 45 of 1988

Maintenance Act No 99 of 1998

Recognition of Customary Marriages Act 120 of 1998.



Nigeria

Adoption Law of 1965

Adoption Edict of Lagos state 1968 now known as Adoption Law, Cap. A5 Laws of Lagos State 2003

The Child Rights Acts No 26 of 2003

The 1999 Constitution of the Federal Republic of Nigeria, as amended.

Botswana

Adoption of Children Act 1952

Common Law and Customary Law Act 1969

Constitution of Botswana 1966

Constitution of Botswana, 1966

Customary Law (Application and Ascertainment) Act 1969

General Law (Removal of Discrimination) Revision Law 1964

The Children's Act 2009.

BILLS

South Africa

Adoption of Children Bill 25 of 1923.

Law Commission papers

South Africa

South African Law Commission (Project 90) Report on Traditional Courts and the Judicial function of Traditional Leaders (2003) available at https://www.justice.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf (accessed 4 November 2021)

South African Law Commission (Project 110) Review of the Child Care Act Project 110 Discussion paper 103 (2001)

South African Law Commission (Project 110) Report on the Review of the Child Care Act (2002).

Conference papers, draft papers and draft documents

Nigeria

Ladan MT 'The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 Northern States'. Paper presented at the Interactive forum for Sokoto State House of

Assembly Legislators, Sokoto, Nigeria (2007) 57-63 available at <https://www.researchgate.net/publication/349319488> (accessed 21 February 2021).

Okaisabor N 'Adoption, Guardianship and Fostering: Practice and Procedure – Customary Law Perspective' a presentation at the National Workshop for Area/Sharia/Customary Court Judges organized by the National Judicial Institute, Abuja 18 – 22 March 2019 1-20 available at <https://nji.gov.ng/wp-content/uploads/2019/04/ADOPTION-GUARDIANSHIP-AND-FOSTERING.pdf> (accessed 11 June 2021).

South Africa

Department of Social Development Presentation to the National Child Care and Protection Forum' 18 April 2018 slide 2 available at <http://www.ci.uct.ac.za/sites/default/files/image> (accessed 25 July 2021).



Botswana

Mokobi E *Lingering Inequality in Inheritance Law: The Child Born Out of Wedlock in Botswana* (2014) Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana on 28 and 29 March 2014.

THESES

Sigweni S *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and compliance with Regional and International Human Rights standards* (unpublished LLM thesis, University of Cape Town, 2008)

Ferreira S *Interracial and Intercultural Adoption: A South African Legal Perspective* (unpublished doctoral thesis, University of South Africa, 2009).

TREATIES

African Charter on the Rights and Welfare of the Child (OAU Doc.

CAB. /LEG/24.9/49 (1990).

United Nations Convention on the Rights of the Child (UN Doc. A/44/736 (1989).

United Nations Declaration on Social and Legal Principles relating to the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special Reference to Foster Placement and Adoption Nationally and Internationally (A/RES/41/85).

Reports

South Africa

Department of Social Development *Draft Child Care and Protection Policy* (2018) Pretoria: DSD

Department of Social Development *National Child Care and Protection Policy* (2019) Pretoria: DSD



Online materials

Chukwu L Adoption of children in Nigeria under the Child's Rights Act 2003 (2012) <https://kipdf.com/adoption-of-children-in-nigeria-under-the-child-s-rights-act-2003-larry-oc-chukw_5aafe0e61723dd329c6341fa.html> (accessed 28 February 2022)

Newspaper Article: 'Woman arrested in Nigerian child slavery probe,' Irish Examiner 8 March 2005 available at <https://www.irishexaminer.com> (accessed 24 February 2021)

Ogunniyi D 'There are still huge gaps in Nigeria's efforts to protect children' The Conversation 24 November 2019 available at <https://theconversation.com> (accessed 8 February 2021)

Premium Times 11 May 2019 available at <https://www.premiumtimesng.com> (accessed 8 February 2021).

Dictionary

Cambridge Advanced Learner's Dictionary 3 ed (2008):Cambridge University Press available at <https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689>.

Internet sites

<https://m.polity.org.za>.

<http://www.statssa.gov.za>

<https://legal.sabinet.co.za/articles/national-child-care-and-protection-policy-published>.

<https://www.amazon.com/Cambridge-Advanced-Learners-Dictionary/dp/0521674689>

<http://www.nyulawglobal.org/Globalex/Botswana.htm>

<https://charterforcompassion.org/11eleven-project/childline-botswana>

<http://caritas africa.org/caritas-botswana-tirisanyo-catholic-commission>

<https://www.soschildrensvillages.ca/botswana>

<https://travel.state.gov/content/dam/Newadoptionassets/pdfs/>

[https://travel.state.gov//Intercountry Adoption News and Notices](https://travel.state.gov//Intercountry%20Adoption%20News%20and%20Notices)

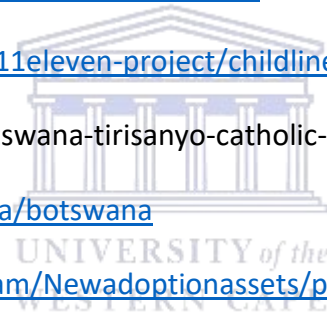
<http://www.judy.legal>

<http://hdl.handle.net/10485/384>

<http://www.easo.europa.eu>.

<https://docplayer.net/31952432-Adoption-of-children-in-nigeria-under-the-child-s-rights-act-2003-larry-o-c-chukwu-esq.html>

<http://hdl.handle.net/10485/384>.



APPENDIX

Definitions and Interpretations

Botho	<i>Means good nurturing</i>
Ga ona botho	<i>Means having bad manners</i>
Patlo	<i>A ceremony where a young man's family requests the hand of a woman in marriage and pays bogadi</i>
Bogadi	<i>in adoption, means payment in cattle as consideration for the child's upbringing</i>
Omo iyawo	<i>Means child of the bride</i>
Ununwe ugba	<i>Depicts a woman who remarries as result of a divorce or the death of the initial husband</i>
Ununwe uhwashi	<i>Represents a marriage undertaken by a widow</i>
Ununwe utu	<i>Means the man and his wife are having a marital experience for the first time or a young woman is having a marital experience for the first time in a polygamous marriage</i>
Uyaya	<i>Means a stranger</i>